

“A DEPOSITION IS NOT A TAKE HOME EXAMINATION”: RESOLVING
THE AMBIGUITY OF TEXAS RULE OF CIVIL PROCEDURE 203.1

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INTRODUCTION

Suppose you are scheduled to take the deposition of your opposing party’s key witness or corporate representative. You are not expecting more than rehearsed and unremarkable answers from a well-prepped witness. Once the deposition begins, you initiate your questioning with the typical introductory questions. The day proceeds with little significance until you reach the contested issues. In response to your questions, the deponent begins to directly contradict the answers you expected him to give—in a way that provides further support for your claim. His testimony directly refutes the claim of the opposing party. Has he forgotten the party he is supposed to testify on behalf of? Has he simply changed his mind about the contested issues? Or, is he such a good witness that his true impressions are coming to light in the absence of pressure from the opposing party or attorney?

At the conclusion of the deposition, you are pleased with the deponent’s responses. You are confident that these can help form the basis of a motion for summary judgment, which you plan to promptly file with the court. A few weeks later, however, you receive the deposition transcript and errata sheet to find that the deponent has wholly amended his deposition responses to contradict the responses he gave on the day of the deposition.

The next logical action is to file a motion to strike the errata sheet with the contradictions. Surely, the court will agree that a witness cannot wholly change his unequivocal deposition testimony by simply explaining that he “misunderstood” a clear question. But, as this Comment will address, the answer is unclear in Texas.

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A deposition facilitates the purposes of pre-trial discovery by allowing lawyers to confront potential witnesses and gain valuable information while the witness is under oath.¹ This is the reason that oral depositions are some of the most heavily used pre-trial discovery processes.² They can also be some of the most powerful, informative, and effective methods of discovery—when used correctly.³ Rule 203.1 of the Texas Rules of Civil Procedure allows a deponent to change deposition responses in writing, on a separate sheet of paper, and with a statement of the reasons for making the changes, if made within twenty days of receiving the transcript.⁴ Previous versions of the rule authorized “[a]ny changes in form or substance.”⁵ Though this language has been eliminated from the current Rule 203.1, the effect of its deletion has left courts to determine whether a deponent can make substantial changes to his deposition testimony by errata sheet which completely contradicts unequivocal testimony made under oath. As many federal courts have repeated in interpreting the Federal counterpart to Rule 203.1, “[a] deposition is not a take home examination.”⁶ This Comment will explore the ambiguity surrounding Rule 203.1 and suggest that this approach as adopted in some federal courts is the appropriate path moving forward.

Part I of this Comment begins with a brief background of general principles necessary to understand the debate surrounding interpretation of Rule 203.1. Part II demonstrates how Texas courts have analyzed Rule 203.1. There is no consensus on whether the rule permits a deponent to substantially amend his deposition testimony to contradict the original testimony.⁷ Generally, courts adopt what will be referred to in this Comment as a “broad interpretation” and a “narrow interpretation.” The broad interpretation reasons that Rule 203.1 authorizes the deponent to make any changes to the deposition transcript by errata sheet, but any

¹ Alyson Nelson, Comment, *Deposition Conduct: Texas’s New Discovery Rules End Up Taking Another Jab at the Rambos of Litigation*, 30 TEX. TECH L. REV. 1471, 1473 (1999).

² *Id.*

³ *Id.*

⁴ TEX. R. CIV. P. 203.1(b).

⁵ TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); *see also* TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

⁶ *Greenway v. Int’l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992).

⁷ *See Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 242 (Tex. Civ. App.—Eastland 1975, writ *ref’d n.r.e.*); *see also Cherry v. McCall*, 138 S.W.3d 35, 37 (Tex. App.—San Antonio 2004, *pet. denied*).

inconsistent statements can be used by the opposing party to impeach the witness' credibility.⁸ Under the narrow interpretation, the deponent may not make directly contradictory changes to his deposition, and the trial court has discretion to admit or exclude any errata sheets.⁹ Part III demonstrates support for a narrow interpretation of Rule 203.1 that necessarily goes beyond guidance provided by Texas courts and draws on existing principles of law. Part IV concludes that a narrow interpretation of the rule is required after thoroughly analyzing the issue. I also submit to the Texas Supreme Court and the Supreme Court Advisory Committee (SCAC) a plea to speak on this issue and clarify the correct answer.

I. BACKGROUND AND GENERAL PRINCIPLES

Rule 203.1 presents a peculiar ambiguity to courts and litigators alike. The plain language of the rule has been used as support for conflicting interpretations.¹⁰ Under the broad interpretation, the court has no discretion to exclude or strike the errata sheet changes.¹¹ The court must admit the changes as long as the requirements in Rule 203.1 are followed.¹² Courts adopting the narrow interpretation reason that Rule 203.1 only gives the deponent a permissive grant of authority to change deposition responses and the court has discretion to admit or exclude these changes.¹³

One may glean a certain arbitrariness from litigating the meaning of words such as, "may" and "shall".¹⁴ However, in our current legal landscape it may be worth it for the litigant to battle this preliminary issue.¹⁵ In 2015, a mere 0.4% of civil cases disposed of in Texas District Courts were adjudicated by a jury.¹⁶ This number is down almost 35% from the 1.4% of civil cases disposed of by jury verdict in Texas District Courts in

⁸ See *Pursley*, 527 S.W.2d at 242.

⁹ See *Cherry*, 138 S.W.3d at 37.

¹⁰ Compare *id.*, with *Pursley*, 527 S.W.2d at 242.

¹¹ See *Pursley*, 527 S.W.2d at 242.

¹² See *id.*

¹³ See *Cherry*, 138 S.W.3d at 37.

¹⁴ See TEX. R. CIV. P. 203.1.

