

TAKING AND DEFENDING DEPOSITIONS

Michael Sawicki

Brown, Sawicki & Mitchell, L.L.P.

2626 Cole Ave., Suite 850

Dallas, Texas 75204

(214) 468-8844

MSawicki@BSMlawfirm.com

The author wishes to acknowledge the contributions and assistance of James Mitchell in preparing this paper.

TABLE OF CONTENTS

I.	OUTLINE OBJECTIVE.....	15
II.	DISCOVERY CONTROL PLANS	15
	A. <u>Discovery Control Plan Limitations</u>	15
III.	LIMITATIONS.....	15
	A. <u>Level 1: Rule 190.2</u>	15
	B. <u>Level 2: Rule 190.3</u>	15
	C. <u>Level 3: Rule 190.4</u>	26
	D. <u>Rules Unaffected By Limitations</u>	26
IV.	NOTICING AND OBJECTING TO NOTICES OF DEPOSITIONS.....	37
	A. <u>Filing</u>	37
	B. <u>Timing</u>	37
	C. <u>Content</u>	37
	1. <u>Individuals</u>	37
	2. <u>Corporations and Organizations</u>	48
	3. <u>Time and Place</u>	48
	6. <u>Requests for Production</u>	48
	a. <u>Nonparty</u>	48
	b. <u>Party</u>	48
	7. <u>Compelling Attendance</u>	59
	a. <u>Nonparty</u>	59
	b. <u>Parties</u>	59
	D. <u>Objections to Time and Place [Rule 199.4]</u>	59
V.	CONDUCTING THE ORAL DEPOSITION [Rule 199.5].....	59
	A. <u>Attendance [Rule 199.5(a)]</u>	59
	B. <u>Time Limits [Rule 199.5(c)]</u>	59
	C. <u>Conduct During the Deposition</u>	59
	1. <u>Guidelines</u>	59
	2. <u>Conferences</u>	59
	3. <u>Objections [Rule 199.5(e)]</u>	59
	4. <u>Instructions Not to Answer [Rule 199.5(f)]</u>	610
	5. <u>Suspending the Deposition</u>	610
	D. <u>Sanction for Noncompliance with Conduct Rules [R199.5(d)]</u>	610
VI.	SCOPE OF DEPOSITION DISCOVERY.....	610
	A. <u>No Express Changes</u>	610
	B. <u>Contentions</u>	711
	C. <u>Any Individual</u>	711
	1. <u>Non Compos Mentis</u>	711
	2. <u>Attorneys</u>	711
	3. <u>Apex</u>	711
	a. <u>Definition</u>	711
	b. <u>Crown Central Guidelines</u>	711

	c. <u>Application</u>	711
VII.	EXPERT DEPOSITIONS.....	812
	A. <u>Scope</u>	812
	B. <u>Scheduling</u>	812
VIII.	SUPPLEMENTATION	812
	A. <u>Timing</u>	812
	B. <u>Experts</u>	812
IX.	SUBPOENAS	812
	A. <u>Reorganization</u>	812
	B. <u>Substantive Changes</u>	812
	C. <u>Parties</u>	913
	D. <u>Nonparties</u>	913
X.	DEPOSITIONS BEFORE SUIT.....	913
	A. <u>History</u>	913
	B. <u>Scope</u>	913
	C. <u>The Petition</u>	913
	D. <u>Notice</u>	1014
	E. <u>The Order</u>	1014

I. OUTLINE OBJECTIVE

This paper will try to accomplish two goals. First, it will give you an overview of how to approach the chore of taking and defending a deposition. This will include practical tips on how to survive most depositions. Second, the paper will provide an overview of the rules regarding deposition practice in Texas. This will include a discussion of the rules and how they apply for discovery and pre-suit depositions.

II.

The Fun Stuff

The art of taking and defending depositions cannot be distilled into one set of questions or an outline of topics that will work in every case. While there are certain practices and general rules that can help, each deposition requires focused attention and preparation. Taking and defending depositions constitutes a large part of my litigation practice. Over the years, I have deposed Army generals, surgeons, pathologists and airline pilots. I use depositions for two primary goals, to educate myself about the evidence that will be available at trial and to help posture the case for early settlement. The practical tips in this paper are based on the things that have worked for me. The tips, however, cannot replace careful preparation.

Preparing for taking a deposition

Outline a strategy for the witness

The first step to prepare for taking a deposition is to identify what role the witness has in the case. To do this, review the petition, answer and potential jury questions to determine what the witness will add to the case. This review may help you determine if the person really needs to be deposed at all. Look for witnesses that support or directly contradict the positions you will want to take at trial. This process of elimination becomes very important in cases where the number of depositions is limited by a discovery control plan.

