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THE ERA OF TRIAL BY PAPER: WHEN THE WITNESS RE-WRITES THE ORAL DEPOSITION TESTIMONY IN THE ERRATA SHEET

Brian P. Lauten[*]

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[*] Brian P. Lauten is a triple board certified business and commercial trial lawyer. Lauten is board certified in Civil Trial Law by the Texas Board of Legal Specialization, board certified in Civil Trial Advocacy by the National Board of Trial Advocacy, and board certified in Civil Pretrial Practice by the National Board of Civil Pretrial Practice Advocacy. Lauten has argued before both the United States and Texas Supreme Courts. He is a member of the American Board of Trial Advocates (ABOTA). Lauten is a partner with the Dallas law firm of Brian Lauten, P.C. Lauten would like to thank the executive board of HLR*e*: Off the Record, the online companion to the Houston Law Review, for their editing and publication support.

I. INTRODUCTION

Although it is not the role of either the trial judge or the appellate courts to "weigh" the evidence or to adjudicate the credibility of the witnesses, our civil justice system, in the alarming wake of the vanishing civil jury trial,[1] has become just that: a system of "trial by paper."[2] In light of the advent of the "trial by paper," there is a disturbing trend of party deponents, presumably with the assistance of counsel, re-writing his or her oral testimony after an inauspicious oral deposition (*ex-post* in the errata sheet), strategically anchored toward a party's theory of the

1. The empirical research establishes that, "[i]n 1975 twice as many cases were resolved by trial as by summary judgment; in 2000, three times as many cases were resolved by summary judgment as by trial." *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 84 (2009). That trend undeniably continues today. *See* United States District Judge Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It*? 45 ST. MARY'S L.J. 333 et seq. (2014) (less than 2 percent of civil cases are decided by a jury); *see also* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, Vol. 30, No. 2, J. SEC. LIT. (p. 4) (American Bar Association 2004) ("The vanishing trial may be the most important issue facing our civil justice system today. It deserves our continued attention."); Mark Curriden, *Civil Jury Trials Plummet in Texas*, DALLAS MORNING NEWS (April 2, 2012) ("[N]ew statistics show that the right to 'trial by jury' is quietly and steadily disappearing thanks to a mixture of tort reform laws and Texas appellate court decisions that have made it more difficult for parties in a lawsuit to have their disputes decided by juries."); *accord*, Judges Craig Smith & Eric Moye, *Outsourcing American Civil Justice Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH. L. REV., 281, 282 (2011) ("The Seventh Amendment right to a jury trial is vanishing before our very eyes.") (citations omitted).

2. *See, e.g.,* Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (*per curiam*) (reversing the 5th Circuit and holding that a summary judgment motion was improperly granted because the panel failed to "credit evidence that contradicted some of its key factual conclusions, [and] the court [thereby] improperly 'weigh[ed] the evidence' and [wrongfully] resolved disputed issues in favor of the moving party.") (citations omitted).

case, steering the dispute toward a favorable summary judgment ruling.[3]

Albeit there is nothing controversial about rudimentary changes to inaccuracies and transcription errors in an oral deposition, it is another situation entirely when an eyewitness account or an expert's opinion is dismantled on cross examination, only to have that oral testimony artfully resurrected through creative written changes to the oral testimony in the errata sheet *ex-post*. This evolving topic of procedural concern has been virtually un-discussed in the law review literature.[4]

The aim of this article is to provide a scholarly resource for courts and the trial practitioner that will hopefully aid parties and trial courts to evaluate: (i) the proper circumstances when oral deposition testimony can be changed in an errata sheet; (ii) the rights and remedies available to parties who receive material changes to the oral testimony in an errata sheet; (iii) the law of privilege that should be inapposite to such changes; (iv) and rules on admissibility at the summary judgment stage and at trial when testimony is re-shaped on "paper" after oral deposition testimony reveals something different entirely.

