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**ADVANCED CIVIL DISCOVERY UNDER THE NEW RULES**

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**PRESUIT DISCOVERY AND DISCOVERY  
FROM THIRD PARTIES**

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## **I. SCOPE OF ARTICLE**

The revised rules of civil discovery changed the procedure for obtaining presuit discovery, and added a new method for obtaining discovery from nonparties during litigation. This article discusses these changes, focusing on the new procedure for obtaining presuit discovery and revised methods for obtaining discovery from nonparties under the new rules of civil discovery.

## **II. PRESUIT DISCOVERY – AN OVERVIEW**

In revising the discovery rules, the committee combined all forms of presuit discovery into one rule. The procedure for obtaining pre-suit discovery is set forth in Rule 202 of the Texas Rules of Civil Procedure.

### **A. Presuit Discovery Is Limited to Depositions**

Under Rule 202, any person may petition the Court for an order authorizing a deposition. Rule 202.1. Requests for Production or Requests for Inspection are not permitted under Rule 202. The deposition may be by oral examination or by written questions.

#### **1. Purpose of presuit discovery**

Under Rule 202, the purpose of a presuit deposition is either to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit or to investigate a potential claim or suit. Rules 202.1(a) and (b).

#### **a. Presuit depositions may be taken by potential Plaintiffs or Defendants**

A common misconception concerning presuit discovery is that it is available only to potential plaintiffs. However, presuit discovery is available to anyone who "seeks to investigate a potential claim by or against the petitioner." Rule 202.2(d)(2). Accordingly, Rule 202 makes clear that presuit discovery is available to both potential plaintiffs and defendants. Indeed, a presuit deposition may be quite useful to a potential defendant to pin down the potential plaintiff to his story. This could certainly limit the potential defendant's exposure, or could even discourage a suit from ever being filed.

### **B. Requirements of the Petition**

Rule 202.2 sets forth eight requirements of a petition for a presuit deposition.

**1. The Petition must be verified**

All Petitions for a presuit deposition must be verified by the Petitioner. Rule 202.2(a).

**2. Venue**

A Petition filed pursuant to Rule 202 must be filed in a proper court of any county:

- 1) where venue of the anticipated suit may lie, if suit is anticipated; or
- 2) where the witness resides, if no suit is yet anticipated.

Rule 202.2(b).

**3. The caption**

A Petition for a presuit deposition must be brought in the name of the Petitioner.

Rule 202.2(c).

**4. The basis for relief**

The Petition for a presuit deposition must state either:

- 1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or
- 2) that the petitioner seeks to investigate a potential claim by or against the petitioner.

Rule 202.2(d)

**5. The petitioner's interest**

The Petition must also state the subject matter of the anticipated action, if any, and the petitioner's interest in the action. Rule 202.2(e).

## **6. Other interested persons**

If the petitioner is seeking the deposition in anticipation of a suit, the Petition must either:

- 1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or
- 2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons.

Rule 202.2(f).

## **7. The persons to be deposed**

The petition must state the names, addresses and telephone numbers of the persons to be deposed. Rule 202.2(g). The petition must also set forth the substance of the testimony that the petitioner expects to elicit from each witness, as well as the petitioner's reasons for wanting to obtain the testimony of each witness. Rule 202.2(g).

## **8. Request for an Order**

Finally, a Rule 202 petition must expressly request an order authorizing the petitioner to take the depositions named in the petition. Rule 202.2(h).

### **C. Notice and Service**

Under Rule 202, the petitioner must properly notify both the named witness and all potential adverse parties of the petition being filed. Rule 202.3. Under Rule 202.3, the form of notice required will depend on whether the petitioner actually named the potential adverse parties in the petition, or whether the petitioner asserted that such parties could not be identified at the time the Petition was filed.

#### **1. Witnesses and adverse parties named in the petition**

The petitioner must serve the petition and notice of hearing in accordance with Rule 21a on all persons sought to be deposed, as well as all persons named in the petition that petitioner expects to have interests adverse to petitioner's, if suit is anticipated. Rule 202.3(a).

**a. Service must be made 15 days prior to the hearing**

Under Rule 202.3(a), the petitioner must accomplish service at least 15 days prior to the date of the hearing on the Rule 202 petition. If service is not accomplished, the hearing must be re-set, or the petition will be denied.

