PRE-SUIT DEPOSITIONS UNDER RULE 202: A SURVEY OF HOT BUTTON ISSUES

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I. BACKGROUND OF RULE 202.

Texas Rule of Civil Procedure 202 provides for the taking of depositions prior to the filing of suit. Rule 202 was promulgated by the Texas Supreme Court in 1999 and "replaces and limits the 'bill of discovery' of repealed Rule 737."[1] Former Rule 737 allowed for depositions of any person to investigate potential claims or anticipated suits. The State Bar Court Rules Committee had advocated the repeal of Rule 737 because it was used to depose key witnesses for a later suit without giving notice to the target of that suit.

However, plaintiffs' lawyers asserted that Rule 737 investigatory depositions were useful tools to investigate potential claims and often led them to not pursue lawsuits. They further explained that, when investigating a claim, they could not swear that they anticipated filing suit or give notice to all potential parties, as the Court Rules Committee proposal required.

Rule 202 balances these concerns by "expressly permit[ting]] pre-suit investigatory depositions but limit[ing] the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition." Rule 202 also is "a rewrite of former Rule 187 that is broadened somewhat" and like former Rule 187, provides for pre-suit depositions to perpetuate testimony in anticipation of a lawsuit.

Thus Rule 202 specifies two scenarios where pre-suit depositions are proper: investigating a potential suit, or preserving witness testimony in an anticipated suit. As such, it is arguably the broadest provision for pre-suit depositions in the nation.[2] And although the Texas Supreme Court has cautioned that Rule 202 depositions are not for routine use,[3] they are an increasingly popular discovery tool in Texas. This paper summarizes some of the hot button issues regarding Rule 202.

II. DOES RULE 202 AUTHORIZE TWO, MUTUALLY EXCLUSIVE TYPES OF PRE-SUIT DEPOSITIONS?

There has been some confusion in Texas as to whether Rule 202 depositions to investigate suit on one hand, and Rule 202 depositions in anticipation of suit on the other, are mutually exclusive. For example, the Tenth Court of Appeals has identified "two distinct and separate reasons" for filing a Rule 202 petition."[4] In contrast, the Fourteenth Court of Appeals has implied that the two types of pre-suit depositions are not mutually exclusive.[5]

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[1] Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* G-17 (1998).

[2] Thirty two states have adopted Federal Rule of Civil Procedure 27, which provides for pre-suit depositions to perpetuate testimony, but not to investigate potential claims. FED. R. CIV. P. 27. Fourteen states use different language, but have adopted the same meaning and scope of Federal Rule 27. A few states allow discovery to perpetuate testimony and to confirm the proper defendant to sue or the factual allegations to be included in a suit. Only Alabama's rule is potentially as broad as Rule 202. *See, e.g.*, *Ex Parte Anderson*, 644 So.2d 961 (Ala. 1994).

[3] *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2007) (orig. proceeding).

[4] *In re Denton*, No. 10-08-00255-CV, 2009 WL 471524, at *1 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (mem. op.)

[5] *In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (per curiam) (By its terms, Rule 202 instead requires a trial court to order a deposition if it makes one of two findings . . . . After an evidentiary hearing, the trial court made both findings in this case. Relators have not established that the trial court abused its discretion in making these findings."); *see also Cognata v. Down Hole Injection, Inc.*, No. 14-06-

The text of the Rule suggests that it contemplates two distinct types of pre-suit deposition that are not interchangeable. For example, Rule 202.1 provides that a petitioner can request pre-suit depositions "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."[6] Further, Rule 202 requires a petitioner to state "either [] that the petitioner anticipates the institution of suit . . . or that the petitioner seeks to investigate a potential claim."[7]

The Rule also articulates two, distinct standards that must be met before a trial court can order a pre-suit deposition, depending on whether the petitioner seeks a pre-suit deposition for an "anticipated suit" or to "investigate a potential claim." Thus, a pre-suit deposition to be taken for an "anticipated suit" may be granted only if the trial court finds that doing so "may prevent a failure or delay of justice."[8] A pre-suit deposition to be taken to investigate a potential claim or suit, on the other hand, may be ordered only if the trial court finds that the likely benefit to petitioner of taking such depositions outweighs the burden or expense imposed by the procedure.[9]