The next step involves determining exactly what the witness is likely to say. Just like you do not want to ask a question at trial that you do not know the answer to, you rarely want to depose someone about whom you know very little. It is always a good idea to try to conduct an informal interview of the witness before the actual deposition. This provides a great chance to find out what their story will be and will help direct your questioning. In many cases, however, it is not possible to actually interview the witness; i.e. they are employed by the other side. In this situation, talk with your own clients and try to develop a picture of what the witness might have to say. Be careful when interviewing witnesses not to reveal you work product because disclosure to a third party will break the privilege. Spend as much time as you can with the witness during this interview and try to get responses to all the questions you might ask in the actual deposition.

It is a good idea to review the disclosure responses and interrogatory answers with the witnesses during the interview. Find out if their recollections will fit with the positions you have taken and, if they do not and are critical, consider amending answers before the deposition testimony is recorded. This can help avoid creating potentially damaging cross examination materials for the opposing side.

An attorneys notes and observations during a witness interview are subject to the work product privilege and are not discoverable. Signed witness statements, by contrast, are discoverable. Sometimes it is a good idea to get the witness to sign a statement after the interview. This may help lock in their testimony and may reduce the need to depose them. However, be careful and always produce all witness statements after they are taken even if the deposition does not go forward.

After interviewing the witness and reviewing the issues, determine what areas the witness will cover and begin your outline of questions with information. This will help you focus and prevent you from wasting too much time on unrelated matters. For example, witnesses can be classified under some of the following headings:

- Fact witness
- Causation of damages
- Expert opinion
- Summary judgment or other purely legal issues

Preparing Factual Witness questions

Consider what you would like the witness to discuss at trial when you begin drafting your questions. Preparing a witness summary before the deposition can help this process. Take each potential witness and outline what their role will be in your case. For example, in a straight-forward car wreck case a witness summary might look something like this:

- Paula Plaintiff
 - Good for plaintiff
 - Witness to crash
 - Has knowledge of damages
 - Subject to cross examination regarding speed, visibility of intersection
 - Crash scene photos

- Dan Defendant
 - Good/bad for plaintiff
 - Witness to crash
 - Cross examination regarding prior speeding, prior crashes
 - Crash scene photos

- Wanda Witness
 - Witness to crash
 - In car behind Plaintiff
 - Said Plaintiff could not avoid collision – takes out contributory negligence defense
 - Said Defendant admitted responsibility at scene – strong cross examination
 - Said Defendant driving too fast for conditions

- Treating Doctor
 - Necessary to prove up causation between injury and damages
 - Prove up future medical needs
 - Medical records exhibits

- Defendant's employer
 - o Prove up Defendant acting in course and scope of business at time of crash

The witness summary can be fleshed out with deposition excerpts and additional information about the individuals as the discovery process progresses. It can later be a great help in preparing for trial. After reviewing the summary, determine what is most important for each witness and start drafting your questions there. In the above hypothetical case, for example, you might start with the deposition of Wanda Witness. Some of her testimony might include lay opinions so it is important to review the rules regarding the admissibility of that type of testimony and direct your questions accordingly. For example, T.R.E. 701 governs lay opinion testimony.¹ Your questions to Wanda should track the rule's language to ensure the responses will be admissible later at trial. In this instance, you should ask several questions to illustrate Wanda's ability to see and perceive the crash scene. Questions concerning her opinions about who was at fault can then be asked after building the basis for her perceptions of the incident.

Your question outline should also contain potential exhibits you will use with the witness. Consider proving up the document's authenticity, if that is an issue, with the witness tracking the requisite rules. In cases involving medical records or handwritten documents, it may be a good idea to get the witness to translate their own writing to avoid confusion later on.

Finally, make sure you learn all the potential testimony the witness might give at trial. The journalists' axiom – Who, What, When, Where, Why and How – is good to follow.

Preparing Expert Witness Questions

Taking expert witness depositions can be one of the hardest tasks facing a lawyer. Careful preparation can help take some of the anxiety out of the process. As with other witnesses, determine what the primary focus of the expert witness' testimony will likely be and begin your research there. Under the discovery rules, expert depositions are the primary source of information about their opinions. It is no longer possible to ask numerous interrogatories outlining their testimony before the deposition. However, the rules do allow you to obtain expert reports and disclosure responses about their testimony. Begin here with your question outline and be sure to ask about all opinions they are likely to express at trial.

Preparing for an expert witness deposition should include a review of the person's credentials. Review the resume and look for any anomalies. For example, for a medical doctor look to determine if the witness is certified in the areas he or she is discussing in the case. Compare the resume with your own experts to determine if there are areas where their experience is greater or weaker. Check into claims made on the resume. Experts have been known to "pad" their accomplishments and this can serve as excellent, and often fatal, cross examination material.

