

Presented:
19th Annual Labor and Employment Law Conference

May 17-18, 2012
Austin, TX

Ask Questions First, Sue Later: Considering Rule 202 of the Texas Rules of Civil Procedure

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The Federal Rules of Civil Procedure and the rules of many states give potential plaintiffs the opportunity to take pre-suit depositions if there is a need to preserve testimony that may not be available at trial.¹ Texas takes the pre-suit deposition opportunity one step further, as Tex. R. Civ. P. 202 (“Rule 202”) also allows prospective litigants to depose witnesses “to investigate a potential claim or suit.”² While Texas is not the only state that allows pre-suit discovery to explore the viability of claims, its rules governing when the procedure is available are the most expansive of the few states that allow such discovery.³ This paper examines the opportunities afforded by Rule 202, the considerations a court takes into account when determining whether to grant a motion for a Rule 202 deposition, and the interplay of the rule with federal courts and federal claims.

I. THE RULE AND ITS PREVALENCE

Rule 202 provides that:

202.1 Generally. A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

- (a) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or
- (b) to investigate a potential claim or suit.

202.4 Order.

- (a) Required findings. The court must order a deposition to be taken if, but only if, it finds that:
 - (1) allowing the petitioner to take the requested depositions may prevent a failure or delay of justice in an anticipated suit; or
 - (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.⁴

¹ Fed. R. Civ. P. 27; Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 225 (2007).

² Tex. R. Civ. P. 202.1(b).

³ Scott Dodson, *Symposium: Pondering Iqbal: Federal Pleading and State Pre-suit Discovery*, 14 LEWIS & CLARK L. REV. 43, 57 (2010) (discussing New York, Ohio, and Pennsylvania rules that are less broad than Texas’ and the common law equitable bill of discovery recognized in other states); Jeffrey J. Kroll, *The Art and Science of Presuit Discovery*, 45 TRIAL, Mar. 2009, at 28, 32 (“[Texas Rule 202] represents the broadest scope of pre-suit discovery allowed among the states.”).

⁴ Tex. R. Civ. P. 202.

Although the terms of Rule 202 limit discovery to depositions, Rule 205 allows for discovery of documents and other tangible things in conjunction with an order for a Rule 202 deposition.⁵ Accordingly, a potential litigant can obtain significant documentary and testimonial discovery before a suit is initiated.

Rule 202 emerged from the 1999 revisions to the discovery rules promulgated by the Supreme Court of Texas. The new Rule 202 combines former Rule 187 by allowing for pre-suit depositions “to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit,”⁶ and former Rule 737 by allowing depositions “to investigate a potential claim or suit.”⁷ Because Rule 202.1(a), which allows a deposition in order to preserve testimony, is substantially similar to corresponding federal and other state rules, this paper focuses on Rule 202.1(b), the aspect of the rule that contemplates discovery to investigate a potential claim.

An extensive, although non-scientific, 2005 survey of Texas judges and practicing attorneys revealed the prevalence of Rule 202 petitions throughout the state.⁸ Over half of the attorneys polled reported having either filed or receiving notice of a Rule 202 deposition.⁹ Nearly 60% of responding judges reported that they had considered a motion for pre-suit deposition at least once in their court.¹⁰ The survey also reported that, of the petitions filed, approximately 60% sought to investigate a claim rather than perpetuate testimony.¹¹ While most courts do not publish data relating to how many Rule 202 petitions are filed per year, in Harris County the total number of petitions has been consistently between 100 and 150 per year, with a high of 191 filed in 2002.¹²

II. STANDARDS FOR A PRE-SUIT DEPOSITION: WHAT MUST THE PETITIONER ESTABLISH?

The procedural requirements of a Rule 202 petition are set out in Rule 202.2, which requires that the petition:

- Be verified;
- Be filed in either the county in which the witness resides or the county in which venue would lie for the anticipated suit;

⁵ Tex. R. Civ. P. 205.1.

⁶ Tex. R. Civ. P. 202.1(a).

⁷ Tex. R. Civ. P. 202.1(b).

⁸ Hoffman, *supra* note 1.

⁹ *Id.* at 251.

¹⁰ *Id.* at 251-52.

¹¹ *Id.* at 254.

¹² *Id.* at 252-53 (extrapolating this data to estimate between 4000 and 4500 Rule 202 depositions across the state between 1999 and 2004); Office of Harris County District Clerk, <http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx> (searching for all records with a “Case Type” of “Depositions Before Suit (Rule 202)”).

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First appeared as part of the conference materials for the 19th Annual Labor and Employment Law Conference session "Rule 202 Judicial Panel"