Rule 202 also sets forth differing venue provisions depending on whether the petition concerns pre-suit depositions for an anticipated suit or, alternatively, for investigating potential claims. Specifically, Rule 202.2(b) states that when suit is anticipated, the petition must be filed in a proper court of any county "where venue of the anticipated suit may lie."[10] But when the petition involves the investigation of a potential claim, *i.e.*, a Rule 202.1(b) pre-suit deposition, the Rule requires that the petition be filed in the county "where the witness resides."[11]

Finally, petitions for pre-suit depositions in anticipation of suit must conform to additional requirements. For example, Rule 202.2(e) requires that a petition seeking pre-suit depositions in an anticipated suit must "state the subject matter of the anticipated action, if any, and the petitioners' interest therein."[12] Further, Rule 202.2(f) requires that a petition seeking pre-suit depositions in an anticipated suit must provide the names, addresses, and telephone numbers of the persons a petitioner expects to have interests adverse to petitioners in the anticipated suit, or alternatively state that the information "cannot be ascertained through diligent inquiry, and describe those persons."[13]

There is also a notice requirement applicable only to petitions filed in anticipation of suit. Rule 202.3 provides that "if suit is anticipated," at least fifteen days before the Rule 202 hearing the petitioner must serve "all persons petitioner expects to have interests adverse to petitioners in the anticipated suit with a copy of the petition and notice of hearing."[14]

Recognizing these distinctions in Rule 202 between the procedures applicable to a pre-suit deposition for an "anticipated suit" as opposed to a pre-suit deposition to "investigate a potential claim," it appears that most Texas courts view Rule 202 as "offer[ing] two exclusive avenues of relief for

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00976-CV, 2012 WL 2312086, at *10 n.3 (Tex. App.-Houston [14th Dist.] June 19, 2012, pet. filed) (finding that trial court made required findings where trial court ruled that allowing depositions would prevent failure or delay of justice and benefit would outweigh burden).

[6] TEX. R. CIV. P. 202.1.

[7] *Id.* 202.2(d).

[8] *Id.* 202.4(a)(1).

[9] *Id.* 202.4(a)(2).

[10] *Id.* 202.2(b)(1).

[11] *Id.* 202.1(b)(2).

[12] *Id.* 202.2(e).

[13] *Id.* 202.2(f).

[14] *Id.* 202.3(a).

parties seeking to take pre-suit depositions."[15] Some Texas courts, however, have allowed Rule 202 petitioners to seek the same pre-suit deposition simultaneously as a deposition for an "anticipated suit" (under Rule 202.1(a)) and "to investigate a potential claim" (under Rule 202.1(b)).[16]

III. DOES RULE 202 ENCOMPASS DOCUMENT PRODUCTION?

Rule 202 does not expressly provide for any discovery beyond oral depositions and depositions on written questions. However, Texas Rule of Civil Procedure 199.2(b)(5) allows a request that "the witness produce at [a deposition on oral examination] documents or tangible things within the scope of discovery and within the witness's possession." Similarly, under Texas Rule of Civil Procedure 200.1(b), a request for depositions on written questions "may include a request for production of documents."

Several decisions from Texas courts of appeals have involved document production under Rule 202.

The Ninth Court of Appeals has addressed "whether Rule 202 authorizes a trial court to order discovery other than by deposition."[17] It concluded that "[n]either by its language nor by implication can we construe Rule 202 to authorize a trial court, before suit is filed, to order any form of discovery but deposition" and held that an order making an accident scene available for inspection was an abuse of discretion.[18] However, it did not expressly analyze either Texas Rule of Civil Procedure 199.2(5) or 200.1(b), and commentators have written that "[i]t is unclear whether document requests incident to a deposition are permitted."[19]

Moreover, numerous courts, including the Texas Supreme Court, have analyzed Rule 202 issues petitions that included requests for documents, without flagging document production as a unique issue.[20] In short, given the current state of the caselaw, whether or

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[15] *In re Donna Indep. Sch. Dist.*, 299 S.W.3d 456, 459 n.2 (Tex. App.—Corpus Christi 2009, orig. proceeding [mand. denied]); *see also In re Legate*, No. 04–10–00874–CV, 2011 WL 4828192, at *2 (Tex. App.—San Antonio Oct. 12, 2011, orig. proceeding) (mem. op.); *In re Denton*, 2009 WL 471524, at *1 *supra* n.4.