II. TEXAS RULE 203 AND FEDERAL RULE 30(E) ARE SIMILAR AND GOVERN CHANGES TO ORAL DEPOSITION TESTIMONY

In state court, Texas Rule of Civil Procedure 203.1(b) governs "Changes by witness; signature" to an oral deposition.[5] In federal court, Federal Rule of Civil Procedure 30(e) governs "Review by the Witness; Changes," to an oral deposition.[6] Texas Rule 203.1 and Federal Rule 30(e) are similar, as set forth below:

Texas Rule of Civil Procedure 203.1(b) provides in pertinent part:

> Changes by witness; signature. The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for

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3. A textbook example of this trend can be gleaned from the Dallas court of appeals decision in Cherry Peterson Landry Albert, LLP v. Cruz, 443 S.W.3d 441, 452 (Tex. App.—Dallas 2014, pet. denied) (concluding that the trial judge's order requiring counsel to produce their emails with their client, which led to changes in the errata sheet for cross examination and impeachment at trial, was an appropriate sanction, without more, to establish abuse of process).

4. *See, e.g.,* Robert K. Wise & Kennon L. Wooten, *The Practitioner's Guide to Properly Taking and Defending Depositions Under the Texas Discovery Rules*, 68 BAYLOR L. REV. 399, 548–553 (2016).

5. TEX. R. CIV. P. 203.1(b).

6. FED. R. CIV. P. 30(e).

> making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript.[7]

Federal Rule 30(e) provides in pertinent part:

> Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
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> (A) To review the transcript or recording; and
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> (B) If there are any changes in form or substance, to sign a statement listing the changes and the reasons for making them.[8]

Where a Texas state rule of civil procedure (Rule 203.1) has a parallel federal rule (Rule 30(e)), Texas courts routinely rely upon the federal courts for their "extensive jurisprudential experience" for any "guidance it may yield."[9]

A. An Oral Deposition is Neither a Take Home Examination Nor an Opportunity to Ghost-Write Crafty Answers Ex-Post

A deposition is not a take home test that allows a party's lawyer to ghost write the testimony *ex-post*, in order to make tactical adjustments to the unvarnished testimony.[10] In *Touchcom v. Bereskin & Parr*,[11] the United States District Court for the Eastern District of Virginia, held:

> [T]he purpose of an errata sheet is to correct alleged inaccuracies in what the deponent said at his deposition, not to modify what he wishes that he had said. Rule 30(e) (allowing the submission of errata sheets), 'cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.[12]

The purpose of allowing a party to elicit pre-trial facts in a deposition is "disserved by allowing deponents to answer questions

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7. TEX. R. CIV. P. 203.1(b).

8. FED. R. CIV. P. 30(e)(1)(A)–(B).

9. *Compare, e.g.,* Webb v. State, 36 S.W.3d 164, 181–182 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (following federal case law where Texas rule of procedure was similar to the parallel federal rule), *with* Heckman v. Williamson Cnty., 369 S.W.3d 137, 168 n. 60 (Tex. 2012) (in the context of evaluating "standing" the Texas Supreme Court stated that it relies upon federal case law on analogous questions for guidance when the case–law is more thoroughly developed on a topic of analysis than state court as a good guidepost).

10. *See* Touchcom, Inc. v. Bereskin & Parr, 790 F. Supp. 2d 435, 465 (E.D. Va. 2011).

11. *Id*.

12. *Id*. (emphasis added) (citations omitted).

at a deposition with no thought at all and later to craft answers that better serve the deponent's cause."[13] If courts were to condone "such conduct [it would] make[] a mockery of the serious and important role that depositions play in the litigation process."[14] As the Fifth Circuit explained in *Gonzalez v. Fresenius*,[15] "[a]lthough clients do sometimes make substantive missteps in deposition testimony which may be corrected with an errata sheet, attorneys may not use an errata sheet to push a case to trial where the client no longer adheres to the allegations supporting the claim."[16]

B. Does the Deponent Need a Compelling Reason to Change the Oral Deposition Testimony?

In order to change a sworn answer in an oral deposition, the deponent must provide a reason for the change, which is not conclusory.[17] Although there appears to be two schools of thought regarding the vehicles that permit oral deposition testimony to be changed in an errata sheet, the prevailing view holds that most any change can be made to oral deposition testimony so long as the requirements of Rule 30(e) are satisfied. For example, in *Hodak v. Madison Capital Management, LLC*,[18] the court, in analyzing Rule 30(e)'s limitations, held:

> The court in *Podell v. Citicorp Diners Club, Inc.*,[19] found that Rule 30(e) allows deponents to 'make changes in form or substance to their testimony and to append any changes that are made to the filed transcript. A deponent invoking this privilege must sign a statement reciting such changes and reasons given for making them, but the language of the Rule

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13. *See* E.I. Du Pont v. Kolon Indus. Inc., 277 F.R.D. 286, 297 (E.D. Va. 2011) [quotations omitted].