¹⁵ See Hubert Dee Johnson, *Depositions, Discovery, and Summary Judgments Under the Proposed Uniform Federal Rules*, 16 TEX. L. REV. 191, 193–94 (1938).

¹⁶ State of Texas, Judicial Branch, *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2015*, TXCOURTS.GOV, at Detail - 12, <http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf> (excluding family courts; this is calculated by dividing the number of jury verdicts, 990, by the total dispositions, 209,659) (last visited August 6, 2016).

1999, when Rule 203.1 was enacted.¹⁷ Many arguments in favor of admitting the conflicting testimony rely on the notion that the inconsistency in testimony should be left to the jury to determine the witness' credibility.¹⁸ In a landscape where less than one-half of one percent of cases are adjudicated by jury, this argument simply does not hold weight. Just as evidentiary questions are generally determined by the court, so should the admission of errata sheets which contradict deposition testimony.

A. *Importance of Depositions*

A deposition facilitates the purposes of pre-trial discovery by allowing lawyers to confront potential witnesses and gain valuable information while the witness is under oath.¹⁹ This allows the lawyer to effectively capture unrehearsed testimony early in the litigation proceedings before the witness can be tainted by litigation tactics and attorney devices.²⁰

B. *History of Rule 203.1*

The substance of Rule 203.1 can be traced back to the original inception of the Rules of Civil Procedure in 1941.²¹ From its initial embodiment in

¹⁷ Compare State of Texas, Judicial Branch, *1999 Annual Statistical Report: District Courts: Summary of Jury Activity*, TXCOURTS.GOV, <http://www.txcourts.gov/statistics/annual-statistical-reports/1999/> (the number of final judgments by jury in 1999 were 2,459) (last visited August 6, 2016), with State of Texas, Judicial Branch, *Analysis of Activity for the Year Ended August 31, 1999*, TXCOURTS.GOV, http://www.txcourts.gov/All_Archived_documents/JudicialInformation/pubs/AR99/district/dstnar99.pdf (the total civil cases in 1999 were 454,175) (last visited August 6, 2016).

¹⁸ See *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 242 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); see also *Gilcrease v. Hartford Acc. & Indem. Co.*, 252 S.W.2d 715, 719 (Tex. Civ. App.—Eastland 1952, no writ).

¹⁹ Nelson, *supra* note 1, at 1473.

²⁰ See *id.*

²¹ See TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984). The 1941 version contained the following language:

Rule 209. Submission to Witness; Changes; Signing

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the

Rule 209, effective September 1, 1941, the rule authorized the witness to make “[a]ny change[s] in form or substance” which he desired to make.²² In fact, not only did the previous versions authorize any changes in form or substance, but prescribed that the changes *shall* be entered upon the deposition.²³ This language remained present throughout various versions of the rule, until the promulgation of Rule 203.1.²⁴ Rule 203.1 currently provides in pertinent part:

witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress, made as provided in Rule 212, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Id.

²² *Id.*

²³ *Id.*; see also TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999).

Rule 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the deposition to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, unless such examination and signature are waived by the witness and by the parties.

Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

... This new rule is former Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and nonparty witnesses.

Id.

²⁴ TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); see also TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

(b) 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 making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. . .²⁵

The substantial difference in the previous and current versions of the rule cannot be disputed.²⁶ The current version no longer requires the court to allow a witness to make *any* changes he desires.²⁷ The rule eliminated the witness' ability to make changes *in form or substance*.²⁸ The current rule also changed the process for making such changes.²⁹ Under the previous rules, the changes were made to the original deposition transcript.³⁰ However, under the current rule, the witness is to write the desired changes on the errata sheet without making any erasures or obliterations to the original deposition transcript.³¹

II. TEXAS CASES INTERPRETING RULE 203.1

In the years since 1999, when Rule 203.1 was enacted, there have been a number of discovery disputes on the scope of changes allowed by the rule.³² However, only a small number of these have been presented on appeal.³³

²⁵TEX. R. CIV. P. 203.1(b) (emphasis added).

²⁶See TEX. R. CIV. P. 203.1(b); see TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); see also TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

²⁷Compare TEX. R. CIV. P. 203.1(b) (uses "may"), with TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999) (uses "shall"); see also TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984) (uses "shall").

²⁸Compare TEX. R. CIV. P. 203.1(b) (does not contain "in form or substance"), with TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999) (contained "in form or substance"), and TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

²⁹See TEX. R. CIV. P. 203.1(b).

³⁰TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); see also TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

³¹TEX. R. CIV. P. 203.1. See discussion *infra* Part III for a more detailed analysis of the implications of these amendments.

³²See, e.g., Trial Brief - Cross-Examination on Errata Changes at *2, *Le v. Rodecker*, No. 17-255750-11, 2013 WL 5939943 (17th Dist. Ct., Tarrant Cnty., Tex. Sep. 12, 2013); see also Defendant's Motion to Exclude at *19-20, *Proffitt v. Heise*, No. 08-08055, 2011 WL 11067802 (193rd Dist. Ct., Dall. Cnty., Tex. Sep. 12, 2011).

³³See discussion *infra* Part II.A-B.

The precise reason for this is not entirely clear. However, the ambiguity in the law has mitigated confidence an attorney could have in filing a motion to exclude or a motion to strike. The following discussion illustrates the inconsistency in interpreting Rule 203.1.

