COMMENT

Depose and Expose: The Scope of Authorized Deposition Changes Under Rule 30(e)

Kirin K. Gill[*]

TABLE OF CONTENTS

INTRODUCTION 359
I. BACKGROUND 361
A. *The Rulemaking Process of the Federal Rules of Civil Procedure* 362
B. *The Advisory Committee Notes* 364
C. *Liberal Discovery Policies* 365
D. *Canons of Construction* 366
E. *History of Rule 30(e)* 368
II. CURRENT LAW 369
A. *The Majority's Broad Reading Approach:* Podell v. Citicorp Diner's Club, Inc. 369
B. *The Minority's Narrow Reading Approach:* Hambleton Bros. Lumber Co. v. Balkin Enterprises 371
III. ANALYSIS 373
A. *Using Canons of Construction, the Text of Rule 30(e) Supports a Broad Reading* 373
B. *Under the Plain Meaning Canon, the Notes to Rule 30(e) Support a Broad Reading* 378

[*] Senior Articles Editor, UC Davis Law Review. J.D. Candidate, UC Davis School of Law, 2008; B.A. Psychology, University of California, Berkeley, 2004. Thanks to Brett Goodman, Kristy Young, Katrina Gonzales, Lisa Ohanesian, and John Zollo for their first-rate editorial assistance. Special thanks to Robert Berlet for pushing me harder than I would have pushed myself. Above all, thanks to my family and friends for their continued love, support, and encouragement. All remaining errors are mine.

C. Liberal Discovery Policies Favor a Broad Reading of Rule 30(e) 382
IV. SOLUTIONS 384
CONCLUSION 385

INTRODUCTION

Suppose a deponent answers a series of questions pertaining to the key issues of a civil litigation.[1] The witness reviews the transcript following the deposition.[2] In the course of review, the deponent decides to modify certain portions of the deposition testimony.[3] After complying with the procedural requirements, the deponent submits the changes to become part of the deposition record.[4] The court, however, strikes the changes as unacceptable.[5]

Depositions serve a significant function during the pretrial phase by facilitating the flow of pretrial information.[6] A party's ability to obtain

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[1] *See, e.g.*, Hambleton Bros. Lumber Co. v. Balkin Enters., Inc., 397 F.3d 1217, 1223 (9th Cir. 2005) (noting plaintiff deposed on breach of contract claim); Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1281 (10th Cir. 2003) (noting plaintiff deposed on civil rights claim); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (noting defendant deposed on age discrimination claim); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 102 (2d Cir. 1997) (noting plaintiff deposed on statutory claim); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (noting defendant deposed on details of motor vehicle accident); Allen & Co. v. Occidental Petrol. Corp., 49 F.R.D. 337, 339 (S.D.N.Y. 1970) (noting witness deposed on breach of contract claim).

[2] *See, e.g.*, *Hambleton Bros.*, 397 F.3d at 1223 (noting plaintiff reviewed transcript); *Burns*, 330 F.3d at 1281 (noting plaintiff reviewed his deposition testimony); *Thorn*, 207 F.3d at 389 (noting defendant reviewed transcript after plaintiff pointed to incriminating testimony); *Podell*, 112 F.3d at 102 (noting plaintiff reviewed transcript); *Lugtig*, 89 F.R.D. at 641 (noting court provided defendant deposition transcript); *Allen*, 49 F.R.D. at 339 (noting court officer submitted deposition transcript to witness).

[3] *See, e.g.*, *Hambleton Bros.*, 397 F.3d at 1223 (noting plaintiff made changes contradicting deposition testimony); *Burns*, 330 F.3d at 1281 (noting plaintiff modified portions of deposition transcript); *Thorn*, 207 F.3d at 389 (noting defendant submitted deposition changes); *Podell*, 112 F.3d at 103 (noting plaintiff altered deposition transcript); *Lugtig*, 89 F.R.D. at 641 (noting defendant changed deposition transcript); *Allen*, 49 F.R.D. at 339 (noting witness corrected deposition testimony).

[4] *See* FED. R. CIV. P. 30(e) (permitting deponent to submit changes to deposition transcript).

[5] *See, e.g.*, *Hambleton Bros.*, 397 F.3d at 1226 (finding plaintiff's material alterations unacceptable); *Burns*, 330 F.3d at 1281 (finding plaintiff's material changes unacceptable); Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 (10th Cir. 2002) (finding plaintiff's material changes unacceptable); *Thorn*, 207 F.3d at 389 (finding defendant's substantive changes unacceptable); Greenway v. Int'l Paper Co., 144 F.R.D. 322, 323 (W.D. La. 1992) (finding plaintiff's substantive modifications unacceptable).

[6] *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION 27-32 (2d ed. 1996) (examining advantages of using depositions as discovery device); A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12

adequate information through depositions can lead to a trial date, a motion for summary judgment, or a settlement.[7] Thus, the power to alter a deposition record can dramatically impact a particular case.[8] Federal Rule of Civil Procedure 30(e) ("Rule 30(e)") permits a deponent to alter a deposition transcript.[9] The federal circuit courts are divided, however, as to the scope of authorized changes under Rule 30(e).[10] The majority of federal courts hold Rule 30(e) allows any alterations, including alterations deemed contradictory.[11] A

GEO. J. LEGAL ETHICS 1, 1-2 (1998) [hereinafter *Deposition Dilemmas*] (stating deposition abuses adversely affect pretrial information flow); Gary S. Gildin, *A Practical Guide to Taking and Defending Depositions*, 88 DICK. L. REV. 247, 247 (1984) (observing positive impact of effective depositions on trial).

[7] *Cf.* FED. R. CIV. P. 56 (providing standard for summary judgment motion); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986) (reporting about 90% of state and federal cases are settled or dismissed before trial); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (noting approximately two thirds of federal cases settle).

[8] *See supra* text accompanying notes 6-7 (demonstrating potential impact of altered deposition on various stages of litigation); *see also Deposition Dilemmas*, *supra* note 6, at 6 (noting party's conduct following deposition may affect litigation as much as attorney's conduct during deposition); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 279 (1998) (stating importance of depositions in civil litigation).

[9] FED. R. CIV. P. 30(e) (stating if deponent makes changes in form or substance, deponent must recite changes and reasons for making them); *see also* Adams v. Allied Sec. Holdings, 236 F.R.D. 651, 651-52 (C.D. Cal. 2006) (stating Rule 30(e)'s requirements); Agrizap, Inc. v. Woodstream Corp., 232 F.R.D. 491, 492-93 (E.D. Pa. 2006) (stating Rule 30(e)'s requirements).

[10] *Compare* Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (holding Rule 30(e) permits any changes to transcript), *with Hambleton Bros.*, 397 F.3d at 1226 (holding Rule 30(e) permits only transcriptional, not contradictory changes), *Burns*, 330 F.3d at 1282 (finding Rule 30(e) limited to immaterial changes), *and Thorn*, 207 F.3d at 389 (holding Rule 30(e) limited to non-substantive changes).

[11] *See, e.g.*, *Podell*, 112 F.3d at 103 (holding Rule 30(e) permits any changes); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 (D. Mass. 2001) (stating Rule 30(e) expressly allows substantive changes); Elwell v. Conair, Inc., 145 F. Supp. 2d 79, 86 (D. Me. 2001) (holding Rule 30(e) permits any changes); Holland v. Cedar Creek Mining, Inc., 198 F.R.D. 651, 653 (S.D. W. Va. 2001) (finding Rule 30(e) permits any deposition modifications); Titanium Metals Corp. v. Elkem Mgmt., Inc., 191 F.R.D. 468 (W.D. Pa. 1998) (finding material alteration of deposition permitted under Rule 30(e)); Innovative Mktg. & Tech., LLC v. Norm Thompson Outfitters, Inc., 171 F.R.D. 203, 205 (W.D. Tex. 1997) (adopting broad reading of Rule 30(e) that permits any changes); Sanford v. CBS, Inc., 594 F. Supp. 713, 714 (N.D. Ill. 1984) (reading Rule 30(e) to allow any changes); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (observing Rule 30(e) specifically authorizes changes to form or substance of deposition without placing any limits on such changes).

growing minority rejects such changes and finds that Rule 30(e) permits only non-substantive and typographical changes.[12]

This Comment argues that the majority's approach allowing broad changes more accurately interprets the language, intent, and policy behind Rule 30(e).[13] Part I reviews the procedures, policies, history, and canons of construction relevant to interpreting Rule 30(e).[14] Part II illustrates the circuit split by examining two cases representing the majority and minority views.[15] Part III argues Rule 30(e)'s text favors the majority approach.[16] It also argues the Notes accompanying Rule 30(e) suggest the Federal Rules Advisory Committee ("Advisory Committee") intended courts to read Rule 30(e) broadly.[17] Further, Part III argues liberal discovery policies support a broad interpretation of Rule 30(e).[18] Finally, Part IV proposes solutions to resolve the circuit split.[19] Specifically, it proposes solutions to affirmatively establish that Rule 30(e) permits substantive alterations.[20]

I. BACKGROUND

Courts use various processes and tools to interpret the Federal Rules of Civil Procedure ("Rules").[21] First, courts have accorded great weight to the Advisory Committee Notes ("Notes") when interpreting the Rules.[22] The Rulemaking and Notemaking structures provide

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[12] *See, e.g.*, *Hambleton Bros*., 397 F.3d at 1226 (holding Rule 30(e) intended for transcriptional and not contradictory changes); *Burns*, 330 F.3d at 1282 (finding material changes not permitted under Rule 30(e)); *Thorn*, 207 F.3d at 389 (holding Rule 30(e) does not permit contradictory changes).