[16] *See, e.g., In re Emergency Consultants, Inc.*, 292 S.W.3d at 79; *In re Campos*, No. 2-07-197-CV, 2007 WL 2013057, at *4 (Tex. App.—Fort Worth July 12, 2007, orig. proceeding) (mem. op.) ("A trial court may order the taking of a presuit deposition only if it finds either [Rule 202.4(a)(1) or (2) justification] . . . neither of the above two requisites can be satisfied").

[17] *In re Akzo Nobel Chem., Inc.*, 24 S.W.3d 919, 920 (Tex. App.—Beaumont 2000, orig. proceeding).

[18] *Id.* at 921.

[19] *See* Alex Wilson Albright, Charles Herring, Jr., Robert H. Pemberton, HANDBOOK ON TEXAS DISCOVERY PRACTICE § 16:8, *Taking and Use of Depositions*, Texas Practice Series (2011) (noting Joel M. Fineberg & Michael W. Shore, *Discovery Update*, State Bar of Texas Advanced Personal Injury Law Course (2001), at 4 (urging that "even after A[kz]o, a party may use Rule 202 to subpoena documents" via oral depositions or depositions on written questions)).

[20] *See In re Does*, 337 S.W.3d 862, 863 n.1 (Tex. 2011) (orig. proceeding) (per curiam); *Ross Stores v. Redken Labs.*, 810 S.W.2d 741 (Tex. 1991) (Applying former Rule 737); *Cognata*, 2012 WL 2312086, at *1; *In re Patton Boggs LLP v. Moseley*, No. 05-11-01097-CV, 2011 WL 6849065, at *2 n.3 (Tex. App.—Dallas Dec. 29, 2011, orig. proceeding); *In re Rockafellow*, No. 07-11-00066-CV, 2011 WL 2848638, at *1 (Tex. App.—Amarillo July 11, 2011, orig. proceeding); *In re Kiberu*, No. 2-07-312-CV, 2008 WL 4602070 (Tex. App.—Fort Worth Oct. 16, 2008, orig. proceeding) (mem. op.); *In re Wilner*, No. 05-07-01429-CV, 2008 WL 667932 (Tex. App.—Dallas Mar. 13, 2008, orig. proceeding); *In re Clapp*, 241 S.W.3d 913 (Tex. App.—Dallas 2007, orig. proceeding); *In re Woodlands Country Club*, No. 09-07-352-CV, 2007 WL 2493497 (Tex. App.—Beaumont Sept. 6, 2007, orig. proceeding) (mem. op.); *In re Campos*, No. 2-07-197-CV, 2007 WL 2013057 (Tex. App.—Fort Worth July 12, 2007, orig. proceeding [mand. denied]) (mem. op.) (per curiam); *IFS Sec. Group, Inc. v. Am. Equity Ins. Co.*, 175 S.W.3d 560 (Tex. App.—Dallas 2005, no pet.); *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 115 S.W.3d 793 (Tex. App.—Beaumont 2003, orig. proceeding).

not document production is encompassed by Rule 202 remains an open question.

IV. APPLICATION OF RESTRICTIONS ON AN UNDERLYING SUIT TO RULE 202 DEPOSITIONS.

The Texas Supreme Court has twice applied restrictions from an underlying suit to Rule 202 depositions. In *In re Jorden*, it held that the discovery limitations of the Medical Liability Act[21] apply to Rule 202 depositions. The Court reasoned that the plain terms of the statute stayed all discovery other than three listed limitations, and the Legislature had explicitly provided that it overrode any conflicting laws or rules of procedure.[22] It further held that the limits applied to potential claims, finding that the statutory trigger for the applicability of the Medical Liability Act was facts, not filings.[23]

In *In re Wolfe*, the Texas Supreme Court addressed a Rule 202 petition seeking to investigate grounds to remove a county official.[24] In order to maintain an ouster suit, an individual citizen must be joined by a proper state official.[25] The Court held that, because a proper state official had not joined the petition for pre-suit discovery, the Rule 202 order was improper.[26] It reasoned that "pre-suit discovery is not an end within itself; rather, it is in aid of a suit which is anticipated and ancillary to the anticipated suit."[27]

