

Using Pre-Suit Depositions Effectively

By Jason A. Copling

Pre-suit depositions taken pursuant to Texas Rule of Civil Procedure 202, although growing in popularity, still appear to be greatly underutilized as a tool in the arsenal of a trial attorney.

This tool can be used very effectively to pin down important facts before parties become contentious and to promote quick settlements before filing a lawsuit. The following is a quick primer on determining when pre-suit depositions are appropriate, how to obtain them, and strategies for using them effectively.

When to Use a Pre-Suit Deposition

Judging from the daily filing reports, pre-suit depositions are most often used by attorneys attempting to learn facts from companies or individuals who they do not believe will be parties to any eventual litigation arising out of the facts at

issue. For example, they are often used by victims of Internet defamation to learn from an Internet Service Provider or Web site host the underlying identity, or IP address, of the defaming party. This information is then used to track down the alleged wrongdoer.

While the use of the depositions on third parties is effective as a fact-gathering tool, the pre-suit deposition can be used equally as effectively on an expected defendant or its employee to pin down important facts, while doing so in a manner that is less contentious than after a lawsuit is filed. Alternatively, pre-suit depositions can be used by a potential defendant to ascertain information about perceived imminent litigation, preventing the plaintiff from getting a significant head-start on the case.

Pre-suit depositions are especially useful for locking down an opposing party's position on narrow issues of fact early in a dispute, since they can be used for impeachment purposes in any subsequent litigation. For example, if a negli-

gence claim boils down to the question of when a company received notice of a dangerous condition, a potential plaintiff can seek to depose those who would have first known of the dangerous condition. And this can be done without expending considerable resources filing suit, without engaging in document discovery, and, most importantly, without giving the potential defendant ample time to come up with a good excuse as to why the notice was not received.

Obtaining a Pre-Suit Deposition

The method for obtaining a pre-suit deposition is very well described in Rule 202. The petition, which can seek either an oral deposition or a deposition upon written questions, must be verified and filed in a county where venue would be appropriate if suit is anticipated or where the witness resides if suit is not anticipated. It must state either that the petitioner anticipates a suit where it may be a party or that the petitioner seeks

to investigate a potential claim by or against the petitioner.

The petition must state the subject matter of the anticipated suit, if any, and the petitioner's interest in the lawsuit, and it must contain the contact information of any potential adverse parties, if known. The petition must also contain the contact information of the party sought to be deposed, the substance of the expected testimony, and the petitioner's reasons for seeking the testimony.

The petition and a notice of hearing must be served on the potential deponent, as well as any potentially adverse party if suit is anticipated, at least 15 days prior to the hearing. At the hearing, the petitioner must show either that allowing the deposition "may prevent a failure or delay of justice in an anticipated suit" or that the "likely benefit of allowing the petitioner to take the requested deposition" to investigate the potential claim "outweighs the burden or expense of the procedure," and the order must reflect one of these findings. Because of the responsibility of plaintiffs to investigate claims themselves prior to filing a lawsuit, and the sanctions that can arise out of frivolous lawsuits, courts typically allow the depositions to be taken if a legitimate reason is provided.

An attorney for a petitioner should stress the potential that a lawsuit may not be filed if the content of the testimony is favorable to the adverse party. As long as there is no strong countervailing interest being affected by the deposition, such as a trade secret or privilege of some kind, the court is likely to grant the request.

Strategic Considerations

Because depositions are often important pressure points during the course of litigation, and many times lead to settlement negotiations between even the most entrenched parties, the pre-suit deposition can be an effective method of getting into those negotiations early in a dispute. Having damaging deposition testimony in your hands during these negotiations is a strong motivator for your adversary to settle early.

When used properly, a pre-suit deposition can be an effective tool for getting to the truth quickly and getting your clients what they deserve. **HN**

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On September 18, from 6:30 to 8 p.m., JLTLA will host a panel discussion entitled "A Conversation About Education" at the Yvonne A. Ewell Townview Center (1201 East Eighth Street in Dallas). The panel will include Dr. James Davis, of the U.S. Department of Education, Associate Judge Teresa Guerra Snelson, and other educational leaders.

Students, parents and residents are invited to attend this forum.

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