[13] *See infra* Part III (analyzing Rule 30(e)'s text, Rule 30(e)'s Notes, and Rule 30(e) in context of liberal discovery policies).

[14] *See infra* Part I (presenting background).

[15] *See infra* Part II (presenting current law).

[16] *See infra* Part III.A (arguing analysis of Rule 30(e)'s text under canons of construction supports broad interpretation).

[17] *See infra* Part III.B (arguing textual analysis of Rule 30(e)'s Notes reveals Advisory Committee's intended broad construction).

[18] *See infra* Part III.C (arguing broad interpretation of Rule 30(e) more accurately reflects aims of liberal discovery policies).

[19] *See infra* Part IV (presenting solutions).

[20] *See infra* Part IV (presenting solutions).

[21] *See infra* Part I.A-E (presenting background).

[22] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-17 (1997) (citing Notes to Rule 23); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 544-45 (1991) (rejecting alternate reading of Rule 11 because Notes did not indicate that Advisory Committee intended such reading); Amendments to the Fed. Rules of Civil Procedure, 146 F.R.D. 404, 509 (1993) (Scalia, J., dissenting) (finding previous Note basis for objecting to Rule's amendment).

insight into why the courts turn to the Notes to interpret the Rules.[23] Second, courts liberally construe the discovery Rules to achieve the goals of proper litigation.[24] Third, courts apply the canons of construction when interpreting the Rules.[25] Finally, courts examine a Rule's history as a source of interpretation.[26] One may use each of these techniques to interpret the scope of changes authorized under Rule 30(e).[27]

A. *The Rulemaking Process of the Federal Rules of Civil Procedure*

The original Rulemaking structure was far less complicated than the current process.[28] Congress originally delegated power to the Supreme Court to promulgate the Rules via the Rules Enabling Act of 1934 ("Enabling Act").[29] Congress created the Enabling Act in response to

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[23] *Infra* Part I.A (presenting information about Rulemaking process).

[24] *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting only strong public policies weigh against liberal discovery policy favoring disclosure); Hickman v. Taylor, 329 U.S. 495, 506 (1947) (stating courts must construe Rules broadly); Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985) (holding district court abused discretion by limiting discovery against liberal discovery policies); Goldman v. Checker Taxi Co., 325 F.2d 853, 855 (7th Cir. 1963) (finding district court improperly neglected liberal discovery policy); Roebling v. Anderson, 257 F.2d 615, 620-21 (D.C. Cir. 1958) (finding district court failed to consider broad and liberal discovery policies).

[25] *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (using canon stating express inclusion of one implies exclusion of others to reject heightened pleading standard under Rule 8(a)); Baxter v. Rose, 305 F.3d 486, 490 n.4 (6th Cir. 2002) (finding heightened Rule standard inconsistent with canon stating express inclusion of one implies exclusion of others); Application of Royal Bank of Can., 33 F.R.D. 296, 300 (S.D.N.Y. 1963) (applying canon of harmonious and symmetrical reading to Rules 3 and 4).

[26] *See, e.g.*, Bridgestone/Firestone, Inc. v. Local 988, United Rubber, 4 F.3d 918, 924 (10th Cir. 1993) (using Rule 4(a)(3)'s history to interpret breadth of Rule); Sembach v. McMahon Coll., Inc., 86 F.R.D. 188, 191 (S.D. Tex. 1980) (examining history of Rule 23.2 as source of Rule interpretation); U.S. Indus., Inc. v. Gregg, 58 F.R.D. 469, 473 (D. Del. 1973) (examining Rule's history to interpret Rule 4).

[27] *See infra* Part III.A-C (analyzing Rule 30(e) using canons of construction, Notes, liberal discovery policy, and Rule's history).

[28] *See infra* text accompanying notes 29-39 (describing original and current Rulemaking processes). *See generally* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323 (1991) (describing Rulemaking process); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999) (describing Rulemaking process).

[29] *See* Rules Enabling Act of 1934, 28 U.S.C. § 2071 (2006) (stating Supreme Court has power to make procedural Rules); United States v. Estrada, 680 F. Supp. 1312, 1325 (D. Minn. 1988) (noting Supreme Court's function as delegated

the lack of uniformity in federal procedure.[30] By creating the Enabling Act, Congress charged the Supreme Court with ensuring procedural uniformity.[31]

The Enabling Act relied on a two-tiered decision-making system.[32] Under the Enabling Act, the Supreme Court promulgated the Rules and Congress either approved or rejected them.[33] The Supreme Court created an Advisory Committee to draft proposed Rules and amendments.[34] As Congress added several more layers to the process, the formality of the Rulemaking process increased.[35]

Rulemaker under Enabling Act). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing history of Enabling Act).

[30] *See* Burbank, *supra* note 29, at 1042 (noting different rules of federal procedure presented difficulties for multistate federal practitioners); *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921) (noting non-uniform federal procedural rules caused inequities in litigation rights); *Report of the Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 419 (1896) [hereinafter *Committee Report*] (noting lack of uniformity in federal procedural rules affects both lawyers and judges from different jurisdictions).

[31] *See* Burbank, *supra* note 29, at 1043-68 (noting ABA's general position espousing advantages of courts in promulgating procedural rules); *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 578, 588 (1909) (suggesting Congress should leave procedural Rulemaking power to courts); *Committee Report*, *supra* note 30, at 420-21 (making case against assigning Congress Rulemaking power).

[32] *See* § 2071(a)-(b) (naming only Supreme Court and Congress in Enabling Act); Appointment of Comm. to Draft Unified Sys. of Equity & Law Rules, 295 U.S. 774, 774-75 (1935) (using Enabling Act power to appoint committee to assist in drafting initial Rules); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1105 (2002) (observing Enabling Act did not expressly require other decision makers until 1958 amendment).

[33] *See supra* note 32 and accompanying text (clarifying two-tiered decision-making system).

[34] *See* § 2071(a)-(b) (stating Supreme Court has general power to set Rules); Order Continuing the Advisory Comm., 314 U.S. 720, 720 (1942) (allowing continuing Advisory Committee to advise Supreme Court on proposed amendments or additions to Rules); Appointment of Comm. to Draft Unified Sys. of Equity & Law Rules, 295 U.S. at 774-75 (appointing committee members to assist in preparing initial set of Rules); Struve, *supra* note 32, at 1105 (noting Enabling Act did not expressly elaborate on promulgation process).

[35] *See* Act of July 18, 1958, 28 U.S.C. § 331 (2006) (requiring Judicial Conference to undertake continuous study of Rules); Albert B. Maris, *Federal Procedural Rulemaking: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 772 (1961) (discussing how Enabling Act allowed Chief Justice to appoint Standing Committee on Rules of Practice and Procedure); Struve, *supra* note 32, at 1106-08 (noting how Rules moved through Advisory Committee, Standing Committee, and Judicial Conference before reaching Supreme Court).

The current structure of the process is codified in a 1988 amendment to the Enabling Act.[36] Under this process, proposed Rules move through five channels: the Advisory Committee, the Standing Committee, the Judicial Conference, the Supreme Court, and Congress.[37] The Advisory Committee drafts the Rules and submits them to the Standing Committee.[38] The Rules then proceed through the Judicial Conference and the Supreme Court before reaching Congress.[39] Understanding this Rulemaking process has assisted courts in interpreting the drafter's intent behind a particular Rule.[40]

B. The Advisory Committee Notes

Courts may examine a Rule's Note as a source of the drafter's intent.[41] The current version of the Enabling Act requires the drafting body, generally the Advisory Committee, to include a Note explaining each proposed Rule.[42] After drafting the Rule and Note, the Advisory Committee submits both to the Standing Committee.[43] The Standing

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[36] *See* 28 U.S.C. § 2073(a)(1) (2006) (requiring Judicial Conference to prescribe and publish procedure for consideration of proposed Rules); § 2073(a)(2) (authorizing appointment of Advisory Committee to draft Rules and Notes); § 2073(b) (requiring appointment of Standing Committee).

[37] *See* § 2071(a) (requiring Supreme Court to submit Rules to Congress prior to enactment); § 2073(a)(1)-(2) (noting addition of Standing Committee and Judicial Conference to Advisory Committee in Rulemaking process); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 n.4 (6th Cir. 2000) (describing movement of proposed Rules until adoption).

[38] *See* statutes cited *supra* note 36; Struve, *supra* note 32, at 1103-04 (describing procession of Rules through various bodies until adoption).

[39] *See* Struve, *supra* note 32, at 1104 (describing path of Rules until adoption).

[40] *See In re* Pennie & Edmonds LLP, 323 F.3d 86, 101 (2d Cir. 2003) (reasoning proposed interpretation conflicts with product of Rulemaking process); *Rogers*, 230 F.3d at 874 (noting Rulemaking process provides unique issues when construing drafter's intent); Allison v. Citgo Petrol. Corp., 151 F.3d 402, 432 (5th Cir. 1998) (noting judicially determined interpretation of Rules conflict with congressionally mandated Rulemaking process).

[41] *See, e.g.*, sources cited *supra* note 22.