14. *Id*.

15. *See* Gonzalez v. Fresenius Medical Care N. Am., 689 F.3d 470, 480 (5th Cir. 2012).

16. *Id.* (citations omitted).

17. *See* TEX. R. CIV. P. 203.1(b) ("The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, *together with a statement of the reasons for making the changes*.") (emphasis added); *see also, e.g.*, Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 (D. Mass. 2001) (interpreting Rule 30(e); holding that the deponent "must supply a reason for the changes which is not conclusory"); *accord* Hawthorne Partners v. AT&T Tech., Inc., 831 F. Supp. 1398, 1406–1407 (N.D. Ill. 1993) ("[I]t is not enough for the witness to give general conclusory reasons for all the changes at the end of the transcript—or . . . for the witness to record no reasons at all upon the deposition but merely to claim later that the reasons are 'either explicit or reasonably implied from the circumstances.' Instead, the witness must state the specific reason for the particular change after *each* modification.") (emphasis added) (citations omitted); Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1225–1226 (9th Cir. 2005) (affirming trial court's order striking the errata sheet).

18. No. 07–CV–05, 2008 WL 2598309, *2 (E.D. Ky. June 25, 2008).

19. 112 F.3d 98, 103 (2nd Cir. 1997).

> places no limitations on the type of changes that may be made, . . . nor does the Rule require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes, even if those reasons are unconvincing'.[20]

Hodak's interpretation of Federal Rule 30(e) squarely aligns with *United States ex rel. Barbara Burch v. Piqua Engineering,*[21] where a United States District Court in the Southern District of Ohio held that under Rule 30(e), "changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing."[22]

Be that as it may, and to add even further confusion to the issue, at least one other court, also within the United States Court of Appeals for the Sixth Circuit, has taken an even narrower view of Rule 30(e), stating in pertinent part as follows:

> Rule 30(e) does not 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. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.[23]

III. TIMELINESS OF CHANGES AND WAIVER

It would be remiss not to illuminate one critical distinction between the application of Texas Rule 203.1(b) and its parallel counterpart in Federal Rule 30(e); that is, a trial court's determination on whether an untimely provided errata sheet is automatically waived or if it can in fact be considered, even if it is provided after the deadline imposed in these two respective rules.[24] The former is very forgiving, whereas, the latter is not.[25]

A. Texas: Discretionary *Waiver in State Court*

Under Texas Rule 203.1(b), there is some ambivalent language about whether a deponent automatically waives his or her right to make changes to the oral deposition testimony, if the changes are made *more* than twenty days after the date the

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20. *See Hodak,* 2008 WL 2598309,at *2 (quoting *Podell*, 112 F.3d at 103).

21. *See* 152 F.R.D. 565, 566–567 (S.D. Ohio 1993).

22. *Id*. at 566–567.

23. *See, e.g.,* Tuttle v. Tyco Elecs. Installation Servs., Inc., No. 2:06–CV–581, 2008 WL 343178, *4 (S.D. Ohio Feb. 7, 2008) (citations omitted).

24. "In arguing that the changes were untimely, appellants cite to federal cases, which rely on Federal Rule of Civil Procedure 30 regarding changes to deposition testimony—a rule that varies significantly from Texas Rule of Civil Procedure 203.1." *See Dickerson v. State Farm Lloyds, Inc*., No. 10–11–00071–CV, 2011 WL 3334964, *13 (Tex. App.—Waco June 8, 2012, pet. denied) (citations omitted).

25. *Id*. at *12–13.

transcript is provided to the witness.[26] One Texas court of appeal analyzed whether the twenty-day deadline results in mandatory or discretionary waiver. In *Dickerson v. State Farm Lloyds, Inc.*,[27] the Waco court of appeals held that the trial court did not err in permitting errata sheet changes, which were made *beyond* twenty days after the witness's receipt of the testimony, where opposing counsel waited until the pre-trial conference years later to raise the objection to timeliness.[28] The holding in *Dickerson* makes it clear that trial courts in Texas have broad latitude in determining whether the failure to timely provide errata sheet changes actually results in the harsh consequence of waiver.[29]