A. *Broad Interpretation*

Two Texas Supreme Court cases have adopted a broad interpretation of the predecessors to Rule 203.1 by holding that a witness' original deposition answers, and answers as amended by errata sheet, should both be preserved for trial and the inconsistencies should be submitted to the jury to determine the witness' credibility.³⁴ In *Texaco, Inc. v. Pursley*, the court allowed Pursley to make over one hundred changes to his deposition.³⁵ The trial judge allowed both the original answers and the corrected answers to be read to the jury.³⁶ The court of appeals affirmed and held that it was the jury's responsibility to consider the changes and determine the credibility of Pursley's deposition testimony.³⁷

In *Gilcrease v. Hartford*, a doctor's corrected answers to deposition questions were diametrically opposed to the answers first given.³⁸ The doctor's explanation was that he was "very busy and worn out" and that he was "confused."³⁹ The trial court required the original answers be read but refused to permit the reading of the amended answers.⁴⁰ Though affirmed on a separate issue, the appellate court held: "[The p]laintiff should have been permitted to offer the corrected answers and defendant could then have offered the original answers for impeachment purposes or as original evidence if he so desired, and plaintiff could then have offered the explanation."⁴¹

³⁴ See *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 242 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); see also *Gilcrease v. Hartford Acc. & Indem. Co.*, 252 S.W.2d 715, 719 (Tex. Civ. App.—Eastland 1952, no writ).

³⁵ See 527 S.W.2d at 242.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See 252 S.W.2d at 718–19.

³⁹ *Id.*

⁴⁰ *Id.* at 719.

⁴¹ *Id.*

In a more recent case, the Fourteenth Court of Appeals also adopted a broad interpretation.⁴² In that case, a subcontractor, Aliezer, allegedly disavowed his claim for tortious interference of contract with an inadvertent response to that affect.⁴³ He later corrected his testimony and noted on an errata sheet that he misunderstood counsel's questions because his native language was not English.⁴⁴ The court of appeals reversed summary judgment for Wohlstein and held that "the factfinder's determination of [Aliezer's] knowledge and intent turns, at least in part, upon Aliezer's credibility."⁴⁵

The Beaumont Court of Appeals has similarly adopted a broad interpretation of Rule 203.1.⁴⁶ In *Walter v. Box*, the court refused to disturb a no-evidence motion for summary judgment, in part because the court found that the plaintiff's witness had the opportunity under Rule 203.1(b) to change her deposition testimony and create a fact issue for the jury, but the plaintiff failed to do so.⁴⁷ The plaintiff brought a personal injury suit based on alleged negligence.⁴⁸ The plaintiff presented no evidence to establish causation and in her deposition she testified that she had no way of knowing which of two impacts caused her injuries.⁴⁹ Citing to Rule 203.1, the Beaumont Court of Appeals specifically noted that, the plaintiff "never sought to change her deposition testimony regarding her knowledge of the cause of her complaints."⁵⁰ The court impliedly recognized that the plaintiff had the opportunity to make substantive changes to her deposition testimony sufficient to defeat summary judgment yet failed to do so.⁵¹

⁴² See *Wohlstein v. Aliezer*, 321 S.W.3d 765, 771 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

⁴³ *Id.*

⁴⁴ *Id.* at 771 & n.8.

⁴⁵ *Id.* at 772.

⁴⁶ See *Walter v. Box*, 09-06-174 CV, 2007 WL 1219413, at *1 (Tex. App.—Beaumont Apr. 26, 2007, no pet.).

⁴⁷ *Id.* at *2.

⁴⁸ *Id.* at *1.

⁴⁹ *Id.* at *2.

⁵⁰ *Id.*

⁵¹ See *id.*

B. Narrow Interpretation

The San Antonio Court of Appeals adopted a narrow interpretation of Rule 203.1, in *Cherry v. McCall*.⁵² The Cherrys brought a declaratory judgment action seeking declaration that the McCalls breached the contract.⁵³ After Mrs. Cherry testified in her deposition that she did not believe the McCalls breached the contract, the McCall's filed a motion for summary judgment.⁵⁴ The Cherrys attached to their response two pages of corrections to Mrs. Cherry's deposition testimony.⁵⁵ The McCalls objected to the submission of this errata sheet.⁵⁶ The trial court sustained the objection and granted partial summary judgment in favor of the McCalls.⁵⁷ On appeal, the Cherrys argued that the trial court erred in sustaining this objection.⁵⁸ The San Antonio Court of Appeals refused to find that the errata sheet raised a factual issue on whether the McCalls breached the contract and accordingly affirmed the trial court's exclusion of the errata sheet and accompanying changes to Mrs. Cherry's deposition.⁵⁹

C. Trial Court Has Discretion to Admit or Exclude

The Austin and Waco Courts of Appeals have found that the word "may" in Rule 203.1 indicates that the trial court has discretion to determine the scope of deposition changes allowed by the rule. In *Dickerson v. State Farm Lloyd's Inc.*, the court found that Rule 203.1 clearly vests discretion with the trial court to determine whether such changes should be allowed.⁶⁰ In that case, the deponents made several substantive changes to their deposition testimony via errata sheets.⁶¹ The timeliness of these errata sheets was not objected to until two years after the changes were made.⁶² The court ultimately held that the trial court was correct in admitting the

⁵² See 138 S.W.3d 35, 37 (Tex. App.—San Antonio 2004, pet. denied).

⁵³ *Id.*

⁵⁴ *Id.* at 37, 42.

⁵⁵ *Id.* at 41.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 42.

⁶⁰ No. 10-11-00071-CV, 2011 WL 3334964, at *13 (Tex. App.—Waco Aug. 3, 2011, pet. denied).

⁶¹ *Id.* at *12.