[42] 28 U.S.C. § 2073(d) (requiring promulgating body to include proposed Rule, explanatory Note, report, and minority views on Rule); *see also* United States v. Orlandez-Gamboa, 320 F.3d 328, 332 n.2 (2d Cir. 2003) (stating Congress requires explanatory Note to each proposed Rule); *cf.* Tome v. United States, 513 U.S. 150, 168 (1995) (Scalia, J., concurring) (stating Congress requires explanatory Notes for Federal Rules of Evidence).

[43] *See* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Discovery*, 69 TENN. L. REV. 13, 29 (2001) (presenting Advisory Committee member's statement that Committee gives considerable attention to both Notes and Rules in Rulemaking process); Struve, *supra* note 32, at 1112 (describing

Committee may revise the Rule and Note before forwarding them to the next level.[44] The Judicial Conference and the Supreme Court consider the Rule and Note before submitting them to Congress for approval.[45] Thus, not only are the Notes required in the Rulemaking process, but both Notes and Rules undergo a similar method of drafting, redrafting, and approval.[46] Jurists have considered the Notes useful when construing the Rules.[47] Should the Notes prove unhelpful, however, courts may turn to liberal discovery policies to interpret the Rules.[48]

C. Liberal Discovery Policies

The courts have a long and developed history of interpreting the discovery Rules broadly.[49] In *Hickman v. Taylor*, the Supreme Court found discovery mechanisms vital to proper trial preparation.[50] A thorough discovery process minimizes the probability of surprises at trial.[51] Liberally construing the discovery Rules helps to ensure informed litigation for parties and juries.[52] Thus, the policy of

Notemaking process); U.S. Courts, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, http://www.uscourts.gov/rules/procedurejc.htm (last visited Oct. 19, 2007) (explaining drafting procedures of Rules and Notes in Advisory Committee).

[44] *See* sources cited *supra* note 43 (describing path of Notes in Rulemaking process).

[45] *See* sources cited *supra* note 43 (describing path of Notes in Rulemaking process).

[46] *See* Struve, *supra* note 32, at 1114 (analogizing Notemaking process to Rulemaking process); *see also* United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (stating Rulemaking body adopts Notes and Rules under same process); *cf.* United States v. Vonn, 535 U.S. 55, 64 n.6 (2002) (stating Notes to Federal Rules of Criminal Procedure are product of that Rulemaking process).

[47] *See, e.g.*, sources cited *supra* note 22.

[48] *See infra* text accompanying notes 49-52 (describing role of liberal discovery policy in Rule interpretation); *see also* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting only strong public policies weigh against liberal discovery policy favoring disclosure); Hickman v. Taylor, 329 U.S. 495, 506 (1947) (stating courts must construe discovery Rules broadly).

[49] *See, e.g.*, cases cited *supra* note 24.

[50] 329 U.S. at 500.

[51] *See, e.g.*, *Hickman*, 329 U.S. at 507 (stating liberal discovery promotes disclosure of all facts, which reduces possibility of surprise at trial); Klonoski v. Mahlab, 156 F.3d 255, 271 (1st Cir. 1998) (noting that construing discovery Rules liberally reduces trial surprise); Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980) (stating that reading Rules liberally minimizes surprise at trial).

[52] *See, e.g.*, *Hickman*, 329 U.S. at 507 (stating liberal Rules facilitate disclosure of facts); Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985) (stating

liberally construing the discovery Rules can assist in interpreting Rule 30(e).[53]

Some courts are reluctant, however, to liberally construe the discovery Rules due to potential abuses.[54] Other courts note abuse concerns cannot overshadow the interest in facilitating proper litigation.[55] As a result, reviewing courts grant trial judges discretion in weighing the need for liberal discovery against abuse concerns.[56] Thus, an appropriate approach to interpreting Rule 30(e) balances these two considerations.[57]

D. Canons of Construction

Courts have employed canons of statutory construction to determine a Rule's meaning.[58] The initial step in this analysis turns on whether the language or term at issue has a plain and unambiguous

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court abused discretion when it limited discovery to affect party's right to liberal discovery); Goldman v. Checker Taxi Co., 325 F.2d 853, 855 (7th Cir. 1963) (noting that failing to adopt liberal discovery standard deprives jury of all facts).

[53] *See supra* text accompanying notes 49-52 (outlining use and justifications for liberal construction of discovery Rules).

[54] *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (noting that liberally construing Rules allows plaintiff with groundless claim to waste valuable time); Dart Indus. Co., v. Westwood Chem. Co., 649 F.2d 646, 649-50 (9th Cir. 1980) (finding liberal policy permitting discovery of non-parties is abusive); Klausen v. Sidney Printing & Publ'g Co., 271 F. Supp. 783, 784 (D. Kan. 1967) (noting that liberally construing Rules to permit burdensome interrogatories is abusive).

[55] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 n.20 (1984) (stating discovery abuse does not lessen importance of discovery in litigation process); *In re* Halkin, 598 F.2d 176, 207 (D.C. Cir. 1979) (observing discovery abuse possibilities do not outweigh interest in proper litigation); Bockweg v. Anderson, 117 F.R.D. 563, 566 (M.D.N.C. 1987) (noting courts should balance need for liberal discovery against preventing abuse).

[56] *See, e.g.*, Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2, 197 F.3d 922, 925 (8th Cir. 1999) (finding Rules give district court discretion to determine level of protection against discovery abuse); Rofail v. United States, 227 F.R.D. 53, 54 (E.D.N.Y. 2005) (holding Rules provide court with latitude to prevent discovery abuse); *Bockweg*, 117 F.R.D. at 566 (stating court has power to balance interests of preventing abuse and achieving liberal discovery goals).

[57] *See supra* text accompanying notes 54-56 (explaining why courts weigh liberal discovery against abuse prevention); *see also* Brown v. City of Oneonta, 160 F.R.D. 18, 20 (N.D.N.Y. 1995) (weighing need for liberal discovery and need to prevent abuse of Rules); Hancock Bros. v. Jones, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968) (balancing liberal discovery concerns and abuse concerns).

[58] *See, e.g.*, cases cited *supra* note 25.

meaning.[59] If the language reveals a plain meaning, this concludes the analysis.[60]

If the language is ambiguous, the court will continue its analysis by using other canons of construction.[61] Many courts employ dictionary definitions in the absence of statutory definitions to ascertain the plain meaning of a term.[62] Some courts apply the canon of *noscitur a sociis*, which determines a word's meaning in light of its surrounding language.[63] Another useful canon requires courts to give effect to every word in a statute and avoids an interpretation that would treat any language as surplus.[64] Because these canons may be applied when

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[59] *See, e.g.*, United States v. Cooper, 396 F.3d 308, 310 (3d Cir. 2005) (stating initial step in analysis is whether text has plain meaning); *In re* Sunterra Corp., 361 F.3d 257, 265 (4th Cir. 2004) (stating first step in statutory analysis is whether language is unambiguous); Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (stating court must determine if language at issue has plain and unambiguous meaning); Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (stating initial step in analysis requires court to ask whether language is capable of plain meaning).

[60] *See, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (stating if language has plain meaning, court should end analysis); NLRB v. United Food & Commercial Workers, Local 23, 484 U.S. 112, 123 (1987) (noting if language affords clear intent, court's statutory analysis complete); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (stating courts are not required to examine other canons if Congress's intent is clear).

[61] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48 (1987) (stating if meaning unclear, court's use of canons to reveal intent is legally binding); *Chevron*, 467 U.S. at 843 (stating courts may use traditional canons to ascertain intent if plain meaning unclear); *Cooper*, 396 F.3d at 311 (stating if court cannot find plain meaning, it may use other canons to discern intent); Ki Se Lee v. Ashcroft, 368 F.3d 218, 222 (3d Cir. 2004) (stating courts use canons of construction when congressional intent is unclear).

[62] *See, e.g.*, Price v. Time, Inc., 416 F.3d 1327, 1337 (11th Cir. 2005) (stating court's use of dictionaries is acceptable to determine plain meaning of language); United States v. Lachman, 387 F.3d 42, 51 (1st Cir. 2004) (using dictionary to determine plain meaning of special); United States v. Vargas-Duran, 356 F.3d 598, 602-03 (5th Cir. 2004) (applying dictionary definition of use).

[63] *See, e.g.*, Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 475 (1979) (using *noscitur a sociis* to construe business leagues); *Neal*, 95 U.S. at 709 (stating court can ascertain meaning of word by reference to context under *noscitur a sociis*); Andrews v. United States, 441 F.3d 220, 224 (4th Cir. 2006) (stating courts use *noscitur a sociis* by examining words immediately surrounding word to determine its meaning); *see also* MARGARET Z. JOHNS & REX R. PERSCHBACHER, THE UNITED STATES LEGAL SYSTEM 117 (2002) (stating *noscitur a sociis* means it is known by its companions).