B. Federal Court: No Exceptions

In contrast to state court, the United States District Courts interpret Federal Rule 30(e)'s timeliness requirement harshly. In *Reed v. Hernandez*,[30] the United States Court of Appeals for the Fifth Circuit held that Rule 30(e) requires changes to the errata sheet to be submitted within thirty days of receipt of the transcript or those corrections "shall" be subject to being stricken by the trial court.[31] *Reed* was a "refusal to re-hire" case.[32] In that decision, Reed, the plaintiff in an employment dispute with the Bastrop County Sheriff's office, attempted to make over one hundred changes to his deposition testimony.[33] Reed admitted the errata sheets were provided beyond the thirty day limitation allowed by Rule 30(e).[34] In addition to missing the thirty day deadline, Reed did not provide the errata sheet to the court reporter.[35] The trial court excluded the errata sheet because it was untimely, and entered summary judgment against Reed.[36] Affirming the trial

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26. *See* TEX. R. CIV. P. 203.1(b) ("If the witness does not return the transcript to the deposition officer within 20 days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.").

27. *See* No. 10–11–00071–CV, 2011 WL 3334964, *12–13 (Tex. App.—Waco June 8, 2012, pet. denied).

28. *See id.* at *13 ("Given that appellants waited nearly two years to object to the timeliness of the changes and the record does not demonstrate that appellants were harmed by the delay, we cannot say that the trial court abused its discretion in concluding that Laura and Miguel did not waive their right to change their deposition testimony and, thus, denying appellants' motion to limit the deposition testimony of Laura and Miguel.") (citations omitted).

29. *Id*. at *12–13.

30. 114 Fed. Appx. 609 (5th Cir. 2004).

31. *Id*. at 611.

32. *Id*. at 610.

33. *Id*. at 611.

34. *Id*.

35. *Id*.

36. *Id*.

court's order, the Fifth Circuit held that Rule 30(e) does not provide any exceptions to its requirements.[37] Therefore, there was no error in finding waiver.

IV. AVAILABLE REMEDIES WHEN ORAL DEPOSITION TESTIMONY IS CHANGED

A. Re-Opening the Oral Deposition and Shifting the Costs

It is well settled that when a witness changes his oral deposition testimony through the errata sheet, which makes the deposition "incomplete or useless without further testimony, the party who took the deposition can reopen the examination."[38] Indeed, "[d]eposing counsel can ask questions which were made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or with his attorney."[39]

Relying upon the seminal case of *Lugtig v. Thomas*,[40] the United States District Court in Massachusetts, in *Tingley v. CSC Consulting*,[41] held that 22 changes rendered those portions of the deposition incomplete absent further testimony.[42] *Tingley* therefore held that the number and types of changes made to the deposition justified reopening for the purpose of inquiring into the reasons for the changes and where those changes originated.[43] Similarly, Texas commentators have likewise opined that this analogous federal body of case-law properly interprets the spirit of Texas Rule 203.1(b), which governs in state court practice.[44]

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37. *Id*. (citing FED. R. CIV. P. 30(e)).

38. *See* Lugtig v. Thomas, 89 F.R.D. 639, 642 (N.D. Ill. 1981) (citations omitted); *see also* Titanium Metals Corp. v. Elkem Management, Inc., 191 F.R.D. 468, 472 (W.D. Penn. 1998) (the "witness who changes his or her testimony on a material matter between the giving of the deposition and appearance at the trial may be impeached by the former answers.") (citations omitted); *e.g.,* Tingley Systems, Inc. v. CSC Consulting, Inc., 152 F.Supp.2d 95, 120 (D. Mass. 2001) ("The standard to reopen a deposition is whether the changes contained in the errata sheets 'make the deposition incomplete or useless without further testimony.'") (citations omitted).

39. *See Lugtig*, 89 F.R.D. at 642.

40. *Id*. at 642.

41. 152 F.Supp.2d 95 (D. Mass. 2001).

42. *Id*. at 121.

43. *See id.* (citing *Lugtig*, 89 F.R.D. at 642); *see also* Luhman v. Dalkon Shield Claimants Trust, No. 92–1417–MLB, 1994 WL 542048, *1 (D. Kan. Oct. 3, 1994) (Reid, J.) ("[T]he court will permit defendant to depose the plaintiff concerning the reasons for the changes. Both the original and amended answers shall be made part of the original transcript.") (citations omitted).