The Fifth Court of Appeals has applied *In re Wolfe* to find that governmental immunity precluded pre-suit depositions of a police and fire chief '"for the purpose of ascertaining the propriety of filing litigation against the city of Dallas."'[28] The court found that the lack of an immunity waiver in Rule 202 was "not dispositive as to whether a Rule 202 deposition can be used to investigate a potential claim against a governmental entity that has immunity from suit."[29] Rather, the court looked to "the substantive law respecting the anticipated suit" and found a lack of jurisdiction on that basis.[30]

The First Court of Appeals has allowed Rule 202 depositions of governmental actors in cases where a potential claim under investigation may be brought against a non-immune party.[31] In allowing pre-suit depositions of University of Texas M.D. Anderson Cancer Center officials, the court rejected arguments that the Rule 202 petitioner had not pled any specific facts demonstrating that a cause over the non-immune party would be within the trial court's jurisdiction.[32] The court noted that deponent had not filed special exceptions and that Rule 202 "does not require a petitioner to plead a specific cause of action; instead, it requires only that the petitioner state the subject matter of the anticipated subject, if any, and the petitioner's interest therein."[33] The court distinguished *In re Jorden* on the basis that *Jorden* involved a "comprehensive

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[21] TEX. CIV. PRAC. & REM. CODE § 74.351.
[22] *In re Jorden*, 249 S.W.3d at 420.
[23] *Id.* at 421.
[24] *In re Wolfe*, 341 S.W.3d 932 (Tex. 2011) (orig. proceeding) (per curiam).
[25] *Id.* at 932 (citing *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (1955) (orig. proceeding).
[26] *Id.* at 932-33.
[27] *Id.* at 933 (internal quotations omitted) (citing *Office Emps. Int'l Union Local 277 v. Sw. Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965)).
[28] *City of Dallas v. Dallas Black Fire Fighters Ass'n*, 353 S.W.3d 547, 550 (Tex. App.—Dallas 2011, no pet.).
[29] *Id.* at 554.
[30] *Id.* at 557-58.
[31] *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Tcholakian*, No. 01-11-00754-CV, 2012 WL 4465349 (Tex. App.—Houston [1st Dist.] Sept. 27, 2012, no pet.) (mem. op.); *City of Houston v. U.S. Filter Wastewater Group, Inc.*, 190 S.W.3d 242 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
[32] *Tcholakian*, 2012 WL 4465349, at *5.
[33] *Id.* (internal quotation omitted); *see also In re Emergency Consultants, Inc.*, 292 S.W.3d at 79 ("Rule 202 does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition.").

statutory scheme delineating allowable types of discovery against non-parties."[34]

Thus, Rule 202 petitioners and deponents should be cognizant of the requirements of underlying claims,[35] because such requirements may determine whether a pre-suit deposition can be ordered.

V. WHAT IS THE PROPER VEHICLE TO CHALLENGE THE GRANT OF RULE 202 DEPOSITIONS?

When a trial court grants a pre-suit deposition, additional questions are raised concerning the proper procedural vehicle for seeking appellate review of the order. Are such orders only subject to review through a mandamus proceeding? Does it matter whether the pre-suit deposition was ordered regarding an "anticipated suit" or in order to "investigate a potential claim"? There is some guidance from the Texas Supreme Court on these questions, but the various courts of appeals appear to have taken varying approaches.

In *In re Jorden*, the Texas Supreme Court explained that "[p]resuit deposition orders are appealable only if sought from someone against whom suit is *not* anticipated; when sought from an anticipated defendant . . . such orders have been considered ancillary to the subsequent suit, and thus neither final nor appealable."[36] The *In re Jorden* decision concerned a Rule 202.1(a) order, and did not expressly reference Rule 202.1(b) orders in its discussion of appealability.

However, some courts of appeals have concluded, before and after *In re Jorden*, that no Rule 202 orders are subject to appeal. The Second Court of Appeals for example, has held that no Rule 202 orders are appealable,[37] and with little analysis the Thirteenth[38] and Fourteenth[39] courts of appeals have reached the same conclusion.