**2. Unnamed persons**

For those persons whom the petitioner expects to have an adverse interest in an anticipated suit, but whose identity could not be determined, the petitioner may accomplish service by publication of the petition and notice of hearing. Rule 202.3(b)(1). The notice must state the place for the hearing and the time it will be held. Rule 202.3(b)(1).

**a. Publication must be made more than 14 days prior to the hearing**

If the petitioner is serving notice by publication, the notice must be first published more than 14 days prior to the hearing on the Rule 202 petition. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published. Rule 202.3(b)(1).

**D. The Order**

Upon holding a hearing, the Court must order the requested deposition(s) if it finds that either:

- 1) allowing the petitioner to take the requested deposition(s) 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.

Rule 202.4(a). It is hard to imagine a scenario, for either a potential plaintiff or defendant, that would not fit within one of these two tests. Accordingly, most Rule 202 petitions should be granted.

Under Rule 202.4(b), the Court's order must specifically state whether the petition is granted or denied. If the petition is granted, the Order must state whether it is permitting the deposition by oral examination or by written questions. Rule

202.4(b). The Order must also state the time and place at which the deposition will be taken. If the Order does not state a time and place, the petitioner must notice the deposition in accordance with Rule 199 or Rule 200 of the Texas Rules of Civil Procedure.

The Court's Order must also include any protections the Court finds necessary or appropriate to protect either the witness, or any other person affected by the deposition. Rule 202.4(b).

## **E. The Deposition**

### **1. Manner of taking the deposition**

Presuit depositions under Rule 202 are governed by the rules applicable to depositions of nonparties in a pending suit. Rule 202.5. Notably, the scope of discovery in a Rule 202 deposition is the same as if the anticipated suit or potential claim had already been filed. Rule 202.5. Therefore, it seems as if the petitioner is not bound by the scope of expected testimony set forth in the Petition, pursuant to Rule 202.2(g).

### **2. Permissible uses of a presuit deposition**

Ordinarily, a deposition taken under Rule 202 may be used in a subsequent suit as permitted by the rules of evidence. Rule 202, cmt. 2. However, the committee recognized the potential for abuse of this procedure by failing to properly serve a person who has an interest in the proceeding. Accordingly, a Court may restrict or prohibit the use of a deposition taken pursuant to Rule 202 in order to protect any person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of Rule 202. Rule 202.5. Of course, this power is discretionary, and a court may be reluctant to exclude a deposition if the witness' story has changed significantly

## **F. Removal of Rule 202 Proceedings**

If a Rule 202 petition involves a federal question, then the proceeding may be removed to Federal Court. *See In re the State of Texas*, 110 F.Supp.2d 514, 522-24 (E.D. Tex 2000) (holding that a Rule 202 proceeding is a separate action, subject to removal to Federal Court if a federal question is raised in the petition).

## **G. Reasons for Enacting Rule 202**

Rule 202 replaced former Rule 187, and was enacted to expressly permit discovery depositions prior to suit and to investigate potential claims. The rationale

behind the framework of Rule 202 was explained in HECHT AND PEMBERTON, *A Guide to the 1999 Texas Discovery Rules Revisions* (November 11, 1998):

The Court fashioned Rule 202 in an attempt to accommodate competing concerns of plaintiffs and defense lawyers regarding the extent to which plaintiffs should be permitted to obtain presuit depositions without notice to potential parties. Under former Rule 737, a person could bring an independent action to obtain an order authorizing a deposition of any other person to investigate a potential claim or anticipated lawsuit. The State Bar Court Rules Committee urged the repeal of Rule 737 on the grounds that some plaintiffs were using the rule to “set up” target defendants for later suit by obtaining one-sided depositions of key witnesses without notice to the target. While these depositions generally could not be used as evidence because the target did not have notice, they arguably had the same effect—because they could be used for impeachment, the deposition “pinned down” the witness’ testimony.

HECHT & PEMBERTON, *A Guide to the 1999 Texas Discovery Rules Revisions* (November 11, 1998) (footnote omitted).

To address this situation, the Rules Committee proposed the repeal of Rule 737, accompanied by a modification of Rule 187. While Rule 187 already allowed presuit depositions to perpetuate testimony, the Rules Committee proposed an amendment to expressly authorize presuit depositions in anticipation of suit.