⁶² *Id.*

deposition changes.⁶³ Nevertheless, this case is significant for proponents of the narrow interpretation in two regards.⁶⁴ First, the court repeatedly pronounces the mantra that Rule 203.1 vests in the trial court the discretion to determine the admissibility of errata sheet changes.⁶⁵ It arguably announces a standard by which the court should analyze the scope of errata sheets.⁶⁶ If the trial court determines that a party's changes would inflict harm or prejudice on opposing parties, the trial court has the discretion to exclude such changes.⁶⁷ Second, the court refuses to accept as support, federal courts' findings that the trial court does not have discretion to determine admissibility of errata sheet changes, under Rule 30(e) of the Federal Rules of Civil Procedure.⁶⁸ The court reasons that Federal Rule 30(e) varies significantly from Texas Rule of Civil Procedure 203.1 because the former provides that the deponent *must* be allowed 30 days to make changes.⁶⁹

In *Farmers Insurance Exchange v. Leonard*, the issue on appeal was whether class counsel could adequately represent the class because counsel had permitted deponents to make numerous errata sheet changes to their testimony.⁷⁰ Similarly to *Dickerson*, the court in *Leonard*, affirmed the admission of the errata sheets, but concluded that trial court's assessment of the credibility of witnesses must be given the benefit of the doubt.⁷¹

D. Reconciling the Split

Though a few courts of appeals have adopted a broad interpretation of Rule 203.1, this authority is not as persuasive as it appears. First, *Gilcrease* and *Pursley* were decided under repealed versions of Rule 203.1.⁷² The old rules provide a much broader grant of authority to change deposition

⁶³ *Id.* at *13.

⁶⁴ *Id.*

⁶⁵ *Id.* at *12–13.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.* at *13 (citing FED. R. CIV. P. 30).

⁶⁹ FED. R. CIV. P. 30(e) (emphasis added); accord *Dickerson*, 2011 WL 3334964, at *13.

⁷⁰ 25 S.W.3d 55, 68 (Tex. App.—Austin 2003, pet. denied).

⁷¹ *See id.*

⁷² *See* TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); *see also* TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984); *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 241–42 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *Gilcrease v. Hartford Acc. & Indem. Co.*, 252 S.W.2d 715, 719 (Tex. Civ. App.—Eastland 1952, no writ).

testimony.⁷³ They allowed for “any changes in form or substance” and used the mandatory word “shall” to mandate such desired changes.⁷⁴ The new rule narrowed this authority by eliminating the phrase, “any changes in form or substance.”⁷⁵ The new rule also replaced the mandatory word “shall” with the word “may” to indicate that the trial court has discretion to determine whether to admit an errata sheet into evidence.⁷⁶ These changes call *Gilcrease* and *Pursley* into question because the reasoning as applied by the Texas Supreme Court in those cases cannot be afforded the same persuasive authority as they may have had under the previous versions of the rule.

In addition, the court in *Wohlstein* allowed the deponent to make changes to his testimony because he did not speak English.⁷⁷ The deponent did not attempt to directly contradict the responses he gave in his deposition, and stated that the reason for the change was that he did not fully understand the question.⁷⁸ These distinctions make clear that authority supporting the broad interpretation is not as sound as it may appear to be.

III. EXISTING PRINCIPLES OF LAW SUPPORT THE NARROW INTERPRETATION

The previous sections of this Comment demonstrate the requisite background surrounding the debate on the proper interpretation of Rule 203.1. In the absence of guidance from the Texas Supreme Court on the issue, the inconsistency among the courts on the proper interpretation can be resolved using existing principles of law.

A. *Background and Purpose of 1999 Amendment*

The Texas Supreme Court has statutory and constitutional authority to promulgate the Texas Rules of Civil Procedure.⁷⁹ It delegates this task to

⁷³See TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999); see also TEX. R. CIV. P. 209, 17 TEX. B.J. 567 (Tex. 1954, repealed 1984).

⁷⁴*Id.*

⁷⁵TEX. R. CIV. P. 203.1.

⁷⁶*Id.*

⁷⁷*Wohlstein v. Aliezer*, 321 S.W.3d 765, 771 n.8 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

⁷⁸See *id.* at 771–72.

⁷⁹Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 90 (2000).

the Supreme Court Advisory Committee (SCAC) to consider amendments to the Texas Rules of Civil Procedure.⁸⁰ On January 7, 1994, the SCAC formed a Discovery Task Force to address major problems in discovery procedures and propose amendments to the rules.⁸¹ The SCAC and Discovery Task Force met over the course of four years, from 1994 to 1997, for two days in January, March, May, July, September, and November of each year to debate recommended changes.⁸² In the order approving the revisions to the rules, the Texas Supreme Court discussed the reasons that made the amendments necessary.⁸³ In the years leading up to the revisions, the discovery process was abused as a means of stalling resolution of cases and driving up the costs of litigation until it was unaffordable.⁸⁴ The court recognized that the rules of procedure must both, provide adequate and expedient access to information unknown to the litigant while effectively curbing discovery when appropriate in order to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism.⁸⁵ The rules were revised and reorganized to reduce costs and delays associated with discovery practice by clarifying and streamlining discovery procedures.⁸⁶ The court also noted that “[a]n important aspect of these revisions [was] the regrouping of provisions in a more logical sequence and the elimination of archaic and confusing language.”⁸⁷

1. Discovery Task Force Report

At the July 1994 SCAC meeting, the Discovery Task Force submitted a supplemental report which contained affidavits from owners and employees of court reporting firms regarding their experience of attorneys’ misuse of

⁸⁰ See ALEX ALBRIGHT ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 2.2 (1999).

⁸¹ *Id.*

⁸² State of Texas, Judicial Branch, *Supreme Court Advisory Comm. Meeting Transcripts 1991–2000*, TXCOURTS.GOV, <http://www.txcourts.gov/scac/meetings/1991-2000/> (last visited Dec. 9, 2016).