[64] *See, e.g.*, *Duncan*, 533 U.S. at 174 (finding interpretation rendering statutory language insignificant is contrary to canon of construction); *Cooper*, 396 F.3d at 312 (noting proposed statutory interpretation conflicts with canon avoiding surplus language); Elwood v. Jeter, 386 F.3d 842, 848 (8th Cir. 2004) (stating court reluctant to adopt statutory definition that would treat terms as surplusage).

construing the Rules, a court may use them to interpret the proper scope of Rule 30(e).[65]

E. History of Rule 30(e)

In addition to using canons of construction, courts may examine a Rule's history.[66] The Supreme Court adopted Rule 30(e) in 1937.[67] The original version of the Rule required deponents to review the deposition transcript unless they waived their right to do so.[68] In 1970, the Court amended Rule 30(e) to limit the period of review to thirty days.[69] This form of the Rule remained in force until 1993.[70] Under the current version adopted in 1993, a deponent may review a deposition transcript and make modifications.[71] If altering a transcript, a deponent must sign a statement and detail the specific modifications, as well as the reasons for making them.[72] The amendments to Rule 30(e) track various changes to the Rule and provide a basis to interpret the Rule's scope.[73] Given the varied

[65] *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (using canon stating express inclusion of one implies exclusion of others to reject heightened pleading standard of Rule 8(a)); SEC v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) (using canon of interpretation giving effect to each word to construe Rule 1); Baxter v. Rose, 305 F.3d 486, 490 n.4 (6th Cir. 2002) (finding heightened Rule standard inconsistent with canon).

[66] *See, e.g.*, cases cited *supra* note 26.

[67] *See* FED. R. CIV. P. 30(e) advisory committee's note (1993) (explaining purpose of 1993 amendment); FED. R. CIV. P. 30(e) advisory committee's note (1970) (explaining purpose of 1970 amendment); FED. R. CIV. P. 30(e) advisory committee's note (1937) (explaining Rule's purpose at adoption).

[68] FED. R. CIV. P. 30(e) advisory committee's note (1937) (stating court officer required to make any changes deponent desires); *see also* Colin v. Thompson, 16 F.R.D. 194, 195 (W.D. Mo. 1954) (using 1937 version of Rule 30(e)); De Seversky v. Republic Aviation Corp., 2 F.R.D. 113, 114 (E.D.N.Y. 1941) (using 1937 version of Rule 30(e)).

[69] *See* FED. R. CIV. P. 30(e) advisory committee's note (1970) (describing change in 30-day signing procedure); *see also* Sanford v. CBS, Inc., 594 F. Supp. 713, 714 (N.D. Ill. 1984) (using 1970 version of Rule 30(e)); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (using 1970 version of Rule 30(e)).

[70] *See* FED. R. CIV. P. 30(e) advisory committee's note (1993) (noting various changes made to subdivision (e)); *see also* Reilly v. TXU Corp., 230 F.R.D. 486, 487 (N.D. Tex. 2005) (using current version of Rule 30(e)); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 119-20 (D. Mass. 2001) (using current version of Rule 30(e)).

[71] *See* sources cited *supra* note 70 (stating current requirements of Rule 30(e)).

[72] *See* sources cited *supra* note 70 (stating current requirements of Rule 30(e)).

[73] *See supra* text accompanying notes 67-72 (outlining history of Rule 30(e) from adoption).

methods to construe the Rules, it is no surprise courts have reached different interpretations of Rule 30(e).[74]

II. CURRENT LAW

Neither the Supreme Court nor the Advisory Committee has clarified the extent of Rule 30(e)'s authorized changes.[75] As a result, several circuits have developed divergent views.[76] The majority uses a "broad reading" approach, which permits any changes under Rule 30(e), including those deemed material or contradictory to the original testimony.[77] An emerging minority view takes a "narrow reading" approach, which interprets Rule 30(e) to exclude material or contradictory modifications.[78] The cases below illustrate each approach.[79]

A. *The Majority's Broad Reading Approach:* Podell v. Citicorp Diner's Club, Inc.

In *Podell v. Citicorp Diner's Club, Inc.*, the Second Circuit Court of Appeals applied the majority approach and interpreted Rule 30(e) broadly.[80] In 1991, Gary Podell learned someone had illegally obtained credit cards under his name.[81] He contacted two credit reporting agencies, including TRW, to ensure they corrected his credit

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[74] *See supra* Part I.A-E (outlining Rulemaking process, Notemaking process, liberal discovery policies, canons of construction, and Rule 30(e)'s history). *Compare* Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1225-26 (9th Cir. 2005) (holding Rule 30(e) permits only transcriptional, not contradictory changes) *with* Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (holding Rule 30(e) permits any changes to transcript).

[75] *See supra* note 10.

[76] *Compare Podell*, 112 F.3d at 103 (using broad reading approach to hold Rule 30(e) permits any changes to transcript), *with Hambleton Bros.*, 397 F.3d at 1225-26 (using narrow reading approach to hold Rule 30(e) permits transcriptional, not contradictory changes), Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1282 (10th Cir. 2003) (using narrow reading approach to find Rule 30(e) limited to immaterial changes), *and* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (using narrow reading approach to find Rule 30(e) limited to non-substantive changes).

[77] *See, e.g.*, cases cited *supra* note 11.

[78] *See, e.g.*, cases cited *supra* note 12.

[79] *Infra* Part II.A-B (describing cases representing majority and minority approaches).

[80] *See Podell*, 112 F.3d at 103 (using broad reading approach to hold Rule 30(e) permits contradictory changes to transcript).

[81] *Id.* at 100.

reports to reflect the incident.[82] Some time later, Podell sued TRW, contending it failed to comply with statutorily imposed duties after discovering the credit reports were inaccurate.[83]

The district court found that unless Podell could submit evidence demonstrating TRW's statutory compliance was an issue of fact, TRW was entitled to summary judgment.[84] In opposing summary judgment, Podell argued he did not receive anything from TRW showing it complied with the governing statute.[85] In his deposition, however, Podell made several admissions to the contrary.[86] Pursuant to Rule 30(e), Podell reviewed his deposition transcript and crossed out the admissions, noting the reasons for doing so on his transcript.[87] The district court granted TRW's motion for summary judgment, finding Podell's alterations did not create an issue of fact.[88]

On appeal, the Second Circuit affirmed the district court holding.[89] Podell argued that the district court erred in evaluating his original answers because Rule 30(e) should permit changes to replace the original testimony.[90] The Second Circuit expressly found that Rule 30(e) did not place limitations on the scope of permitted changes.[91] The court, however, rejected Podell's contention that the deposition changes replaced his original deposition.[92]

The Second Circuit examined Rule 30(e)'s text to conclude the Rule permits broad changes to deposition transcripts.[93] First, the Second Circuit held the language of Rule 30(e) places no affirmative limitations on the scope of changes.[94] The Second Circuit, however, found that nothing in Rule 30(e) requires deposition changes to replace the original answers.[95] The court held that when a party alters his testimony pursuant to Rule 30(e), the original deposition testimony remains a part of the record.[96] While some courts have

[82] *Id.*
[83] *Id.* at 102.
[84] *Id.*
[85] *Id.*
[86] *See id.* (noting Podell conceded possibility that TRW sent disputed report).
[87] *Id.* at 103.
[88] *Id.* (finding Podell's material deposition changes unpersuasive).
[89] *Id.* at 104.
[90] *Id.* at 103.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

considered this broad view toward Rule 30(e), they ultimately conclude that there are implicit limitations on Rule 30(e)'s permitted changes.[97] Therefore, the broad and narrow views regarding Rule 30(e) have created a split in interpreting the scope of authorized changes.[98]

B. *The Minority's Narrow Reading Approach:* Hambleton Bros. Lumber Co. v. Balkin Enterprises

In *Hambleton Bros. Lumber Co. v. Balkin Enterprises*, the Ninth Circuit Court of Appeals adhered to a narrow reading, thereby limiting Rule 30(e)'s scope.[99] Hambleton Brothers Lumber Company ("Hambleton Brothers") entered into a timber contract with Balkin Enterprises ("Balkin") in 1994.[100] The contract gave Hambleton Brothers timber rights to a property until January 31, 1997.[101] Balkin dissolved in 1995 and sold the property to another party.[102] As a result, Hambleton Brothers sued Balkin for breach of contract.[103] The suit included claims against Jim Ballinger ("Ballinger"), the president of Balkin.[104]

Ballinger filed a summary judgment motion.[105] Pursuant to Rule 30(e), Hambleton Brothers submitted corrections to James Hambleton's deposition.[106] Initially, James Hambleton testified Ballinger was not involved in the dispute.[107] Hambleton Brothers later corrected the deposition to suggest Ballinger actually took part in breaching the contract.[108] Ballinger moved to strike the changes.[109] The district court granted the motion, finding Rule 30(e) did not allow Hambleton Brothers's changes.[110]

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[97] *See infra* Part II.B (describing minority approach to Rule 30(e)).
[98] *See supra* note 76.
[99] Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1225-26 (9th Cir. 2005).
[100] *Id.* at 1222.
[101] *Id.*
[102] *Id.* at 1223.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1224.

The Ninth Circuit examined Hambleton Brothers's contention that the district court erred in granting Ballinger's motion to strike the deposition corrections.[111] The Ninth Circuit affirmed the district court's judgment.[112] It expressly held that Rule 30(e) is limited to typographical changes and therefore does not permit contradictory modifications.[113]

The Ninth Circuit premised the limitations on its concern for abuse.[114] The court's concern centered on Hambleton Brothers's apparent attempt to manufacture an issue of material fact to avoid an adverse summary judgment ruling.[115] Under a common law rule governing affidavits, courts will not find an issue of material fact from an affidavit contradicting prior deposition testimony.[116] Extending the reasoning behind this rule, the court found Rule 30(e) does not permit changes that create a material dispute solely to evade summary judgment.[117]

In support of its position, the court quoted *Greenway v. International Paper Co.*, a lower court case rejecting material deposition alterations.[118] The *Greenway* court noted that allowing a party to modify a deposition transcript discourages thoughtful testimony.[119] The Ninth Circuit adopted *Greenway*'s criticism that a deposition subject to a broad interpretation of Rule 30(e) is indistinguishable from a written interrogatory.[120] Under such a broad interpretation, the *Greenway* court stated one could plan responses to a deposition outside the courtroom, similar to an interrogatory.[121] Thus, unlike the

[111] *Id.*

[112] *Id.* at 1226.