44. *See, e.g.,* Wise & Wooten, *supra* note 5 at 551. ("If . . . substantive changes make the deposition incomplete or useless without further testimony, the party who took the deposition should be allowed to reopen the deposition to ask questions that are 'made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or his

When a deposition must be reopened "but-for" substantive changes made by the deponent, the Court acts within its discretion in ordering either the deponent or his attorneys or both to pay for the costs and attorney's fees associated with a second deposition.[45]

B. Striking the Errata Sheet

Commentators, interpreting Texas Rule of Civil Procedure 203.1(b), have stated in the law review literature that a trial court may *strike* an errata sheet where there is not an adequate reason for the change on each modification made.[46] The federal courts have similarly held that a trial court properly strikes the errata sheet where the changes are not substantially justified.[47]

C. Written Discovery on the Reasons for the Changes

In Texas, a trial judge has discretion to order a party to produce the substantive communications with his attorneys that led to changes and contradictions in the errata sheet for purposes of further cross examination and impeachment at the time of trial.[48]

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attorney.'") (citations omitted).

45. *See* Reilly v. TXU Corp., 230 F.R.D. 486, 491 (N.D. Tex. 2005) (Ramirez, J.) ("Defendants may also ask follow–up questions to the changed responses. Plaintiff, as the party making the 111 changes, will be responsible for costs and attorney's fees.") (citations omitted); *see also Lugtig*, 89 F.R.D. at 642 ("Since it is defendant's actions which necessitate reopening the examination of defendant, the costs and attorney's fees connected with the continued deposition will be borne by defendant.") (citations omitted); *accord* Wise & Wooten, *supra* note 5 at 551 ("[I]f the witness is a party, a court may be able to order the party to pay the costs, including reasonable attorney's fees incurred in connection with the second deposition.") (citations omitted).

46. *See* Wise & Wooten, *supra* note 5 at 549 ("The witness *must* give a reason for *each* change. A court *should strike* any change for which no reason is given.") (emphasis added) (citing EBC, Inc. v. Clark Bldg. Sys., 618 F.3d 253, 266 (3d Cir. 2010) ("Courts have found that the failure to provide a statement of reasons alone suffices to strike a proposed change. We agree with these Courts. If the party or deponent proffering changes in the form or substance of a deposition transcript fails to state the reasons for the changes, the reviewing court may appropriately strike the errata sheet.") (citations omitted); Kouassi v. W. Ill. Univ., No. 13–cv–1265, 2015 U.S. Dist. LEXIS 64926, *8–9 (C.D. Ill. May 18, 2015); E.I. Du Pont v. Kolon Indus. Inc., 277 F.R.D. 286, 295 (E.D. Va. 2011)).

47. *See* EBC, Inc. v. Clark Building Systems, Inc., 618 F.3d 253, 266 (3rd Cir. 2010) ("If the party or deponent proffering changes in the form or substance of a deposition transcript fails to state the reasons for the changes, the reviewing court may appropriately strike the errata sheet.") (citations omitted).

48. *See* Cherry Peterson Landry Albert, LLP v. Cruz, 443 S.W.3d 441, 452 (Tex. App.—Dallas 2014, pet. denied) (concluding that trial judge's order requiring counsel to produce their emails with their client, which led to changes in the errata sheet for cross examination and impeachment at trial was an appropriate sanction, without more, to establish abuse of process).

V. ASSERTIONS OF PRIVILEGE ON CHANGES TO TESTIMONY

A. No Privilege Should Apply

The attorney-client privilege should not be used to prevent the discovery of communications between lawyer and client if those communications impact a witness's decision to change sworn testimony in an errata sheet.[49] On the contrary, the attorney-client privilege protects communications where the lawyer is advising the client.[50] A client has no right to lay behind the protections of the privilege if the substance of the communication is the lawyer steering the client toward material changes in the sworn testimony previously given in an oral deposition. There is nothing embodied in Rule 503(b) of the Texas Rules of Evidence (the attorney-client privilege) which empowers the lawyer to manipulate the sworn answer in an errata sheet that has already been given in a prior oral deposition, without risking disclosure of that communication. In fact, the law—in both federal and state court—is just the opposite.