⁸³ See *Feature: Court Orders: In the Supreme Court of Texas Misc. Docket No. 98-9136 – Approval of Revisions to the Texas Rules of Civil Procedure*, 61 TEX. B.J. 752, 752 (1998).

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 754 (emphasis added).

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Rule 205.⁸⁸ Interestingly, this is the most in-depth reference to Rule 205 contained in any SCAC proceeding from 1994 to 1997, though these affidavits were not actually specifically discussed in the meeting.⁸⁹

These affidavits addressed issues court reporters had experienced with language in Rule 205 that was interpreted to mean the deposition officer would send the original transcript to the attorney of the witness.⁹⁰ Though the rule provided that the deposition officer shall enter the witness' desired changes upon the transcript, it was common for attorneys and witnesses to wholly alter the testimony without the deposition officer present.⁹¹ These affidavits demonstrated a significant problem where attorneys would tamper with the original deposition transcript by removing pages of the transcript, removing exhibits, making erasures and obliterations on the original, altering testimony, and simply losing or never returning the transcript altogether.⁹²

2. Substance of Amendment

The drafters addressed the issues of deposition tampering by amending the language of Rule 205 when they incorporated its substance into Rule 203.1. Rule 205 was interpreted to require the deposition officer to return the original deposition transcript to the witness, who could make any changes in form or substance he desired on the deposition transcript itself.⁹³ The drafters attempted to clarify this issue by replacing this language with clear instructions that the desired changes should be submitted in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes.⁹⁴ The drafters went a step further to clarify that no erasures or obliterations of any kind could be made to the original deposition transcript.⁹⁵

⁸⁸State of Texas, Judicial Branch, *Supplement to the SCAC Agenda*, July 15 Part 2 at 0381–409, http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1994/supplementary/sc07151994-2.pdf.

⁸⁹*See id.*

⁹⁰*See id.*

⁹¹*See id.*

⁹²*See id.*

⁹³*See id.*; TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999).

⁹⁴*See* TEX. R. CIV. P. 203.1.

⁹⁵*Id.*

That the drafters intended for the desired changes to be made on an errata sheet, separate from the original deposition transcript, is clear from the plain language of the rule.⁹⁶ The drafters also unequivocally replaced the word “shall” with “may” and eliminated altogether the allowance of “any changes in form or substance which the witness desires to make.”⁹⁷ What is unclear from a reading of the plain language of Rule 203.1 is why the drafters eliminated the language that mandated any changes in form or substance which the witness desires to make.⁹⁸ The drafters could have simply addressed the problem of attorney deposition tampering when drafting Rule 203.1, but they went a step further.⁹⁹ The drafters’ intent in going a step further to restrain “any changes in form or substance” is obvious after looking at the circumstances leading up to the amendment.¹⁰⁰

3. Canons of Construction

The meaning of the Texas Rules of Civil Procedure are interpreted by the same canons of construction as apply to statutes.¹⁰¹ The primary objective in statutory construction is to give effect to the drafters’ intent through the language of the statute or rule.¹⁰² Legislative intent is determined by relying on the plain meaning of the statutory text, unless a different meaning is apparent from the context or such construction leads to absurd results.¹⁰³ Rules of construction and extrinsic aids are used only when the words of the statute are ambiguous.¹⁰⁴ However, the legislative history of a statute is considered regardless of whether the statute is considered ambiguous on its face.¹⁰⁵ It is presumed that the entire statute is intended to be effective and that a just and reasonable result is intended.¹⁰⁶ The object sought to be attained, the circumstances under which the statute

⁹⁶ *Id.*

⁹⁷ *See id.*; TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999).

⁹⁸ *See* TEX. R. CIV. P. 203.1.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *Bradt v. Sebek*, 14 S.W.3d 756, 762 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

¹⁰² *See S & P Consulting Eng’rs, PLLC v. Baker*, 334 S.W.3d 390, 395 (Tex. App.—Austin 2011, no pet.) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)).

¹⁰³ *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008).

¹⁰⁴ *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

¹⁰⁵ TEX. GOV’T CODE ANN. § 311.023(3) (West 2005).

¹⁰⁶ *See Baker*, 334 S.W.3d at 396 (citing TEX. GOV’T CODE ANN. § 311.021(2), (3)).

was enacted, former provisions, and the consequences of a particular construction are all considered.¹⁰⁷

a. Context and Intent

The meaning of Rule 203.1 is ambiguous.¹⁰⁸ However, the drafters' intent can be determined by considering the context of the promulgation of Rule 203.1 and the incorporated modifications from Rule 205. The Discovery Task Force was formed by the SCAC to study the rules of discovery and propose amendments.¹⁰⁹ The SCAC tasked the Discovery Task Force with addressing significant complaints in the discovery process.¹¹⁰ In one SCAC meeting, Justice Hecht noted that problems in the conduct of discovery were not unique to Texas and were occurring all over the United States.¹¹¹ Justice Hecht noted that the chief complaints of practitioners were that discovery was beginning to dominate the litigation process and that the amount of time and resources devoted to discovery was so eclipsing that it made it difficult for ordinary plaintiffs and defendants to avail themselves of litigation as an effective means of resolving disputes.¹¹² Justice Hecht believed that the situation was so significant that real measures needed to be adopted in order to restrain lawyers rather than continue to trust lawyers to restrain themselves.¹¹³ Justice Hecht manifested the Texas Supreme Court's strong hopes that the changes to the discovery process would be guided by changes made throughout the country, and a goal to reduce costs and delays in litigation.¹¹⁴

This contentious environment that existed in Texas prior to the creation of the Discovery Task Force demonstrates the circumstances under which it proposed changes to discovery rules.¹¹⁵ In response to these problems, the Discovery Task Force made changes to almost every discovery rule.¹¹⁶ The

¹⁰⁷TEX. GOV'T CODE ANN. § 311.023.