[113] *Id.* at 1224-26.

[114] *Id.* at 1226.

[115] *Id.* at 1225.

[116] *Id.*; *see also* Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1281-82 (10th Cir. 2003) (finding no distinction between Rule 30(e) corrections and rule proscribing contradictory affidavits); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (analogizing rule against contradictory affidavits to deposition alteration under Rule 30(e)).

[117] *Hambleton Bros.*, 397 F.3d at 1225.

[118] *Id.* (quoting Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (holding broad construction of Rule 30(e) encourages party to use deposition as written interrogatory)).

[119] Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992).

[120] *Hambleton Bros.*, 397 F.3d at 1225 (quoting *Greenway*, 144 F.R.D. at 325).

[121] *Greenway*, 144 F.R.D. at 325.

Second Circuit, the Ninth Circuit found limitations on Rule 30(e)'s scope of authorized changes.[122]

III. ANALYSIS

The majority's broad reading approach toward Rule 30(e), illustrated by the Second Circuit in *Podell*, is the proper approach for three reasons.[123] First, Rule 30(e)'s language supports a broad reading.[124] Second, Rule 30(e)'s purpose, as evidenced by its Notes, indicates the Advisory Committee intended that courts construe the Rule broadly.[125] Third, a broad approach toward Rule 30(e) comports with the liberal discovery policy.[126] Therefore, courts should interpret Rule 30(e) broadly.[127]

A. Using Canons of Construction, the Text of Rule 30(e) Supports a Broad Reading

The circuits are divided on the scope of Rule 30(e)'s authorized changes.[128] The majority relies on the language of Rule 30(e) to support its broad reading.[129] Using canons of construction to examine the language, the textual arguments favor the broad approach to interpreting the Rule.[130]

Two portions of Rule 30(e)'s text support a broad interpretation.[131] First, the Rule states a deponent can modify a deposition transcript in "form or substance."[132] Under the plain meaning canon, drafters are

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[122] *Compare* Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (holding Rule 30(e) permits substantial changes to transcript, including contradictory changes), *with Hambleton Bros.*, 397 F.3d at 1225-26 (holding Rule 30(e) permits transcriptional and not contradictory changes).

[123] *Infra* Part III (analyzing text, Notes accompanying Rule 30(e), and liberal discovery policies).

[124] *Infra* Part III.A (arguing Rule 30(e)'s text supports broad construction).

[125] *Infra* Part III.B (arguing text of Notes suggest Advisory Committee intended broad reading of Rule 30(e)).

[126] *Infra* Part III.C (arguing liberal discovery policy supports broad reading of Rule 30(e)).

[127] *See infra* Part III.A-C (arguing Rule 30(e)'s text, Notes, and liberal policy favor broad interpretation).

[128] *See supra* note 10.

[129] *See, e.g.*, cases cited *supra* note 11.

[130] *See infra* text accompanying notes 131-44 (demonstrating how applying canons of construction to Rule 30(e)'s text favors broad reading).

[131] FED. R. CIV. P. 30(e) (allowing "changes in form or substance" and requiring deponent to "append any changes made").

[132] *Id.*

presumed to mean precisely what they say.[133] The Merriam-Webster Dictionary defines the word "form" as "the structure of something distinguished from its substance."[134] Further, it defines the word "substance" as a "fundamental or characteristic part."[135] Rule 30(e), then, expressly contemplates both fundamental and structural changes.[136] This supports the majority's view that by its terms, Rule 30(e) permits any changes to deposition transcripts.[137]

Second, Rule 30(e) requires the court officer to append "any" changes.[138] Consistent with the canon of *noscitur a sociis*, one can ascertain a word's meaning in light of its surrounding language.[139] The Merriam-Webster Dictionary defines the word "any" as "an undetermined number or amount."[140] Thus, the word "any," together

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[133] *See, e.g.*, cases cited *supra* note 60.

[134] *See* Merriam-Webster Online Dictionary, Definition of form, http://www.m-w.com/dictionary/form (last visited Oct. 19, 2007); *see also* Sanchez v. State, 182 S.W.3d 34, 46 (Tex. Ct. App. 2005) (defining "form" as "nonessential part" to interpret "form or substance"); Dailey v. Albertson's, Inc., 83 S.W.3d 222, 226 (Tex. Ct. App. 2002) (defining "form" as "structure of something distinguished from its material"); Georgia-Pacific Corp. v. Clark County, 552 P.2d 1073, 1075 (Wash. Ct. App. 1976) (defining "form" as "shape or structure" to distinguish from "substance").

[135] *See* Merriam-Webster Online Dictionary, Definition of substance, http://www.m-w.com/dictionary/substance (last visited Oct. 19, 2007); *see also* Bldg. Materials Corp. of Am. v. Certainteed Corp., 273 F. Supp. 2d 552, 560 (D.N.J. 2003) (defining "substance" as "essential nature"); Adam v. Shelby County Comm'n, 415 So. 2d 1066, 1072 (Ala. 1982) (defining "substance" as "real or essential part"); State *ex rel.* Hanna v. Tunstall, 40 So. 135, 135 (Ala. 1905) (defining "substance" as "essential or material part").

[136] *See supra* text accompanying notes 134-35 (defining "form" and "substance").

[137] *See, e.g.*, Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (noting Rule 30(e)'s language authorizes any changes); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (stating broad interpretation supported by Rule 30(e)'s text); Allen & Co. v. Occidental Petrol. Corp., 49 F.R.D. 337, 340 (S.D.N.Y. 1970) (finding no textual limitations on Rule 30(e)'s scope of changes).

[138] FED. R. CIV. P. 30(e).

[139] *See, e.g.*, Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 475 (1979) (using *noscitur a sociis* to construe phrase); Neal v. Clark, 95 U.S. 704, 709 (1877) (stating under *noscitur a sociis*, court can ascertain meaning of word by reference to context); Andrews v. United States, 441 F.3d 220, 224 (4th Cir. 2006) (stating courts use *noscitur a sociis* by examining words immediately surrounding word to determine its meaning); Util. Elec. Supply, Inc. v. ABB Power T & D Co., 36 F.3d 737, 740 (8th Cir. 1994) (defining word using *noscitur a sociis*); *see also* JOHNS & PERSCHBACHER, *supra* note 63, at 117 (stating *noscitur a sociis* means it is known by its companions).

[140] Merriam-Webster Online Dictionary, Definition of any, http://www.m-w.com/dictionary/any (last visited Oct. 19, 2007); *see also* Ruby-Collins, Inc. v. Cobb County, 515 S.E.2d 187, 189 (Ga. Ct. App. 1999) (defining "any" as "an indefinite number"); State v. Pleva, 496 A.2d 375 (N.J. Super. Ct. App. Div. 1985) (defining "any" as "an indefinite number"); State v. Church, 589 N.W.2d 638, 642 (Wis. Ct.

with the clause "form or substance," supports the view that Rule 30(e) permits all changes to depositions.[141]

This broad language contrasts with the minority view limiting the types of changes authorized by Rule 30(e).[142] One must deviate from Rule 30(e)'s plain language to find the typographical limitations espoused by the minority.[143] Such an approach is inconsistent with the canons of construction favoring the plain meaning interpretation of a statute.[144] Thus, the language of Rule 30(e) supports the majority's broad reading rather than the minority approach.[145]

Some courts object to interpreting Rule 30(e) broadly, arguing this broad view allows parties to treat oral depositions as written interrogatories.[146] These courts contend the Rulemaking body could not have intended to create two different discovery Rules with the same function.[147] One canon of construction requires courts to give

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App. 1998) (defining "any" as "one, some, every, or all without specification").

[141] *See supra* text accompanying notes 131-40 (using canon of plain meaning to define clause "form or substance" and *noscitur a sociis* to interpret clause in light of "any").

[142] *See, e.g.*, cases cited *supra* note 12.

[143] *See, e.g.*, Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1225 (9th Cir. 2005) (stating Rule 30(e)'s language does not limit scope of changes); Glenwood Farms, Inc. v. Ivey, 229 F.R.D. 34, 35 (D. Me. 2005) (holding Rule 30(e) expressly contemplates broad changes); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 (D. Mass. 2001) (noting Rule 30(e)'s language permits one to alter the substance of one's deposition responses).

[144] *See, e.g.*, Norfolk Dredging Co. v. United States, 375 F.3d 1106, 1110 (Fed. Cir. 2004) (finding limitations on statute inconsistent with plain language of statute); R.E. Schanzer, Inc. v. Bowles, 141 F.2d 262, 264 (Emer. Ct. App. 1944) (stating courts should give effect to plain meaning of words in statute especially when party suggests interpretation with implied limitations); Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for the W. Dist. of Mich., 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002) (finding defendant's proposed interpretation of term requiring limitation is contrary to plain meaning of statute).

[145] *See supra* text accompanying notes 131-44 (arguing canons of construction favor broad construction of Rule 30(e) over narrow construction of Rule 30(e)); *see also* Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004) (stating Court will prefer plain meaning of terms when interpreting statute). *See generally* 16 C.J.S. *Constitutional Law* § 62 (2006) (stating courts should prefer plain meaning of term when interpreting statute).