However, as Hecht and Pemberton explain:

Plaintiffs lawyers were strongly opposed to this proposal on several grounds. They contended that it effectively eliminated their ability to obtain pre-suit depositions to investigate a claim because (1) when merely investigating a claim, plaintiffs could not swear that they actually anticipated filing suit, a requirement under the Court Rules Committee’s proposal; and (2) they could not give notice to all potential parties as required by Rule 187 and the Court Rules Committee proposal because they did not yet know who the parties might be. They urged that investigatory depositions under Rule 737 had proven to be a useful device by which plaintiffs could investigate a potential claim, a step that, they contended, has become increasingly necessary in an era of sanctions for frivolous lawsuits, “no evidence” summary judgment motions, and other heightened burdens on plaintiffs. Several practitioners commented that the results of bill of discovery depositions frequently lead them not to file suit or not to pursue a potential defendant, thereby reducing the numbers of lawsuits and overall litigation costs.

To address both sets of concerns, Rule 202 expressly permits presuit investigatory depositions but limits the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition. A Rule 202 deposition ordinarily can be used to the same extent as a sworn statement; that is, solely for impeaching the witness from whom the deposition was taken. But if a party attempts to use Rule 202 abusively and/or to circumvent deposition notice requirements—such as to “set up” a target rather than for good faith investigation of a potential claim—Rule 202.5 authorizes the trial court to forbid the use of the deposition for any purposes, including impeachment.

HECHT & PEMBERTON, *A Guide to the 1999 Texas Discovery Rules Revisions* (November 11, 1998).

### III. JUDICIAL APPLICATION OF RULE 202

The 1999 revisions to the Rules of Civil Procedure have now been in effect for several years. Surprisingly, there have been few cases applying Rule 202 in their decisions, which suggests that Rule 202 is underutilized by practitioners.

One of the most significant appellate decisions interpreting Rule 202 is *In re Akzo Nobel Chemical, Inc.*, 24 S.W.3d 919 (Tex. App.—Beaumont 2000, orig. proceeding), which discusses several aspects of Rule 202.

#### A. *In re Akzo Nobel Chemical, Inc.*, 24 S.W.3d 919 (Tex. App.—Beaumont 2000, orig. proceeding)

##### 1. Facts

*In re Akzo Nobel Chemical* arose after a serious accident occurred on the premises of Akzo Nobel Chemical in Harris County. The accident victim and his spouse anticipated bringing a personal injury lawsuit against the alleged tortfeasor, Akzo Nobel Chemical. Because of the victim’s deteriorating health condition, the victim and his spouse petitioned the Court for the victim’s deposition to preserve the victim’s testimony, as well as the depositions of witnesses to the accident pursuant to Rule 202. The petitioners also sought an Order allowing the petitioners access to the accident site.

After the hearing, the Court issued two orders. First, the Court ordered the depositions of both the victim, as well as witnesses to the accident designated by Akzo Nobel Chemical. Second, the Court ordered Akzo Nobel Chemical to make the accident scene available for inspection, photographing and videotaping. The victim died three

days after the Orders were issued. Akzo Nobel Chemical then petitioned the court of appeals for mandamus relief.

## **2. Application of Rule 202**

### **a. Mandamus relief**

At the outset, the court of appeals noted that Akzo Nobel Chemical had no adequate remedy on appeal because its only opportunity to appeal the trial court's orders would occur after the depositions and inspection have taken place. Therefore, mandamus relief could be sought. *In re Akzo Nobel Chemical, Inc.*, 24 S.W.3d at 920.

### **b. Venue**

The *Akzo Nobel Chemical* court also addressed the proper venue for filing a Rule 202 petition. *Id.* In *Akzo Nobel Chemical*, the accident occurred in Harris County, and the alleged tortfeasor had its principal place of business in Harris County. *Id.* at 920-21. The potential plaintiffs, however, lived in Liberty County.

The potential plaintiffs filed the Rule 202 petition in Liberty County. The Court of Appeals held that because the potential plaintiffs acknowledged in their petition that a suit was anticipated, they could not rely on Rule 202.2(b), which provides that a Rule 202 petition may be filed where the witness resides only if no suit is yet anticipated.

However, the potential plaintiffs' argued that venue might be proper in Liberty County, and thus, the Rule 202 petition was properly filed in Liberty County. The Court of Appeals rejected these arguments and found that based upon the facts alleged in the Rule 202 petition, venue for the suit could only lie in Harris County. Therefore, the Court held that the Liberty County Court lacked jurisdiction over the Petition, and the court abused its discretion in issuing the two orders.