¹⁰⁸*See supra* Parts III.A.1-2.

¹⁰⁹*See* State of Texas, Judicial Branch, *Supreme Court Advisory Comm. Meeting Transcripts*, Jan. 22, 1994, 1055–1219, <http://www.txcourts.gov/scac/meetings/1991-2000/>.

¹¹⁰*Id.* at 1086.

¹¹¹*See id.*

¹¹²*See id.* at 1087.

¹¹³*Id.* at 1087–88.

¹¹⁴*Id.* at 1089.

¹¹⁵*See id.*

¹¹⁶*See id.* at 1055–63.

chair of the Discovery Task Force, David W. Keltner of Fort Worth, gave an interim report to the SCAC in January of 1994.¹¹⁷ David Keltner indicated in this report that the changes to the rules of discovery were going to “radically change discovery as we know it.” Keltner continued, “They’re going to limit it more than you suspect. They’re going to put a lot of pressure on lawyers to answer discovery truthfully. . . .”¹¹⁸

It is difficult to reconcile the broad interpretation of Rule 203.1 after considering the context and the spirit undergirding its amendment and promulgation.¹¹⁹ In the years leading up to the amendments, discovery was misused to deny justice to parties by stalling resolution of cases and by driving up the costs of litigation until it was unaffordable.¹²⁰ The drafters intended to cure problems relating to discovery by preserving it as an viable, affordable, and expeditious dispute resolution mechanism.¹²¹ The revisions were intended to recognize the necessity of reasonable limits, and eliminate archaic and confusing language.¹²² This context makes clear the intent of the revisions of Rule 203.1.¹²³ The Discovery Task Force recognized a significant problem that existed under previous interpretations of the rule with attorneys making significant changes to the original deposition transcript.¹²⁴ The drafters eliminated the archaic and confusing language that previously authorized any changes in form or substance, intending to prevent substantive changes to deposition transcripts.¹²⁵

b. Excluded with a Purpose

A statute’s silence is significant.¹²⁶ It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose.¹²⁷ Likewise, every word excluded from a statute must also be

¹¹⁷ *See id.* at 1055.

¹¹⁸ *Id.* at 1084.

¹¹⁹ *See Approval of Revisions to the Texas Rules of Civil Procedure in the Supreme Court of Texas Misc. Docket No 98–9196*, 61 TEX. B.J. 1140, 1140 (1998).

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *Id.* at 1140–41.

¹²³ *Supplement to the SCAC Agenda*, *supra* note 88, at 0381–409.

¹²⁴ *See id.*

¹²⁵ *See* TEX. R. CIV. P. 203.1.

¹²⁶ *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P’ship*, 146 S.W.3d 79, 84 (Tex. 2004).

¹²⁷ *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (quoting *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (citations omitted)).

presumed to have been excluded for a purpose.¹²⁸ The court may look to the statute's purpose for guidance in determining the meaning of the exclusion.¹²⁹

The 1999 amendments to the Texas Rules of Civil Procedure were implemented to address complaints in the discovery system by significantly restricting the scope of discovery.¹³⁰ Under the previous version of Rule 203.1, the rule gave the deponent carte blanche to make any changes in form or substance to the original deposition transcript.¹³¹ The amendments eliminated the unlimited discretion given to the parties and placed it in the hands of the court to determine the admission or exclusion of errata changes.¹³²

Proponents of the broad approach argue, in contrast, that the exclusion of the phrase "any changes in form or substance" actually broadens the rule.¹³³ They argue that the modification from Rule 205 is not significant because Rule 203.1 places no limitations on the type of changes that can be made.¹³⁴ But this reading is only sound when the language is read in an ahistorical, context-free vacuum.¹³⁵ The context in which Rule 203.1 was drafted makes clear the drafters' purpose in amending its language. The lack of restriction in the deposition-taking process posed a significant problem to practitioners that was intended to be curbed by the new discovery rules.¹³⁶ Thus, Rule 203.1 was purposely drafted in a way that reinstated depositions as a reliable and unique discovery tool by preventing the abuse of arbitrary amendments to deposition testimony as had been a common practice.¹³⁷

¹²⁸ *Id.*

¹²⁹ *PPG Indus.*, 146 S.W.3d at 84.

¹³⁰ See *Supplement to the SCAC Agenda*, *supra* note 88, at 0381–409.

¹³¹ See TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999).

¹³² Compare TEX. R. CIV. P. 203.1, with TEX. R. CIV. P. 205, 61 TEX. B.J. 752 (Tex. 1987, repealed 1999).

¹³³ Cf. Gregory A. Ruehlmann, Jr., Comment, "A Deposition Is Not a Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet, 106 NW. U. L. REV. 893, 909 (2012).

¹³⁴ Cf. *id.*

¹³⁵ Cf. *id.*

¹³⁶ Cf. *id.*

¹³⁷ Cf. *id.*

B. Does the Federal Counterpart Provide Any Guidance?

The Federal Rules of Civil Procedure contain a rule authorizing changes to deposition transcripts that is similar to Rule 203.1.¹³⁸ The primary difference between Rule 203.1 and Federal Rule of Civil Procedure 30(e) is that the latter authorizes “changes in form or substance.”¹³⁹ As seemingly apparent as this authorization may seem, nevertheless, there is a significant disagreement among federal courts on the scope of deposition changes authorized by errata sheet.¹⁴⁰

In *Greenway v. International Paper Co.*, the Western District of Louisiana offered a clear explanation for its adoption of a narrow interpretation of Federal Rule 30(e).¹⁴¹ The plaintiff attempted to make 64 corrections to her deposition testimony.¹⁴² Some corrections addressed clerical errors, while many completely contradicted the plaintiff’s deposition testimony by changing affirmative answers to negative and inserting entire paragraphs into the deposition transcript.¹⁴³ The court opined that the purpose of Federal Rule 30(e) was to allow the witness to correct typographical errors in the spelling of names or incorrect transcriptions of the testimony.¹⁴⁴ The court refused to interpret the rule to authorize the witness to alter what was said under oath.¹⁴⁵ The court reasoned that “[i]f that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses.”¹⁴⁶ The court’s reasoning for adopting the narrow interpretation of Federal Rule 30(e) can be summarized in a widely cited concluding remark: “A deposition is not a take home examination.”¹⁴⁷

¹³⁸ See FED. R. CIV. P. 30(e).