Next, review what evidence the expert has relied upon in reaching the opinions. Evaluate whether the expert is subject to *Daubert* challenges by reviewing the methodology that underlies how they reached their conclusions. Determine if the expert is relying on any new or unproven science to reach conclusions. For example, in a recent *Dram Shop* case the defendant tendered an expert in toxicology that sought to testify about a person's level of intoxication and impairment based on a blood alcohol level taken more

¹ "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

than an hour after a motor vehicle crash. The expert's report contained a dense and intimidating series of calculations that purported to support his opinions. Under Texas law, however, there is a body of cases interpreting the admissibility of this science – known as “Retrograde Extrapolation.” These cases outlined the long list of parameters that any expert offering opinions in the area must follow for the opinions to be admitted. Deposition questions tracking those parameters revealed that the expert had not taken many of them into consideration and, in some cases, he simply made some numbers up to support his opinions. This deposition testimony was later incorporated into a successful motion to strike the expert's testimony from the case.

In this case, the expert's opinion about what time a blood sample was drawn was inconsistent with numerous documents in the case. He even ignored a time given to him in a letter from the defense attorney's legal assistant in an attempt to improve his results. The trial judge relied upon the following testimony in striking the expert:

Q: Now, [the legal assistant's letter] though told you that the time of the crash was 12:22, correct?

A: That is in her letter, yes.

Q: Now, why didn't you use 12:22 in doing your calculations?

A: Apparently, when I did the calculation, I had forgotten that she gave me a time in her letter.

Q: Would you agree with me that if the sample was harvested at 1:00 and the crash occurred at 12:22, that your opinions in your report would be different?

A: Yes.

Q: But you didn't use 12:22 correct?

A: **I divined my own time.**

Expert Homework

Research prior testimony and writings of an expert while preparing your questions. Often you will find that an expert has taken inconsistent positions in prior cases. This can be used quite effectively to destroy his credibility during the deposition. There are several sources on the Internet to obtain prior expert witness testimony. It is well worth the expense to get prior depositions to learn more about how the expert will react in your own case and where there are skeletons in his or her closet. For example, in the Dram Shop case described above, the defendants had tendered an accident reconstructionist to testify that the Plaintiff was also negligent in causing the crash. The expert had a long history of testimony and had been deposed by the late John Howie in a trucking case. Mr. Howie had investigated the expert's resume claims and determined that a prestigious sounding crash investigation school the expert claimed to run was actually housed in a bar.

John Howie: Do you still have that gentleman's club that you run?

A: A gentleman's club?

John Howie: Yeah, there was a while you all had a beer joint out there and shared the space by your Police Academy?

A: Oh, I – that wasn't my club. We – we did share the space with them.

John Howie: Well, you were involved in it?

A: Sure, that's where I taught my school.

John Howie: All right. In the beer joint?

A: **Right, we taught school in a beer joint when we first started, you're – you're exactly right.**

Prior depositions often contain great ideas for cross examination and can give you quick access to other lawyers' investigations into an expert's methodology, credentials and background.

Review the expert's report and compare it with the areas that he or she have been designated to testify about in responses to disclosures. Often you will find there are discrepancies between what the lawyer expects the expert to say and what the expert has actually opined. This can be used to drive a wedge between the lawyer's position and the expert's beliefs. Also, it is a good idea to review the different types of areas that an expert claims to be educated in. Some experts try to stretch their credentials to offer testimony on a wide range of topics. This alone can be the source of powerful cross examination.

Check your expert's names in various Internet search engines and see what comes back. Over the years I have done this and found a wide variety of incriminating evidence about experts.

Basic Expert Witness Questions

There are several general things that I like to accomplish in all expert witness depositions. First, I want to eliminate all areas that they do not consider themselves qualified to testify in. Ask the witness all areas in which he or she considers themselves to be an expert and watch their faces turn red. If they testify frequently, some experts will have a hard time remembering all the areas they have testified on. These types of questions may also help eliminate the opposing side from trying to later stretch the expert out to cover other areas involved in the case. Second, I like to know all of the opinions that the expert will likely express during the case. Be sure that they have not changed any of their opinions expressed in their report. Third, have the expert review and comment on your own expert's reports. Have them highlight any areas with which they disagree and get them to critique the analysis and methodology your experts have used. Finally, have the expert critique your witness' resume and ask whether they consider the credentials to be sufficient to testify on the subjects involved in the case. This can be helpful if, later on, the opposing side moves to strike your experts.

Advanced Expert Witness Questions

"The Fighting First"

I personally spend almost no time at the beginning of the deposition getting the expert's name, address and personal information. Instead, I like to begin with some of the toughest questions or pick on an area of weakness in the expert's resume or opinions from the very outset. This sometimes unsettles the expert and can make them go on the defensive. One method of doing this is to identify an area in which their opinions differ widely from uninterested and/or unbiased factual witnesses. For example, in a nursing home case the defendants had tendered a medical doctor reached who offered opinions about a woman's cause of death. These opinions, however, were not shared by any of the actual treating doctors involved in her care and were inconsistent with the official cause recorded on the death certificate. Here is an excerpt from my question outline:

Do you agree that the official cause of death for (the plaintiff's decedent) was sepsis related to her bed sores?