On the other hand, the Fourth Court of Appeals has concluded that only Rule 202.1(a) orders concerning the depositions of parties to an anticipated suit are not appealable. In *In re Legate*, the Fourth Court considered an appeal filed by a Rule 202 petitioner who had sought to obtain depositions of certain prison officials in anticipation of suit; that is, a petition filed under Rule 202.1(a).[40] The court held that it had jurisdiction to consider Legate's appeal because the individuals he wanted to depose were not the persons against whom he was going to file suit.[41]

A third approach taken by some Texas appellate courts appears to be that a Rule 202 order is not appealable if the petitioner anticipates suing the deponent under 202.1(a) or might sue the deponent under 202.1(b). For example, the Tenth Court of Appeals has held that, if a Rule 202.1(b) petitioner believes that the requested depositions might lead to a lawsuit against the deponents, the order compelling those depositions is ancillary to that potential suit and therefore non-appealable.[42]

The Third Court of Appeals has likewise held that a 202.1(b) petition was not a final, appealable order even when the petitioner

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[34] *Id.* at *6.

[35] *See also In re Rockafellow*, 2011 WL 2848638, at *4 (requesting party's burden is heightened when deposition involves trade secret information); *In re Reger*, 193 S.W.3d 922, 923 (Tex. App.—Amarillo 2006, pet. denied) (finding any error in dismissal of Rule 202 petition harmless because, *inter alia*, "effort to nullify a felony conviction must be undertaken via habeas corpus instituted per art. 11.07 of the Texas Code of Criminal Procedure").

[36] *In re Jorden*, 249 S.W.3d at 419.

[37] *In re Kiberu*, 2008 WL 4602070, at *1.

[38] *In re Donna Indep. Sch. Dist.*, 299 S.W.3d at 459.

[39] *In re Emergency Consultants*, 292 S.W.3d at 80.

[40] *In re Legate*, 2011 WL 4828192, at *1-2.

[41] *Id.* at *1 n.1.

[42] *Pishko v. Yurttas*, Nos. 10–11–00124–CV, 10–11–00125–CV, 2011 WL 2937484, at *1 (Tex. App.—Waco July 20, 2011, pet. denied) (mem. op.).

acknowledged it might have no claim and was unsure whether it would ultimately file a suit against anyone.[43] Notably, in so holding, the Third Court relied on 202.1(a) cases.[44] Similarly, the Seventh Court of Appeals, in analyzing a Rule 202 petition to "investigate a potential claim or suit," found that it had no jurisdiction over an appeal where it "appear[ed] that [petitioner] contemplated suit against [deponent]."[45] The Eleventh Court of Appeals has also held that "[a] ruling on a Rule 202 petition constitutes a final, appealable order only if the petition seeks discovery from a third party against whom suit is not contemplated, but a Rule 202 ruling is interlocutory and does not constitute a final, appealable order if discovery is sought from a person against whom litigation is either pending or contemplated."[46]

Finally, in *In re Wolfe*, the Texas Supreme Court allowed mandamus relief from a Rule 202.1(b) petition without analyzing or discussing the issue of mandamus versus appeal.[47]

In sum, some courts of appeals have held that no Rule 202 order is appealable, the Fourth Court of Appeals has ruled that 202.1(a) depositions of an anticipated defendant are not appealable, and several courts of appeals have held that Rule 202 orders cannot be appealed if the deponent is party to an anticipated suit or if petitioner might file a suit that might include the deponent as a defendant.[48]

[43] *In re Hewlett Packard*, 212 S.W.3d 356, 360-63 (Tex. App.—Austin 2006, orig. proceeding [mand. denied]).

[44] *Id.* (citing *IFS Sec. Group*, 175 S.W.3d at 563-65; *In re Akzo Nobel Chem., Inc.*, 24 S.W.3d 919 (Tex. App.—Beaumont 2000, orig. proceeding)).

[45] *In re Salonquest*, No. 07-11-00022-CV, 2011 WL 721844, at *1 (Tex. App.—Amarillo Mar. 2, 2011, no pet.) (mem. op.); *see also In re Rockafellow*, 2011 WL 2848638.

[46] *Sossamon III v. Bardin*, No.11-12-00164-CV, 2012 WL 3537817 at *1 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (mem. op.) (per curiam).

[47] *In re Wolfe*, 341 S.W.3d 932 (Tex. 2011).

[48] The trend towards considering 202.1(a) petitions in anticipation of suit as distinct from 202.1(b) petitions to investigate suit is in some tension with finding that 202.1(b) petitions cannot be appealed because suit is contemplated/anticipated against a deponent.