¹³⁹ Compare *id.*, with TEX. R. CIV. P. 203.1.

¹⁴⁰ See Christopher Macchiaroli & Danielle Tarin, *Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript*, 3 FED. CTS. L. REV. 1, 2 (2009) (discussion on the circuit split). See generally Ruehlmann, *supra* note 133.

¹⁴¹ See 144 F.R.D. 322, 325 (W.D. La. 1992).

¹⁴² *Id.* at 323.

¹⁴³ *Id.* at 323–25.

¹⁴⁴ See *id.* at 325.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Greenway has been cited by the Seventh, Ninth, and Tenth Circuits as support for ratification of the narrow interpretation.¹⁴⁸ Various federal district courts have not permitted deponents to use errata sheets to alter what was said under oath, or to virtually rewrite portions of a deposition, but rather interpreted Federal Rule 30(e) to only permit the deponent to correct errors or to clarify or change an answer when a question is misunderstood.¹⁴⁹ However, for every case adopting the narrow approach, there is at least as many federal courts which have adopted a broad interpretation of Federal Rule 30(e).¹⁵⁰

Courts adopting the broad approach reason that this promotes accuracy and truthfulness without prejudicing the opposing party.¹⁵¹ Under this rationale, any unfairness is balanced by the opportunity for the opposing party to preserve original testimony and present the inconsistencies between it and the errata sheet for impeachment or further clarification.¹⁵² The United States Supreme Court has not resolved the split, and apart from offering an interesting scholarly debate, there is no direct authority to speak to whether the broad or narrow interpretation of Federal Rule 30(e) is correct.¹⁵³ Even though the language of Federal Rule 30(e) is arguably more clear than Rule 203.1 in authorizing any changes in form or substance, the aforementioned discussion has indicated a disagreement in federal courts. If the interpretation of Federal Rule 30(e) is to provide any guidance, *Greenway* and its progeny should provide a persuasive basis for Texas state courts to adopt a narrow interpretation of Rule 203.1 because *Greenway* is the standing precedent in the Fifth Circuit.

¹⁴⁸ See *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002); see also *Hambleton Bros. Lumber Co. v. Balkin Enter. Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005); see also *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

¹⁴⁹ See *DeLoach v. Philip Morris Cos.*, 206 F.R.D. 568, 573 (M.D.N.C. 2002); see also *Hambleton Bros.*, 397 F.3d at 1225; see also *Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994); see also *Rios v. Bigler*, 847 F. Supp. 1538, 1546 (D. Kan. 1994).

¹⁵⁰ See *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997); see also, e.g., *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490–92 (N.D. Tex. 2005); see also *Fourtz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002); see also *Elwell v. Conair, Inc.*, 145 F. Supp. 2d 79, 86–87 (D. Me. 2001); see also *Titanium Metals Corp. v. Elkem Mgmt., Inc.*, 191 F.R.D. 468, 472 (W.D. Pa. 1998).

¹⁵¹ See *N. Trade U.S., Inc. v. Guinness Bass Imp. Co.*, 3:03CV1892CFDTPS, 2006 WL 2263885, at *2 (D. Conn. Aug. 7, 2006).

¹⁵² See *S.E.C. v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 536 (D.D.C. 1994).

¹⁵³ See *Ruehlmann*, *supra* note 133, at 893; see also *Macchiaroli & Tarin*, *supra* note 140, at 1–4.

Federal Rule 30(e) also interestingly differs from Rule 203.1 in its implied authorization of changes to non-stenographic recordings of oral depositions.¹⁵⁴ Federal Rule 30(e) gives the deponent thirty days to review the transcript or recording of the deposition, and if there are changes in form or substance, to sign a statement listing the changes and reasons for making them.¹⁵⁵ Federal Rule 30(e) generally authorizes changes to the deposition in the same subsection as, and directly after, prescribing review of the “transcript or recording.”¹⁵⁶ On the other hand, Rule 203.1 authorizes only changes to the “deposition transcript” and expressly excludes any changes to “non-stenographic recordings of oral depositions.”¹⁵⁷

The Chair of the Discovery Task Force, David Keltner, indicated that the task force chose not to follow federal rules when drafting new discovery rules.¹⁵⁸ Keltner did not explain why the task force chose not to follow the federal rules, but there is at least a compelling argument that it disapproved of the federal rules and their interpretation. Further, that the task force explicitly excluded the alteration of deposition recordings indicates an intent to only authorize changes to address typographical and non-substantive testimony.¹⁵⁹ Of note is the fact that *Greenway* was decided during the preliminary stages of the discussion on modifying Rule 205.¹⁶⁰ This provides support for an inference that the Discovery Task Force approved of the court’s reasoning in *Greenway* and chose to reflect this approval in Rule 203.1.¹⁶¹

C. Sham Affidavit Doctrine and Summary Judgment

The sham affidavit doctrine prohibits a witness from submitting an affidavit that contradicts his deposition testimony to form the basis of, or

¹⁵⁴ See FED. R. CIV. P. 30(e).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.*

¹⁵⁷ TEX. R. CIV. P. 203.1(b), (c)(3).