### **c. The scope of Rule 202 discovery**

The Court also addressed the merits of the District Court's orders, and specifically whether the District Court abused its discretion by ordering Akzo Nobel Chemical to make the accident scene available for inspection prior to suit being filed. The Court held 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." *Id.* at 21. Accordingly, the Court held that the District Court abused its discretion in ordering the inspection, and confirmed that the only discovery available presuit is a deposition.

**B. *In re Nexstar Broadcasting Group, Inc.*, 2000 WL 1053950 (Tex. App.–Amarillo 2000, orig. proceeding)**

**1. Facts**

*In Nexstar Broadcasting Group, Inc.*, the potential plaintiffs filed a Rule 202 petition seeking a deposition by oral examination of individuals employed by the potential defendant, as well as the custodian of records for the potential defendant. The District Court granted the Rule 202 petition. The potential defendant sought mandamus relief on the ground that the depositions requested were too burdensome, and that the burden of allowing the potential plaintiffs to depose the potential defendants before filing suit clearly outweighed the potential benefits.

**2. Standard for mandamus relief**

First, the Court of Appeals held that Rule 202.4 is a discovery rule. Therefore, the Court held that the standards for discovery mandamus set forth in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992) must be satisfied.

**3. The party opposing the deposition must present evidence to the Court**

Although the potential defendant argued that the potential benefits of the deposition were “clearly” outweighed by the burden, in an attempt to satisfy *Walker v. Packer*, it failed to present any evidence to support its argument. Therefore, the Court held that while this may be a valid argument, because the potential defendant presented no evidence to support it, it had to fail.

The Court acknowledged that the potential defendant may have a viable defense to any resulting suit. However, “that is exactly the possibility which [the potential plaintiff] is entitled to test via Rule 202.1(b). To the extent that the rule entitles him to test that possibility, it can hardly be suggested (as the relators apparently do) that undergoing depositions to enable [the potential plaintiff] to complete his testing equates undue burden, extraordinary circumstance, or harm.”

**C. *Valley Baptist Medical Center v. Gonzales*, 18 S.W.3d 673 (Tex. App.–Corpus Christi 2000) vacated, 33 S.W.3d 821 (Tex. 2000)**

*In Valley Baptist Medical Center v. Gonzales*, the Court addressed when an Order pursuant to Rule 202 is a final, appealable Order, as opposed to being limited to mandamus relief.

## 1. Facts

In *Valley Baptist*, the potential plaintiffs anticipated a lawsuit involving the delivery of their baby. The potential plaintiffs sought the depositions of the attending physician, as well as the corporate representative of the hospital. The District Court granted the Rule 202 petition.

The hospital sought mandamus relief and also filed a notice of appeal. The Court of Appeals stayed the depositions pending the outcome of the application for writ of mandamus. The writ of mandamus was denied. The Court then addressed whether the District Court's Order was properly appealable.

## 2. Rule 202 Orders may be appealable

The Court held that a presuit deposition petition is not a separate suit, but is ancillary to an anticipated suit. Therefore, the Court held that while the Order granting the depositions may be "final," it is not a final judgment. Therefore, the Court held that an appeal of a Rule 202 Order is generally an impermissible interlocutory appeal.

However, the Court noted that under this reasoning, whether the Order is truly a final Order is dependent upon the deponent. If the presuit deposition is in anticipation of a suit against that deponent, then the Order granting the deposition would be interlocutory. However, if the deposition is to obtain information in preparation for a claim against a third party not involving the deponent, then the Order granting the deposition would be final as to this individual, and appealable.

Because this opinion was issued after the potential defendants produced a representative for the ordered deposition, the Texas Supreme Court subsequently held that the Court of Appeals' opinion was advisory, and vacated the opinion in accordance with Rule 59.1 of the Texas Rules of Appellate Procedure. *Valley Baptist Medical Center v. Gonzales*, 33 S.W.3d 821 (Tex. 2000).

Although the opinion was vacated, it is instructive for how a subsequent court may address the issue. In situations in which the deponent is not the potential defendant, the argument clearly can be made that an Order granting the deposition is appealable as a final Order.