[146] *See* Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 (10th Cir. 2002) (holding narrow reading of Rule 30(e) correct); Saffa v. Okla. Oncology, Inc., 405 F. Supp. 2d 1280, 1284 (N.D. Okla. 2005) (reading Rule 30(e) narrowly); Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (finding narrow reading of Rule 30(e) correct).

[147] *See, e.g.*, Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1282 (10th Cir. 2003) (noting broad interpretation of Rule 30(e) encroaches on function of interrogatories); *Garcia*, 299 F.3d at 1242 (finding Rule 30(e)'s purpose does not

independent meaning and effect to every word in a statute to avoid surplus or useless language.[148] Thus, the minority reasons interpreting Rule 30(e) broadly deprives the Rule governing interrogatories of independent meaning, rendering it surplus.[149]

Interrogatories furnish a party with an opportunity to plan thoughtful responses because the answers are routinely prepared by the party's attorney.[150] The minority asserts that a broadly construed Rule 30(e) allows a party to plan deliberate deposition responses.[151] They argue that a broadly construed Rule 30(e) renders depositions indistinguishable from interrogatories and is at odds with the canon avoiding surplusage.[152] A broad interpretation suggests the Rulemaking body intended to adopt two different Rules with the same meaning.[153] Courts have refused to impute this intent to Congress

permit party to plan artful responses); *Greenway*, 144 F.R.D. at 325 (advocating for narrow reading of Rule 30(e) because broad reading allows one to plan responses to deposition questions).

[148] *See, e.g.*, United States v. Cooper, 396 F.3d 308, 312 (3d Cir. 2005) (noting canon avoiding surplus language requires court to give meaning to all language); United Am., Inc. v. NBC-USA Hous., Inc. Twenty Seven, 400 F. Supp. 2d 59, 62 (D.D.C. 2005) (stating canon avoiding surplus language requires court to give effect to all parts of statute); Brewer v. Patel, 25 Cal. Rptr. 2d 65, 68 (Ct. App. 1993) (applying canon avoiding surplusage).

[149] *See generally Burns*, 330 F.3d at 1282 (interpreting Rule 30(e) narrowly because broad approach allows party to plan artful responses to deposition); *Garcia*, 299 F.3d at 1242 (reading Rule 30(e) narrowly because broad reading would allow party to plan responses to depositions); *Greenway*, 144 F.R.D. at 325 (advocating for narrow reading of Rule 30(e) because broad reading allows one to plan responses to deposition questions).

[150] *See* 7 MOORE'S FEDERAL PRACTICE, § 33.104[1] (3d ed. 2000) (noting courts' awareness of counsel's role in preparation of interrogatory responses); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 2172 (3d ed. 1998) (noting common practice of attorney-prepared responses to interrogatories); *see also* Jones v. Williams, 41 F. App'x 964, 967 (9th Cir. 2002) (noting one cannot object to attorney-drafted interrogatory responses).

[151] *See, e.g.*, *Burns*, 330 F.3d at 1282 (interpreting Rule 30(e) narrowly because broad approach allows party to plan artful responses to questions after deposition testimony); *Garcia*, 299 F.3d at 1242 (reading Rule 30(e) narrowly because broad reading allows party to plan responses to deposition after sworn testimony); *Greenway*, 144 F.R.D. at 325 (advocating for narrow reading of Rule 30(e) as broad reading allows one to plan responses to questions after in-court deposition).

[152] *See supra* text accompanying notes 146-51 (explaining how treating depositions and interrogatories identically renders latter surplus, conflicting with canon avoiding surplusage).

[153] *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001) (stating court accepting interpretation with surplus language is equivalent to court accepting that Congress expended energy to write surplus language); *Cooper*, 396 F.3d at 312 (stating rationale for canon avoiding surplusage is for courts to reject interpretations suggesting

when interpreting statutes.[154] Thus, courts must construe Rule 30(e) narrowly to avoid a duplicative Rule.[155]

This interpretation, however, is flawed.[156] It discounts the practical differences between an interrogatory and a deposition under a broadly interpreted Rule 30(e).[157] Rule 30(e) expressly requires a deponent to append deposition changes and the reasons for making them to the original transcript.[158] Once a deponent appends the changes, the fact-finder may compare the modifications and the reasons for making them with the original deposition testimony.[159] This makes a party's intent to plan deliberate and evasive answers in lieu of the original testimony apparent.[160] One cannot evaluate interrogatory responses in the same way because in-court interrogatory testimony does not exist.[161] This undermines the minority's position that a witness can

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Congress deliberately wasted effort in distinguishing terms); Elwood v. Jeter, 386 F.3d 842, 848 (8th Cir. 2004) (observing how adopting statutory definition treating terms as surplusage presumes Congress intended to treat different clauses similarly).

[154] *See, e.g.*, *Duncan*, 533 U.S. at 174 (refusing to impute statutory meaning rendering language surplusage); *Cooper*, 396 F.3d at 312 (declining to adopt statutory meaning rendering other provision surplusage); *Elwood*, 386 F.3d at 848 (presenting case where court reluctant to adopt statutory definition treating terms as surplusage).

[155] *See, e.g.*, cases cited *supra* note 151.

[156] *See infra* text accompanying notes 158-62 (rebutting minority's assumption).

[157] *See infra* text accompanying notes 158-62 (describing how Rule 30(e)'s requirement that one append deposition changes allows fact-finder to evaluate nature of changes).

[158] FED. R. CIV. P. 30(e); *see also* Reilly v. TXU Corp., 230 F.R.D. 486, 487 (N.D. Tex. 2005) (noting Rule 30(e)'s requirement that deponent append changes); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (stating Rule 30(e) requires deponent to append changes to original testimony).

[159] *See* Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (stating even if deponent amends deposition, original deposition responses remain part of record); Zhu v. Countrywide Realty Co., 165 F. Supp. 2d 1181, 1195 n.13 (D. Kan. 2001) (recognizing that original answers, changes, and reasons for changes become part of deposition record); *Lugtig*, 89 F.R.D. at 641-42 (noting fact-finder can evaluate original answers, changes, and reasons for changes because all remain on record).

[160] *See* CSC Holdings, Inc. v. Alberto, 379 F. Supp. 2d 490, 493 (S.D.N.Y. 2005) (stating court can consider both original deposition testimony and edits to deposition testimony); DeLoach v. Philip Morris Cos., 206 F.R.D. 568, 570 (M.D.N.C. 2002) (noting jury may impeach deponent's changes by examining reasons for changes and original testimony); *Zhu*, 165 F. Supp. 2d at 1195 n.13 (stating court can review original answers to examine whether deponent amended deposition solely to give more artful answers).

[161] *See* FED. R. CIV. P. 33 (stating interrogatories require written responses); *see also* Jones v. Williams, 41 F. App'x 964, 966-67 (9th Cir. 2002) (noting one cannot object to attorney-drafted interrogatory responses); WRIGHT ET AL., *supra* note 150, § 2172 (noting common practice of attorneys preparing responses to interrogatories).

use a broadly interpreted Rule 30(e) and a written interrogatory identically.[162] Interpreting Rule 30(e) to authorize any changes does not conflict with the canon avoiding surplus language.[163] Therefore, this argument does not militate against interpreting Rule 30(e) broadly.[164]

B. Under the Plain Meaning Canon, the Notes to Rule 30(e) Support a Broad Reading

If a Rule's plain meaning is not evident, courts often ask if a proposed interpretation is consistent with the Advisory Committee's intent.[165] Congress requires the Advisory Committee to include a Note explaining the purpose of each proposed Rule or amendment.[166] Thus, courts turn to the Rules' Notes for guidance.[167] An analysis of the Notes' plain language shows that the Advisory Committee intended a broad reading of Rule 30(e).[168]

Under the 1937 version of Rule 30(e), the Note required a court officer to alter a deposition if "the deponent is not satisfied with it."[169] The Merriam-Webster Dictionary defines "satisfy" as "to gratify to the

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[162] *See supra* text accompanying notes 158-61 (arguing how, unlike written interrogatories, Rule 30(e) expressly requires appending changes to original testimony and allows trier of fact to compare both).

[163] *See supra* text accompanying notes 158-61 (explaining difference between written interrogatories and deposition under broadly interpreted Rule 30(e)).

[164] *See supra* text accompanying notes 158-63 (rebutting minority's objection to broad reading of Rule 30(e)).

[165] *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 544 (1991) (rejecting interpretation of Rule 11 because it conflicted with Advisory Committee's intent); United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999) (referring to Advisory Committee's intent to construe Rule 43); United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (noting Supreme Court consults Notes because they reflect Advisory Committee's intent).

[166] *See, e.g.*, sources cited *supra* note 42.

[167] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-17 (1997) (citing Notes to Federal Rule of Civil Procedure 23); *cf.* Bracy v. Gramley, 520 U.S. 899, 909 (1997) (citing Note to Habeas Corpus Rule 6); United States v. Hyde, 520 U.S. 670, 676-77 (1997) (citing Note to Federal Rule of Criminal Procedure 32); United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Advisory Committee Notes to Federal Rules of Criminal Procedure 23 and 52).

[168] *See infra* text accompanying notes 169-72 (arguing language of 1937 Note indicates Advisory Committee intended broad reading of Rule 30(e)); *see also infra* text accompanying notes 173-78 (arguing language of 1993 Note indicates Advisory Committee intended broad reading of amended Rule 30(e)).