¹⁵⁸ See Supreme Court Advisory Comm. Meeting Transcripts, Jan. 22, 1994, 1084, http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1994/transcripts/sc01221994.pdf (last visited Aug. 6, 2016).

¹⁵⁹ See TEX. R. CIV. P. 203.1.

¹⁶⁰ See 144 F.R.D. 322 (W.D. La. 1992); see also Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 92 (2000).

¹⁶¹ Shore, *supra* note 160, at 92.

prevent summary judgment.¹⁶² When a witness prepares an affidavit that contains conflicts with statements made in an earlier deposition, that are so disparate as to amount to nothing more than a sham, then the court will not admit the affidavit into evidence.¹⁶³

Farroux v. Denny's was one of the first Texas Courts of Appeals to apply the sham affidavit doctrine.¹⁶⁴ Farroux sued Denny's for illnesses allegedly caused by eating under-cooked eggs.¹⁶⁵ Farroux testified in a deposition that he did not remember any doctor telling him that the eggs were the cause of his illness.¹⁶⁶ After Denny's filed a motion for summary judgment, Farroux filed an affidavit where he swore that his physician told him his illness was food poisoning, directly conflicting his prior deposition.¹⁶⁷ The court of appeals held that the affidavit was properly excluded because it directly contradicted Farroux's deposition, and he did not explain a reason for the change in testimony.¹⁶⁸ The court explained that the affidavit must explain a reason for the change in testimony.¹⁶⁹ In a footnote, the court gave examples of what would constitute a valid reason for the change.¹⁷⁰ For example, an affiant could explain that he was confused in a deposition, or that he discovered additional, relevant materials after the deposition.¹⁷¹

At a time when less than 1% of cases in Texas courts end in a jury verdict, the discovery, pre-trial, and summary judgment phases of litigation have become even more crucial.¹⁷² As one scholar noted, attorneys, aware of the likely disposition of their cases at the pre-trial stage, often view the taking of depositions as an opportunity to collect straightforward admissions that can later form the basis of a motion for summary

¹⁶² See *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 110–11.

¹⁶⁵ See *id.* at 109.

¹⁶⁶ See *id.* at 111.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 111 n.1.

¹⁷¹ *Id.*

¹⁷² See *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2015*, *supra* note 16, at Court-Level - 12–13, Court-Level - 18–19, Court-Level - 23–24.

judgment.¹⁷³ The sham affidavit doctrine evidences a general sentiment among Texas courts to preserving the integrity of the deposition as an alternative to trial testimony.¹⁷⁴ The purpose of a deposition is to give the opposing party an opportunity to question the witness and inform itself of the issues that will prove significant at trial.¹⁷⁵ The sham affidavit doctrine provides a safeguard to prevent arbitrary and contradictory deposition changes.¹⁷⁶ There would be no purpose for this safeguard if deponents could circumvent its measures by directly changing deposition testimony to contradict answers given during the deposition.

The same reasoning that underlies the sham affidavit doctrine supports a narrow interpretation of Rule 203.1. Direct repudiation of prior deposition testimony undermines summary judgment as a means of screening out cases that do not involve issues of material fact.¹⁷⁷ The sham affidavit doctrine is intended to preserve the integrity of the summary judgment process by permitting the trial court to disregard an affidavit that is inconsistent with the affiant's prior deposition testimony.¹⁷⁸ From the same token, under the broad interpretation of Rule 203.1, the expediency and effectiveness of summary judgment as a means of resolving disputes is completely undermined.¹⁷⁹ If the trial court has no discretion to rule on the admission of inconsistent deposition testimony, and is to admit both the original deposition transcript and any changes in form or substance by errata sheet, which must be submitted to the jury for a determination of the witness' credibility, then summary judgment could be avoided in *every single case* by submitting an errata sheet that contradicts the original deposition testimony which creates a genuine issue of material fact.¹⁸⁰ This surely was not the intent of the drafters nor can it plausibly be the implication of Rule 203.1.

¹⁷³ See Ruehlmann, *supra* note 133, at 912; see also Farroux, 962 S.W.2d at 108.

¹⁷⁴ See Farroux, 962 S.W.2d at 108.

¹⁷⁵ See Nelson, *supra* note 1, at 1473.

¹⁷⁶ See Farroux, 962 S.W.2d at 111.

¹⁷⁷ See Ruehlmann, *supra* note 133, at 912–13.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 913.

¹⁸⁰ See *id.*

IV. CONCLUSION

Many proponents of a broad interpretation of Rule 203.1 argue that there are protective measures to prevent unfairness of a broad interpretation, allowing any changes in form or substance.¹⁸¹ Though there are protective measures to prevent unfairness, such as maintaining the initial transcript as a part of the judicial record, allowing cross-examination as to the nature of the changes, and permitting the opposing party to reopen depositions, these measures illustrate the precise result the rule drafters intended to eliminate the necessity for—expensive and extensive discovery disputes.¹⁸²

The foregoing discussion is intended to bring to light the foregoing issues that have gone relatively unnoticed by Texas courts. Discovery disputes are numerous and it is within the court's province to prevent, or at least limit the unknowns in a legal landscape that heavily depends on the discovery process to resolve disputes. The Texas Supreme Court and Supreme Court Advisory Committee should clarify the correct interpretation of Rule 203.1 in order to prevent the unfairness, inefficiency, and significant costs associated with discovery disputes.

A deposition simply is not and cannot be a take home examination.

¹⁸¹ See Macchiaroli & Tarin, *supra* note 140, at 13.

¹⁸² *Id.*