Moreover, there is also an argument that a Rule 202 Order against a potential party is also final and appealable particularly in light of the fact that the *Valley Baptist* opinion was vacated. *In re the State of Texas*, 110 F.2d 514 (E.D. Tex. 2000),

the United States District Court criticized the Court's reasoning in *Valley Baptist* that a Rule 202 proceeding "is not, in itself, a separate lawsuit, but is incident to and in anticipation of a suit." *Id.* at 523. The Court continued:

The Court's holding in *Valley Baptist* that a Rule 202 proceeding is ancillary has, admittedly, been difficult for this Court to conceptualize: to say that a proceeding is ancillary to an investigation or an anticipated suit is to say that it is ancillary to nothing.

*Id.* Accordingly, following the reasoning as the federal court in *In Re the State of Texas*, any Rule 202 Order would be final and appealable. Moreover, as noted above, if the Rule 202 petition involves a federal question, the action would be removable to federal court.

**D. *In re Wheat*, 2002 WL 31320095 (Tex.App.-Houston [1<sup>st</sup> Dist.] 2002, orig. proceeding).**

In *In re Wheat*, the Court addressed whether a Rule 202 deposition of a potential plaintiff is appropriate when there is a charge of discrimination pending before the Equal Employment Opportunity Commission.

**1. Facts**

Patti Wheat was employed as a salesperson with Andon Specialties, Inc. when she quit her job, and filed a charge of discrimination with the EEOC. In her charge, Wheat alleged that she was subjected to sexual harassment by a co-worker, claiming that Andon had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and the Texas Commission on Human Rights Act. Wheat asserted that the sexual harassment constituted a hostile work environment, and that she was constructively discharged when she resigned. While Wheat's charge of discrimination was pending before the EEOC, Andon filed a petition for a Rule 202 deposition of Wheat, claiming that, in light of the charge of discrimination filed with the EEOC, it anticipated that Wheat would later file suit against Andon.

Wheat filed a Motion for Protective Order, urging that the deposition was not necessary because any information real party in interest needed could be obtained from the EEOC. In response to Wheat's Motion for Protective Order, Andon pointed out two facts, which the Court found to be significant. First, prior to her resignation, Wheat never made any complaint of sexual harassment to anyone at Andon. As a result, Andon was never given any of the details of Wheat's complaint, which prohibited from beginning an investigation into her allegations.

Second, Andon argued that because memories fade over time, and there was a likelihood that employees with knowledge of the alleged incidents may quit, its ability to effectively investigate Wheat's allegations and adequately defend the potential lawsuit could quickly diminish. Therefore, Andon argued that it needed to investigate Wheat's potential suit as quickly as possible, and thus needed Wheat's deposition prior to suit being filed. Andon pointed out to the court that even when the EEOC concludes its investigation and issues Wheat a Right to Sue, Wheat would still have 90 days in which to file suit. Moreover, if suit were filed in federal court, several months would pass after suit was filed before Andon would even be entitled to take her deposition. The District Court granted the Rule 202 deposition.

## **2. The District Court Did Not Abuse Its Discretion**

Wheat filed a petition for writ of mandamus of the District Court's Order. In her petition, Wheat argued that because the EEOC was investigating her charge of discrimination, the Rule 202 deposition would usurp and circumvent the authority of the EEOC. The Court of Appeals rejected Wheat's contentions, and found no basis on which to hold that the District Court abused its discretion in ordering the deposition of Wheat. Accordingly, Wheat was ordered to appear for the deposition, pursuant to Rule 202.

## **IV. DISCOVERY FROM NONPARTIES - AN OVERVIEW**

In revising the discovery rules, the committee outlined all forms of discovery from nonparties in one rule -- Rule 205. Rule 205 also created a new form of discovery -- the request for production to nonparties. All nonparty discovery requests must be compelled by a subpoena. Rule 205.1.

### **A. Forms of Nonparty Discovery**

Rule 205.1 outlines the various methods of discovery from nonparties, which are briefly described below. Regardless of which method authorized by Rule 205 is used, the applicable discovery notice must first be served on all parties, as well as the nonparty from whom documents are requested, in accordance with Rule 21a. Rule 205.2. This must be completed at least 10 days before the subpoena compelling compliance is served. Rule 205.2.

#### **1. Motion for entry upon property**

Under Rule 196.7, a party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon.