[169] *See* sources cited *supra* note 68.

full."[170] Accordingly, this broad language supports the majority approach toward Rule 30(e).[171] Thus, the 1937 Note, along with Rule 30(e)'s language permitting "changes in form or substance," suggests the Advisory Committee originally intended a broad interpretation.[172]

The 1993 amendment to Rule 30(e) provides the framework for the Rule in its present form.[173] The Note to the Rule specifically states a deponent must indicate "any changes in form or substance."[174] The Merriam-Webster Dictionary defines "any" as "an undetermined number or amount."[175] The use of the word "any" evidences the Advisory Committee's intent to permit broad changes under Rule 30(e).[176] The use of the phrase "form or substance" further supports this intent.[177] Thus, under the plain meaning canon, both the 1937 and 1993 Notes indicate that a broad interpretation of Rule 30(e) is proper.[178]

Proponents of a narrow view may argue that using the Notes as a binding source of intent conflicts with the language of the Enabling Act.[179] The Enabling Act expressly grants the Supreme Court power to create the Rules.[180] Some argue that the Supreme Court may interpret

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[170] Merriam-Webster Online Dictionary, Definition of satisfy, http://www.m-w.com/dictionary/satisfy (last visited Oct. 19, 2007); *see also* United States v. Schwartz & Co., 3 Ct. Cust. 24, 35 (App. 1912) (Barber, J., dissenting) (defining "satisfy" as "to meet the desire or wish"); Rock Island Bank & Trust Co. v. Rhoads, 187 N.E. 139, 142 (Ill. 1933) (finding "satisfaction" entails subjective gratification).

[171] *See supra* note 170 and accompanying text (defining "satisfy").

[172] *See supra* text accompanying notes 169-71 (explaining language of 1937 Note coupled with text of Rule 30(e) indicates Advisory Committee intended broad interpretation); *see also supra* text accompanying notes 131-36 (construing phrase "form or substance").

[173] *See* FED. R. CIV. P. 30(e) (2006) (showing no amendments to Rule 30(e) since 1993); *see also* Reilly v. TXU Corp., 230 F.R.D. 486, 487 (N.D. Tex. 2005) (stating 1993 version of Rule 30(e) is current); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 119-20 (D. Mass. 2001) (stating 1993 version of Rule 30(e) is current).

[174] *See* sources cited *supra* note 70.

[175] *See supra* note 140.

[176] *See supra* note 140 and accompanying text (defining "any").

[177] *See supra* text accompanying notes 133-35 (explaining clause "form or substance" contemplates material and immaterial changes).

[178] *See supra* text accompanying notes 169-77 (arguing plain language of 1937 Note and 1993 Note supports broad reading of Rule 30(e)).

[179] *See infra* text accompanying notes 180-84 (explaining how Enabling Act's requirement that Supreme Court create Rules may allow other courts to disregard Notes when interpreting Rules).

[180] The Rules Enabling Act of 1934, 28 U.S.C. § 2071 (2006) (stating Supreme Court has power to make procedural Rules); *see also* United States v. Estrada, 680 F.

a Rule however it likes because it has the power to promulgate the Rules.[181] These scholars would further assert the Supreme Court may ignore the Notes when interpreting a Rule.[182] Courts may be persuaded by such a view and ignore a Note's explicit recommendation when construing a Rule.[183] These courts would reason that if a Note's language does not bind the Supreme Court, the Note does not bind other courts.[184] Thus, one may argue courts can ignore the Notes to Rule 30(e) and interpret the Rule narrowly.[185]

This position, however, is erroneous for three reasons.[186] First, it neglects the language of the Enabling Act.[187] By its own terms, the Enabling Act confers power on the Supreme Court, and does not mention anything about a lower court's Rulemaking authority.[188] Thus, while the Supreme Court's own ability to overlook the Notes

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Supp. 1312, 1325 (D. Minn. 1988) (stating Supreme Court's function as delegated Rulemaker under Enabling Act). *See generally* Burbank, *supra* note 29 (discussing history of Enabling Act).

[181] *See, e.g.*, Joseph P. Bauer, Schiavone: *An Un-*Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 728 (1988) (arguing Supreme Court's role as Rule promulgator entitles it to give limited weight to Advisory Committee's intent); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1094 (1993) (arguing Supreme Court's power to promulgate Rules affords Supreme Court expansive authority, unconstrained by lower drafting bodies, to interpret Rules). *But see* Struve, *supra* note 32, at 1168-69 (arguing Supreme Court should give Notes substantial weight when construing Rules).

[182] *See* sources cited *supra* note 181 (arguing Supreme Court can ignore Notes when construing Rules).

[183] *Cf.* Hays v. Sony Corp., 847 F.2d 412 (7th Cir. 1988) (ignoring Note to Rule 11); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (declining to consider Note to Rule 11); Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists, Dist. No. 8, 802 F.2d 247 (7th Cir. 1986) (ignoring Note to Rule 11).

[184] *See* Brandt v. Schal Assocs., 960 F.2d 640, 645-46 (7th Cir. 1992) (ignoring Rule 11's Note as well as Supreme Court's reliance on Note to Rule in another case); *Hays*, 847 F.2d at 418 (ignoring Note to Rule 11 and relying on Rule's ambiguous text and policy to interpret Rule); *Szabo*, 823 F.2d at 1079 (declining to consider Rule 11's Note and opting to premise remedy on policy because of ambiguity in Rule); *see also* FED. R. CIV. P. 11(c)(2) (1993) (amending Rule to include portion of Note in text of Rule).

[185] *See supra* text accompanying notes 180-84 (arguing Supreme Court's power to promulgate Rules may permit lower courts to ignore Notes).

[186] *See infra* text accompanying notes 187-200 (rebutting position that courts can ignore Notes).

[187] *See* sources cited *supra* note 180.

[188] *See* sources cited *supra* note 180.

may be debatable, nothing in the Enabling Act permits a lower court to do so.[189]

Second, this view discounts the Supreme Court's history of using the Notes in interpreting the Rules.[190] The Justices have explicitly consulted the Notes to ascertain the Advisory Committee's intent in drafting a Rule.[191] In some cases, the Justices have used the Notes as a basis for objecting to a Rule's interpretation.[192] The history of the Supreme Court's reliance on the Notes demonstrates its willingness to consider the Advisory Committee's intent when interpreting a Rule.[193]

Third, this view overlooks the Notes' role in the Rulemaking process.[194] Notes undergo an adoption process similar to the Rules.[195] This process suggests that the Notes are as much a product of the Rulemaking body's intent as are the Rules themselves.[196] Moreover, Congress requires the Advisory Committee to submit a Note with each proposed Rule or amendment.[197] Congress's requirement indicates it intended that courts use the Notes to interpret the Rules.[198] This

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[189] *See* § 2071(a) (2006) (noting only Supreme Court's power); *see also* Henderson v. United States, 517 U.S. 654, 679 (1996) (Thomas, J., dissenting) (noting Supreme Court is Rule promulgator under Enabling Act); United States v. Estrada, 680 F. Supp. 1312, 1325 (D. Minn. 1988) (stating Supreme Court's function as delegated Rule promulgator under Enabling Act).

[190] *See, e.g.*, sources cited *supra* note 167.

[191] *See, e.g.*, sources cited *supra* note 22.

[192] *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 558-59 (1991) (Kennedy, J., dissenting) (finding Note as basis to dissent from majority's opinion); Amendments to the Fed. Rules of Civil Procedure, 146 F.R.D. 404, 509 (Scalia, J., dissenting) (finding Note basis for disagreeing with Rule's amendment); *cf.* Hohn v. United States, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (finding 1967 Note to Federal Rule of Appellate Procedure 22 as basis to disagree with majority's interpretation).

[193] *See supra* text accompanying notes 190-92 (explaining Supreme Court's use of Notes in Rule interpretation).

[194] *See infra* text accompanying notes 195-98 (explaining role of Notes in Rulemaking process).

[195] *See supra* text accompanying notes 43-46 (describing similarity of Notemaking process to Rulemaking process).

[196] *See, e.g.*, United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (observing Notemaking process legitimizes courts' use of Notes when interpreting Rules); *cf.* United States v. Vonn, 535 U.S. 55, 64 n.6 (2002) (stating Notes to Federal Rules of Criminal Procedure are reliable source of intent because of Notemaking process); Tome v. United States, 513 U.S. 150, 160 (1995) (finding Notes are useful in interpreting Federal Rules of Evidence because of Notemaking process).

[197] *See* sources cited *supra* note 42.

[198] *See supra* note 42 (citing authority that promulgating body is required to submit explanatory Note); *see also* FED. R. CIV. P. 50 advisory committee's note (1993) (stating purpose of revision); FED. R. CIV P. 50 advisory committee's note (1991)

illustrates the Notes' importance in the Rulemaking process and justifies their use as a source of intent.[199] Thus, consistent with the Notes, courts should interpret Rule 30(e) broadly.[200]

C. *Liberal Discovery Policies Favor a Broad Reading of Rule 30(e)*

Courts generally construe the discovery Rules broadly and liberally to facilitate litigation.[201] Proper litigation includes the availability of all facts to prevent surprises at trial.[202] Consistent with this objective, a broad construction of Rule 30(e) is preferable to a narrow approach.[203]

Courts have stated that the availability of all facts reduces the probability of surprise during trial.[204] A broad construction of Rule 30(e) permits any changes on the deposition record, including modifications contradicting the original deposition testimony.[205] A narrow interpretation of Rule 30(e) limits the scope of changes to those merely typographical in nature.[206] Thus, the policy of eliciting all facts favors a broad interpretation of Rule 30(e).[207]

Further, it is possible to balance the concerns of encouraging liberal discovery and preventing abuse.[208] Rule 30(e) expressly requires a

(stating purpose of amendment).