On point is the federal rules decision in *Reilly v. TXU Corp.*, which holds that the deponent, in a re-opened deposition, cannot lie behind the privilege and thereby obfuscate the examination into communications between the lawyer and the deponent regarding the reasons for the changes, the genesis of those changes, including, specifically, whether the changes originated with the deponent's attorney.[51] *Reilly* held:

> Consistent with the case-law on point, the reopening [of the deposition] should be limited in scope. *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.*[52]

This general proposition of law in federal court is identical to that of Texas state courts—insofar as the lack of privilege is concerned.[53]

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49. *See id.*

50. Rule 503 of the Texas Rules of Civil Evidence protects from discovery confidential communications between an attorney or the attorney's representative and a client or the client's representative which are "made for the purpose of facilitating the rendition of professional legal services to the client." *See* TEX. R. CIV. EVID. 503(b).

51. Reilly v. TXU Corp., 230 F.R.D. 486 (N.D. Tex. 2005).

52. *Id.* at 491 (emphasis added) (citing Lugtig v. Thomas, 89 F.R.D. 639, 642 (N.D. Ill. 1981); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 (D. Mass. 2001), Sanford v. CBS, Inc., 594 F. Supp. 713, 714 (N.D. Ill. 1984)).

53. *See* Cherry Peterson Landry Albert, LLP v. Cruz, 443 S.W.3d 441, 452 (Tex. App.—Dallas 2014, pet. denied) (concluding that trial judge's order requiring counsel to produce their emails with their client, which led to changes in the errata sheet for cross

B. Compelling Information Germane to the Changes

A fair, but broad reading of the Dallas court of appeals opinion in *Cherry Peterson Landry Albert, LLP v. Cruz*,[54] would suggest that a trial court may properly compel discovery and order the party to produce his emails and communications with Counsel, as a proper sanction, which would explain what led to the changes in the testimony and why—even if emails and communications with Counsel may otherwise be arguably privileged.[55]

VI. ADMISSIBILITY OF ERRATA SHEET CHANGES

A. Sham Affidavit Doctrine on Summary Judgment

As the Third Circuit in *EBC, Inc. v. Clark Building Systems, Inc.*,[56] duly observed, "[a]s a general proposition, a party may not generate from whole cloth a genuine issue of material fact (or eliminate the same) simply by re-tailoring sworn deposition testimony to his or her satisfaction."[57]

Consistent with this principle, the Seventh,[58] Ninth,[59] and Tenth Circuit[60] courts of appeal have applied an analogous concept to that which is known in Texas as the "sham affidavit doctrine"[61] in the context of summary judgment motion practice, where Courts have been asked to disregard errata sheets in deciding a summary judgment motion. In *Thorn v. Sundstrand Aerospace Corp.*,[62] for instance, the Seventh Circuit held that, "by analogy to the cases which hold that a subsequent affidavit may not be used to contradict the witness' deposition . . . a change of substance which actually contradicts the transcript is impermissible unless

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examination and impeachment at trial was an appropriate sanction, without more, to establish abuse of process).

54. 443 S.W.3d 441, 452 (Tex. App.—Dallas 2014, pet. denied).

55. *Id*. ("We further conclude that the purposes of discovery sanctions were accomplished when the judge gave Cruz the attorney–client email and allowed him to show the jury the deposition errata sheets alongside the e–mail" and finding any further sanction beyond that was "excessive.").

56. 618 F.3d 253 (3rd Cir. 2010).

57. *Id*. at 267–68 (citations omitted).

58. *See* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383 (7th Cir. 2000).

59. *See* Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217 (9th Cir. 2005).

60. *See* Burns v. Bd. of County Comm'rs of Jackson County, 330 F.3d 1275 (10th Cir. 2003).

61. When an affidavit is executed after the deposition and there is a clear contradiction on a material point without explanation, the sham affidavit doctrine may be applied and the contradictory statements in the affidavit may be disregarded. *See, e.g.*, Pando v. Sw. Convenience Stores, L.L.C., 242 S.W.3d 76, 79 (Tex. App.—Eastland 2007, no pet.).