**a. Entry must be obtained by motion**

If the property belongs to a party, then inspection of the property may simply be obtained by a request for inspection. Rule 196.7(a)(1). However, if the property sought to be inspected belongs to a nonparty, then the party seeking inspection must file a motion with the Court. Rule 196.7(a)(2).

The motion for entry upon property owned by a nonparty should state the time, place, manner, conditions, and scope of the desired inspection, and should describe any desired means or procedures for testing or sampling to be done on the property. The Motion should also set forth the person or persons by whom the inspection, testing, or sampling is to be made, so that the Court will have this information to include in its Order. *See* Rule 196.7(b). The motion for entry on the property must be filed no later than 30 days before the end of the discovery period. Rule 196.7(a).

**b. Service of the motion**

The party seeking entry upon the property must serve on all parties, as well as the nonparty owner of the land, a copy of the motion and a notice of hearing in accordance with Rule 21a. Rule 196.7(a)(2). If the identity or address of the nonparty owner is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing. Rule 196.7(a)(2).

**c. Order for entry upon nonparty's property**

An Order for entry upon a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action. Rule 196.7(d). Any Order permitting entry upon a nonparty's property must state the time, place, manner, conditions, and scope of the inspection. Rule 196.7(b). The Order must also specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made. Rule 196.7(b).

**2. Presuit deposition**

Under Rule 202, a potential plaintiff or defendant may petition the court for a deposition prior to suit being filed to perpetuate or obtain the testimony of any other person for use in an anticipated suit or to investigate a potential claim or suit. Rules 202.1(a) and (b). This procedure is fully described in Section II of this paper.

### **3. Request for examining physician's report**

Under Rule 204, a party may move for an order compelling a party to submit to an independent medical examination when that party's physical or mental condition is in controversy. Rule 204.1(c). If the motion for independent medical examination is granted, the party who is ordered to submit to the examination has a right to the examining physician's report following the examination. Of course, the right to the report also applies to any medical examination conducted by agreement of the parties. Rule 204.2(b).

#### **a. Request by the party ordered to be examined**

Under Rule 204.2(a), upon request of the party ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings. This report must include the results of all tests made, as well as all diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.

#### **b. Request by the party seeking the examination**

After delivery of the report, the party seeking the medical examination may then obtain like reports of any examinations made before or after the ordered examination of the same condition (or examination conducted by agreement of the parties).

### **4. Depositions by oral examination**

Under Rule 199, a party may take the testimony of any person or entity by deposition on oral examination.

### **5. Depositions by written questions**

Under Rule 200, a party may take the testimony of any person or entity by deposition on written questions.

### **6. Request for production of documents in conjunction with either a deposition by oral examination or a deposition on written questions**

A party may also notice a deposition of a nonparty, either by oral examination or by written questions, and include with the deposition notice a request for production of documents.

**a. Deposition by oral examination**

Under Rule 199.1, a party may take the testimony of any person or entity by deposition on oral examination. A notice of deposition by oral examination must be served on the witness and all parties a reasonable time before the deposition is taken.

A notice of deposition under Rule 199 may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody or control. Rule 199.2(b)(5). If the witness is a nonparty, the request must also comply with Rule 205, and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. Rule 199.2(b)(5).

**b. Deposition by written questions**

Under Rule 200.1, a party may take the testimony of any person or entity by deposition on written questions. A notice of deposition must be served on the witness and all parties at least 20 days before the deposition is taken.

**7. Request for production of documents**

Rule 205.1(d) sets forth the nonparty request for production, which is a new component of the revised civil discovery rules. Under Rule 205.3, a party may now compel production of documents and tangible things from a nonparty. This eliminates the need to take a nonparty's deposition, either by oral examination or written questions, to obtain documents from that person. The request for production of documents and subpoena must be served a reasonable time before the response is due, but no later than 30 days before the end of the discovery period. Rule 205.3

**a. Contents of notice**

The request for production must be in the same form as a request for production to a party. Rule 205.2. The request must include the following:

- 1) the name of the person from whom production or inspection is sought to be compelled;
- 2) A reasonable time and place for the production or inspection; and

- 3) The items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity.

Rule 205.3(b).

#### **b. Medical records of nonparties**

If the request for production is for a nonparty to produce another nonparty's medical or mental health records, the request for production must be served both on the nonparty whose records are being requested and the nonparty being requested to produce the records. Rule 205.3(c).

