

**TAKING DEPOSITIONS IN BUSINESS CASES:
A CHECKLIST**

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CHAPTER _

Taking Depositions in Business Cases

Uncovering the scheme of the lying, cheating and stealing fiduciary. Dismantling the lost profits analysis. Drilling into who breached the contract first. Discovering whether plaintiff's trade secrets are in defendant's new product. Depositions in business cases can be exciting and intense. They can break open a case and tee it up for settlement or a successful outcome in court. But they require careful strategic planning and execution.

What this is not: This paper is not meant to be a primer on the rules and case law governing depositions,¹ nor is it a specific guide for your next deposition. It is not meant to be preachy. This is a checklist of actions to consider. We'd love to hear your additions and the war stories that caused you to make them.

1. Planning/Initial Steps

- a. Why? Traditionally to
 - i. get admissions
 - ii. nail down story
 - iii. but there's so much more . . .
- b. Is this a pre-suit deposition under TEX. R. CIV. P. 202?²
 - i. could get your client sued in a less favorable/convenient venue
 - ii. perhaps to meet heightened pleading standard
 - iii. no interrogatories; perhaps no documents
- c. Who? Decide whom to depose through:
 - i. initial client interviews
 - ii. written discovery and documents

- parties' production
- documents subpoenaed from third parties
- commissions for out-of-state subpoenas and then for depositions

- iii. Is this an "apex" deposition?
- iv. Chris Reynolds reveals his secrets on whom to depose in his article, *Depositions of Fact and Expert Witnesses*, TexasBarCLE Winning Your Case Before Trial (Jan. 2016):
 - *The "top" person on the other side of the dispute.*
 - *Persons who had extensive, unwritten communications with my client.*
 - *When I represent a defendant: each person that the plaintiff is likely to call to support its case in chief.*
 - *Witnesses whose trial attendance I cannot compel but whose testimony is necessary for one or more of the elements of my claims or defenses.*
 - *Any person who can provide the testimony that will be key to one or more summary judgment points (e.g., the "discovery" of a claim for a limitations defense).*
 - *Those persons who will likely sign an affidavit in opposition to a summary judgment.*

Id.

¹ Robert Wise and Kennon Wooten maintain a comprehensive guide to the law of depositions at 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 (2016). Paul Gold's *Discovery Strategy for* 1

Trial is another valuable resource.

² Sean D. Jordan & Peter C. Hansen, *Pre-Suit Depositions Under Rule 202: A Survey of Hot Button Issues*, 36th Annual Page Keeton Civil Litigation (Oct. 2012).

- d. When? Order of depositions—pick your poison
 - i. top of the org chart?
 - ii. bottom of the org chart?
 - iii. somewhere in between?
- e. Do you need a motion to compel?
- f. Do you have the electronic communications in all their many forms that are attainable under recent precedent?
 - *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)
 - *In re Weekley Homes, LP*, 295 S.W.3d 309 (Tex. 2009)
- g. Nonetheless, consider limiting contention interrogatories in advance of key depositions
- h. Consult experts for guidance on deposition strategy
- i. Do you need a commission for an out-of-state witness?
- j. Do you need a document subpoena for a third party?
- k. Corporate representative notice
 - i. depositions of organizations can be powerful
 - ii. must list topics; this is worth focused time
 - iii. ability to tie down corporation and prevent “bandying”³
 - iv. if the organization designates more than one person, you get up to 6 hours for *each*

1. Revisit budget, timeline and expectations

2. Drafting Outline

- a. Create timeline with key events and document chronology
 - i. Search and review all relevant production documents from parties and subpoenas
 - ii. Search internet/public sources. In his article, *Pretrial Discovery and Depositions on a Budget*, Quentin Brogdon lists some of the many resources available:
 1. *Representations and statements by a party or a witness on websites and social media platforms.*
 2. *Organizational charts and biographies of a party’s key corporate officers.*
 3. *Advertisements containing a party’s representations regarding safety or expertise in specific areas.*
 4. *Articles and media profiles related to a party.*
 5. *Financial documents containing a party’s representations concerning earnings, and sometimes, even a party’s estimates of litigation exposure.*
 6. *Patents, manuals, and design documents regarding a product at issue.*
 7. *Relevant governmental publications, regulations, and standards.*
 8. *Websites, seminars, and publications related to the*

³ Wise, *supra* at n. 63 (quoting *Brazos River Auth. v. GE*

Ionics, Inc., 469 F.3d 416, 432–33 (5th Cir. 2006).

Also available as part of the eCourse

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