62. *See* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383 (7th Cir. 2000).

it can plausibly be represented as the correction of an error in transcription."[63] There, *Thorn* held that the trial court properly disregarded deposition corrections in deciding a motion for summary judgment.[64]

Similarly, in *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc*.,[65] the trial court in that case addressed a motion to strike deposition changes asserted after a summary judgment motion had been filed. In that decision, the plaintiff submitted untimely corrections to his deposition after one of the defendants filed a motion for summary judgment. Those deposition changes implicated a defendant on liability for the very first time.[66] Affirming the trial court's order granting the motion to strike, the Ninth Circuit held the plaintiff's changes were "akin to a sham affidavit," and the rule does not condone, "changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment."[67]

Likewise, in *Burns v. Bd. of County Comm'rs of Jackson County*,[68] the Tenth Circuit reached an analogous holding in a decision where the plaintiff's deposition corrections were cast as an orchestrated attempt to "rewrite portions of his deposition."[69] Finding no meaningful difference between a "sham affidavit" and unauthorized changes to an errata sheet, the Tenth Circuit held that the plaintiff's corrections must be analyzed under the "sham affidavit doctrine." Because the plaintiff had been cross-examined at his deposition, the later changes made to the errata sheet "were not based on newly discovered evidence[,]" and the oral testimony did not "reflect any obvious confusion" that would require changes for the purposes of clarification. *Burns* therefore held that the trial court acted properly in disregarding the changes.[70]

In lockstep with the holdings in *Thorn*, *Hambleton Bros*., and *Burns*, respectively, the sham affidavit doctrine has also been applied (in the context of errata sheet changes) by United States District Courts in other circuits.[71] Indeed, a federal court in

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63. *Id*. at 389 (citations omitted).

64. *Id*.

65. *See* Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1225–1226 (9th Cir. 2005).

66. *Id*. at 1223, 1225.

67. *Id*. at 1225 (citing Combs v. Rockwell Int'l Corp., 927 F.2d 486, 488–89 (9th Cir. 1991)).

68. *See* Burns v. Bd. of County Comm'rs of Jackson County, 330 F.3d 1275 (10th Cir. 2003).

69. *See Burns* at 1281 (10th Cir. 2003).

70. *Id*.

71. *See* Reynolds v. Int'l Bus. Machs. Corp., 320 F.Supp.2d 1290, 1300–1301 (M.D. Fla 2004) (ignoring changes made to deposition in determining a summary judgment motion because the "deposition [did] not reflect any obvious confusion that would justify"

Kansas underscored the point that Rule 30(e) changes to sworn deposition testimony, "*face a heightened standard of review if they have the potential to affect summary judgment*."[72]

B. Admissibility of Changes and Prior Testimony at Trial

Even assuming *arguendo* that the deponent properly changes his oral testimony in the errata sheet, the original sworn testimony given at the deposition is certainly admissible and fair game for cross examination at trial.[73]

VII. CONCLUSION

In conclusion, an unfortunate consequence of the decrease in civil jury trials is a trend of lawyers working with their clients to supplant unfavorable oral deposition testimony with ghost-written errata sheets, resulting in "trial by paper." When oral testimony is re-written *ex-post* in the errata sheet for the strategic purpose of anchoring less than truthful testimony to a party's legal theory, trial courts and adversely impacted parties have rights and remedies. Those remedies include striking the errata sheet *in toto*, an order re-opening the deposition at a party's expense, and a court order requiring the production of communications between the witness and third parties (including the attorneys) for impeachment purposes. If these rights and remedies are not enforced by the trial courts, the gamesmanship of ghost-writing testimony will worsen and the fair administration of justice will undoubtedly be undermined.

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the changes); *see also* Wigg v. Sioux Falls Sch. Dist., 274 F.Supp.2d 1084, 1090 (D.S.D. 2003) (striking changes that were made to the deposition wherein damages were claimed for the first time based on plaintiff's original deposition where any damages were denied), *rev'd in part on other grounds*, 382 F.3d 807 (8th Cir. 2004).

72. *See* Summerhouse v. HCA Health Services of Kansas, 216 F.R.D. 502, 504–505 (D. Kan. 2003) (emphasis added); *see also* Banks v. Office of Senate Sergeant–at–Arms, 222 F.R.D. 7, 9 (D.D.C. 2004).

73. *See* Lugtig v. Thomas, 89 F.R.D. 639, 642 (N.D. Ill. 1981) ("Nothing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made. In fact, the Rule's instruction that the changes be made "upon the deposition" implies that the original answers will remain."); *see also* Titanium Metals Corp. v. Elkem Management, Inc., 191 F.R.D. 468, 472 (W.D. Penn. 1998) ("I will not order Allen's changes to his deposition testimony stricken as improperly making a material alteration. Nor will I strike them for untimeliness, in the absence of any prejudice to defendant. I will, however, direct that both sets of responses remain part of the record. In so ruling, I accord defendant the opportunity to use Allen's former answers as impeachment material at trial.").