#### **c. Compliance with the nonparty request**

The nonparty must respond to the request in accordance with Rule 176.6. Rule 205.3(d). The cost of production of documents by nonparties are borne by the requesting party. Rule 205.3(f). Notably, upon reasonable notice, any other party may inspect the documents produced, and may make copies at its own expense. Rule 205.3(e).

### **V. JUDICIAL APPLICATION OF RULE 205**

#### **A. *In re Guzman*, 19 S.W.3d 522 (Tex. App.–Corpus Christi, orig. proceeding)**

*In re Guzman*, the Court of Appeals confirmed that the types of nonparty discovery are strictly limited to those specifically set forth under Rule 205.

##### **1. Facts**

*In re Guzman* arose after Guzman, the driver of a truck, was involved in a collision in which Domingo Vargas, Sr. was killed. Vargas' heirs and survivors filed suit against Guzman, Guzman's employer, Bicentennial Trucking, Inc., Haas Anderson and Warning Lites, Inc. for wrongful death. Guzman and Bicentennial Trucking subsequently settled with Vargas' survivors.

Haas Anderson and Warning Lites then sought contribution and indemnity from Guzman and Bicentennial for amount for which they may be held liable. Specifically, Haas Anderson and Warning Lites asserted that Guzman was incompetent and unfit to drive at the time of the accident, and that Bicentennial Trucking knew or should have known of the incompetence.

Haas Anderson then served a request for production of documents on Guzman who was by that time not a party to the litigation. After Guzman failed to fully comply with the request, Haas Anderson filed a motion to compel. Haas Anderson sought to compel Guzman to produce authorizations signed by him so that it could obtain his drivers history, medical history, employment history and previous workers compensation claims. The authorization forms were furnished by Haas Anderson for Guzman to sign.

The District Court Ordered Guzman to sign the releases. Guzman then sought mandamus relief, arguing that signing a records release was outside the scope of Rule 205, and the District Court, therefore, abused its discretion by ordering him to sign and complete the authorizations.

## **2. Application of Rule 205**

The Court of Appeals reviewed the types of discovery allowed from nonparties under Rule 205. The Court noted that the authorizations at issue were not in existence prior to the Request for Production being served. Accordingly, “[t]he effect of the Court’s order is to order [Guzman] to create the authorizations. The rules do not permit the trial court to force a party to create documents which do not exist, solely to comply with a request for production.” *Id.* at 525. Therefore, the Court held that the District Court exceeded its authority in ordering Guzman, then a nonparty to the action, to sign a records release.

## **VI. SUBPOENAS—REVISIONS TO RULE 176**

Rule 176 clarified the rules regarding issuance, service and response to trial and discovery subpoenas. As noted above, all nonparty discovery requests must be compelled by a subpoena. Accordingly, a brief discussion of Rule 176 is helpful.

### **A. Required Contents of a Subpoena**

Rules 176.1 and 176.2 set forth the form and required contents of the subpoena.

### **B. Limitations**

Rule 176.3 sets forth the limitations on subpoenas. Under Rule 176.3, nonparties may be required to travel to a county that is up to 150 miles from the county where the witness resides or is served. Moreover, parties may be required to appear at any location permitted under Rule 199.2(b)(2). Rule 176.3(a).

### **C. Issuance of Subpoenas**

A subpoena may be issued by the clerk of the appropriate district, county or justice court, an attorney authorized to practice in the State of Texas, or an officer authorized to take depositions in the State of Texas. Rule 176.4

### **D. Service**

Subpoenas may only be served in the State of Texas, and only by any sheriff, constable or any person who is not a party who is at least 18 years of age. Rule 176.5. If the witness is a party and is represented by counsel, the party's attorney may serve the subpoena on that party. Rule 176.5.

### **E. Response to the Subpoena**

Anyone served with a subpoena must comply with it unless discharged by the court or by the party summoning the witness. Rule 176.6(a). A person commanded to appear and give testimony must appear from day to day until discharged.

#### **1. Organizations**

If the testimony calls for the testimony of an organization, and the matters on which examination is requested are described in the subpoena with reasonable particularity, the organization must designate the witness(es) to testify. Rule 176.6(b). The rule is silent as to the effect of a subpoena calling for the testimony of an organization which does not describe the substance of the testimony. While the organization may not have to comply, it should move for a protective order to ensure that it will not be held in contempt of Court.