[199] *See supra* text accompanying notes 195-98 (explaining role of Notes in Rulemaking process).

[200] *See supra* text accompanying notes 187-98 (rebutting argument that courts should disregard Notes as source of intent).

[201] *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting liberal discovery policy favors proper litigation); Hickman v. Taylor, 329 U.S. 495, 508 (1947) (stating courts must construe discovery Rules broadly to ensure proper litigation); Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985) (holding liberal discovery policies promote proper litigation).

[202] *See, e.g.*, cases cited *supra* note 51.

[203] *See infra* text accompanying notes 204-06 (explaining broad reading of Rule 30(e) promotes availability of facts and reduces trial surprise).

[204] *See, e.g.*, cases cited *supra* note 51.

[205] *See, e.g.*, cases cited *supra* note 11.

[206] *See, e.g.*, cases cited *supra* note 12.

[207] *See supra* text accompanying notes 204-06 (explaining broad reading of Rule 30(e) encourages availability of facts and reduces trial surprise more adequately than narrow reading).

[208] *See infra* text accompanying notes 209-14 (explaining Rule 30(e)'s requirement that witness append changes to original deposition serves as check against abuse). *See generally* Reilly v. TXU Corp., 230 F.R.D. 486 (N.D. Tex. 2005) (using broad reading approach partly because Rule 30(e) requires deponent to append changes); Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981) (allowing substantive changes under Rule 30(e) partly because Rule 30(e) requires deponent to append changes).

deponent to append deposition modifications and the reasons for the modifications to the original transcript.[209] The changes and reasons become a part of the record, along with the original transcript.[210] One may examine the deposition alterations and the reasons for making them.[211] In this setting, if a deponent materially changes testimony, the opposing lawyer can use the changes to impeach the witness.[212] Similarly, a judge can evaluate modifications to determine whether they were made solely to evade summary judgment.[213] Thus, Rule 30(e)'s provision requiring a party to append deposition changes strikes a balance between preventing abuse and facilitating proper litigation.[214] Under liberal discovery policies, then, courts should construe Rule 30(e) broadly.[215]

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[209] FED. R. CIV. P. 30(e).

[210] *See, e.g.*, Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997) (stating deponent's original answer is still part of record, along with changes and reasons for making changes); Sanford v. CBS, Inc., 594 F. Supp. 713, 714 (N.D. Ill. 1984) (stating changes, reasons, and original testimony are all part of record); *Lugtig*, 89 F.R.D. at 641 (noting requirement to append changes implies original answers still on record).

[211] *See, e.g.*, Foutz v. Town of Vinton, 211 F.R.D. 293, 295 (W.D. Va. 2002) (stating juror can examine changes and original testimony); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 n.36 (D. Mass. 2001) (noting appended changes allow one to evaluate modifications against original testimony); Elwell v. Conair, Inc., 145 F. Supp. 2d 79, 87 (D. Me. 2001) (observing Rule 30(e)'s requirement that party append changes can allow jurors to examine both original testimony and changes).

[212] *See, e.g.*, *Foutz*, 211 F.R.D at 295 (stating courts may admit original and corrected answers into evidence to allow jury to impeach deponent with contradictory answers); *Elwell*, 145 F. Supp. 2d at 87 (stating presence of original answers at trial allows jurors to discern nature of changes and impeach deponent if deponent illegitimately changes deposition); *Lugtig*, 89 F.R.D. at 641 (allowing original testimony to remain on record because jury could impeach witness who changed answers in bad faith).

[213] *See Podell*, 98 F.3d at 103 (finding plaintiff's material changes unavailing and insufficient to survive summary judgment); N. Trade U.S., Inc. v. Guinness Bass Import Co., No. 3:03CV1892, 2006 WL 2263885, at *3 (D. Conn. Aug. 7, 2006) (finding plaintiff's material changes did not create issue of fact); *see also* Cahill v. O'Donnell, 75 F. Supp. 2d 264, 273-74 (S.D.N.Y. 1999) (stating party's declarations insufficient to create issue of fact).

[214] *See supra* text accompanying notes 204-13 (arguing Rule 30(e)'s broad reading reduces surprise and Rule 30(e)'s requirement that witness append changes serves as check against abuse). *See generally* Reilly v. TXU Corp., 230 F.R.D. 486 (N.D. Tex. 2005) (using broad reading approach partly because Rule 30(e) requires deponent to append changes); *Lugtig*, 89 F.R.D. at 639 (allowing substantive changes under Rule 30(e) partly because Rule 30(e) requires deponent to append changes).

[215] *See supra* text accompanying notes 204-13 (arguing broad interpretation of Rule 30(e) achieves liberal discovery objectives).

IV. SOLUTIONS

The Federal Courts of Appeals are currently divided on the scope of changes authorized by Rule 30(e).[216] The text and purpose of the Rule, along with liberal discovery policies support a broad reading of Rule 30(e).[217] The interest in promoting uniformity of the Rules serves as a compelling reason to resolve the circuit divide in favor of a broad approach.[218] Thus, the Advisory Committee should explicitly direct courts to construe Rule 30(e) to allow any changes.[219]

The Advisory Committee can instruct the courts to construe Rule 30(e) broadly by using one of two methods.[220] It could amend Rule 30(e) to explicitly state that there are no limitations on the scope of authorized changes.[221] Alternatively, the Advisory Committee could

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[216] *Compare Podell*, 112 F.3d at 103 (holding Rule 30(e) permits any changes to transcript), *with* Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1225-26 (9th Cir. 2005) (holding Rule 30(e) permits only transcriptional, not contradictory, changes), Burns v. Bd. of County Comm'rs, 330 F.3d 1275, 1281-82 (10th Cir. 2003) (finding Rule 30(e) limited to immaterial changes), *and* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (holding Rule 30(e) limited to non-substantive changes).

[217] *See supra* Part III.A-C (arguing broad interpretation of Rule 30(e) is consistent with its text, its purpose as evidenced through its Notes, and aims of liberal discovery).

[218] *See* Prazak v. Local 1 Int'l Union of Bricklayers, 233 F.3d 1149, 1152 (9th Cir. 2000) (observing important interest in uniformity of federal adjudication); Cannon v. Kroger Co., 832 F.2d 303, 306 (4th Cir. 1987) (stating differing procedures threaten goal of uniform adjudication); Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1119 (E.D. Ky. 1980) (noting Congress's sanctioning of Federal Rules of Civil Procedure and Evidence evinces strong policy toward uniformity of procedural rules).

[219] *See infra* notes 221-22 (providing examples of amended Rule 30(e) and amended Note).

[220] *See infra* notes 221-22 (providing examples of amended Rule 30(e) and amended Note).

[221] Proposed Amendment to Rule 30(e) (suggestion italicized):

> Rule 30(e) — Review by Witness; Changes; Signing.
>
> 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 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. *There are no limitations on the scope of changes authorized under this subdivision.*

use the Notes to clarify that courts should read Rule 30(e) broadly.[222] Such an express statement via an amendment to the Rule or Notes instructing courts to interpret Rule 30(e) broadly will resolve the circuit split.[223]

CONCLUSION

Rule 30(e) allows deponents to alter their deposition transcripts.[224] The Federal Courts of Appeals are divided with respect to the scope of Rule 30(e)'s authorized changes.[225] The Second Circuit, conforming to the majority approach in *Podell*, held Rule 30(e) permits deposition modifications without any limitations.[226] On the other hand, the Ninth Circuit's holding in *Hambleton Bros.* stated courts should construe Rule 30(e) narrowly to permit only typographical changes.[227]

Rule 30(e)'s language and purpose along with liberal discovery policies strongly support the Second Circuit's broad interpretation.[228] The public has an interest in promoting the uniform application of the Rules.[229] Until the Rulemaking body resolves the circuit split over Rule 30(e), parties in different federal jurisdictions will have unequal litigation rights.[230]

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[222] Proposed Note to Rule 30(e):

> There are no limitations on the scope of changes authorized under this subdivision.

[223] *See supra* notes 221-22 (providing example of amended Rule 30(e) and amended Note).

[224] FED. R. CIV. P. 30(e).

[225] *See supra* note 216.

[226] Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997).

[227] Hambleton Bros. Lumber Co. v. Balkin Enters., Inc., 397 F.3d 1217, 1225 (9th Cir. 2005).

[228] *See supra* Part III.A-C (arguing broad interpretation of Rule 30(e) is consistent with its text, its purpose, and aims of liberal discovery).

[229] *See, e.g.*, cases cited *supra* note 218.

[230] *See* Ceres Partners v. GEL Assocs., 918 F.2d 349, 355 (2d Cir. 1990) (stating lack of uniformity in laws results in disparities in rights of parties). *Compare Podell*, 112 F.3d at 103 (allowing plaintiff to materially change deposition transcript under Rule 30(e)), *with Hambleton Bros.*, 397 F.3d at 1225 (refusing to allow plaintiff to materially change deposition transcript under Rule 30(e)).