#### **2. Production of documents**

Under Rule 176.6(c), a person commanded to produce documents need not appear in person at the time specified, unless the subpoena also calls for testimony. Rather, production of the documents within the time requested is sufficient to comply with the subpoena. A nonparty's production of documents authenticates the documents for use only against that nonparty. Therefore, if the party issuing the subpoena anticipates using documents produced by a at trial, a business record affidavit or deposition establishing authenticity will still be required.

#### **3. Objections and motions for protective orders**

Objections and motions for protective orders must be made before the time specified in the subpoena for compliance. Objections to a subpoena must be in writing

and may be made only by the subpoenaed party. However, a motion for protective order may be filed by either the subpoenaed party, or any other person affected by the subpoena. Rule 176.6(e). A motion for protective order may be filed in either the court in which the case is pending, or in a district court in the county where the subpoena was served.

Objections and motions for protective orders relieve the responding party from complying with the portion of the subpoena to which an objection has been raised. The party who issued the subpoena must request a ruling on the objection in order to compel compliance with the subpoena.

#### **F. Burdensome Subpoenas**

Under Rule 176.7, parties must take reasonable steps to avoid imposing an undue burden or expense on the person served. A person served with a subpoena is entitled to reasonable time for compliance, and protection from disclosing a privilege.

#### **G. Enforcement of the Subpoena**

Failure to comply with a subpoena will subject a witness to contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena was served. Rule 176.8(a). Contempt of court is punishable by fine, confinement, or both. Rule 176.8(a).

### **VII. PRACTICE TIPS**

#### **A. Tailor the Rule 202 Petition to Make the Deposition Appear Less Burdensome**

Under Rule 202.2(g), a petition for a presuit deposition must set forth the substance of the testimony that the petitioner expects to elicit from each witness, as well as the petitioner's reasons for wanting to obtain the testimony of each witness. Once the deposition is ordered, however, the scope of discovery in a Rule 202 deposition is the same as if the anticipated suit or potential claim had already been filed. Rule 202.5. Therefore, the petitioner is apparently not bound to remain within the scope of expected testimony set forth in the Petition, pursuant to Rule 202.2(g). Therefore, if you are petitioning the Court for a deposition and you are anticipating some resistance, make the substance of the testimony narrow to make the deposition appear less burdensome on the deponent, which should increase the chance of having your petition be granted.

## **B. Control the Scope of a Rule 202 Order**

On the other hand, remember that the Court's Order must also include any protections the Court finds necessary or appropriate to protect either the witness, or any other person affected by the deposition. Rule 202.4(b). Accordingly, if you represent an individual the petitioner seeks to depose, at the hearing on the petition, request that the Court specifically limit the scope of the deposition in its Order to only the information necessary to investigate the claim. This will reduce the costs associated with producing the deponent for the deposition and will also limit the amount of presuit discovery the other party may take.

## **C. Consider Alternatives for Obtaining Document from Nonparties**

You should not limit the method of obtaining documents from nonparties to requests pursuant to Rule 205. Rather, take advantage of other avenues for obtaining information during litigation, such as a Freedom of Information Act request, pursuant to 5 U.S.C. § 552, or an Open Records Act request, under TEX.GOV.CODE § 552.001 (Vernon 1994). Moreover, these options are available presuit and can assist you in preparing for a Rule 202 deposition.

## **D. Consider a Basis to Seek Presuit Discovery in Federal Court**

Keep in mind that the scope of presuit discovery is much broader under the Federal Rules of Civil Procedure. Specifically, under F.R.C.P. Rule 27, the Court can order a presuit deposition as well as orders under Rule 34 (requests for production) and Rule 35 (requests for inspection). This can be particularly useful if a potential case is document intensive, or involves the need to inspect the premises.

## **E. Documents Produced Pursuant to Rule 205 May Not Be in Admissible Form**

One of the useful aspects of a deposition on written questions is that responses to deposition questions will prove up the authenticity of the documents produced. This is not the case regarding documents produced in response to a request for production of documents. Of course, under Rule 193.7, a party's production of a documents in response to written discovery authenticates the document for use against that party. But with respect to nonparty discovery, Rule 193.7 would not apply, and Rule 205 has not addressed this situation. Therefore, unless opposing counsel will stipulate to the authenticity of the documents, either a business record affidavit or a deposition will still be required for admissibility of documents at trial.