Do you agree that the people who reached that conclusion had better evidence than you to render that opinion?

Agree that you have not rendered an opinion about what you consider to be the cause of (the plaintiff's decedent's) death?

Agree that your report does not state what, in reasonable medical probability, was the cause of her death?

Agree that your opinions about her death are not consistent with any of actual treating medical doctors in this case?

"The Common Sense Question"

Another method is to pepper an expert's deposition with numerous questions that are inconsistent with their opinions but, as phrased, are almost impossible to deny. These questions will help provide cross examination material for trial and may also serve to unsettle the expert during his testimony. John Howie, again, demonstrates this technique very well. These excerpts are from a highway crash involving a tractor trailer and a passenger car. The defense expert was offered to testify that the truck driver was not responsible for the crash and, in turn, that the driver's employer was not liable for the passenger's death.

John Howie: Are you an expert in truck safety?

A: Yes.

John Howie: Let me ask you some questions, Would you agree with me, sir, that when it comes to trucking safety that any risk of serious injury or death is an unacceptable risk, if it can be reduced or minimized, using reasonable safety precautions.

A: Yes.

John Howie: Would you agree with me that safety is the number one product that the [Defendant] should be offering to the – to not only the people that buy its services, but the people that share the road with them?

A: Yes.

John Howie: And just because a truck is bigger doesn't give it any more right of way than anybody else?

A: Correct.

John Howie: In fact, the fact that the truck is bigger than most people on the road, puts a greater sense of responsibility on the truck than it does the other folks, doesn't it?

A: Correct.

John Howie: No question about that?

A: No.

This brief exchange already starts to undermine the expert's opinions that the driver of the passenger car was also negligent in causing the crash. This method can be adapted to almost any case.

Defending a Deposition

Defending a deposition successfully, just like taking one, relies on careful preparation. First, your witness should be made familiar with how the process works and prepared for the questions that are likely to come up. Second, review all likely documents or other evidence that might be presented to ensure that there are no hidden traps coming. Finally, you need to give careful thought to questions that you might want to ask of your own witnesses.

Client preparation

Client preparation cannot be ignored. This is especially true for parties that are unfamiliar with the legal process and do not appreciate the dangers of candid disclosures during a deposition. Most people begin conversations with the goal of effectively and quickly communicating their ideas to another person. Lawyers can take advantage of this natural inclination and are rewarded by learning more than they asked. I always instruct clients to give as concise and short an answer as possible to any deposition question. I remind them that the best answer is always the truth and reassure them that there is no benefit to being evasive. Many clients assume that the process is a game of hide and seek and are inclined to help by purposefully making it difficult for the other side. I see no benefit to this as it can often backfire and make the client look dishonest. Prepare clients for the difficult questions that they are likely to face. If there is a fact issue in dispute, for example, review with them the evidence in your case that supports their recollection of events.

Clients should be instructed to avoid answering legal questions. I always tell my clients that while lawyers look and sound like regular people, we are different. We are often very effective of using words and their subtle meanings. This is especially true when dealing with purely legal terms. I always instruct my clients to be careful answering any questions about defining the nature of their claims. I tell them to respond with what they feel was done wrong or why they are upset about their injuries, rather than have them try to classify their damages into legal causes of action. Many defense attorneys like to ask clients to explain the basis for all of their allegations. But this is not typically a question that I would allow them to answer where the response really seeks my work product. With clients that are not trained in the law, I would argue that their understanding of what supports a legal claim could only come from discussions they have had with their lawyer. This is clearly invasive of the attorney work product and attorney/client privileges. But if clients are not warned about this before the deposition begins, they may provide answers that invade those privileges.

Clients should be educated about what to wear and how to act during the deposition. I always tell clients to dress as if they were going to a formal job interview, i.e. dress to impress but not to excess. I

also like to tell them about how the process works, who sits where, how long the deposition is likely to take and the names of the other lawyers involved to help put them more at ease.

Clients also benefit by having a chance to discuss issues that they are concerned about before the deposition starts. Many times clients are worried about an issue that might not be relevant or even likely to arise during the deposition. Defusing these concerns will allow them to focus on the real issues and reduce the stress of the procedure.

Clients cannot be effectively prepared in the moments immediately before a deposition is scheduled to begin. I like to try meet with them a few days before the scheduled deposition to give them time to reflect on important issues in the case and to come up with more questions after the meeting. Doing this a few days before the deposition also helps to reduce stress and allow the client to be better prepared.

Finally, I end every client meeting reiterating that, if they forget everything else, they should always tell the truth.

Expert witness preparation

Preparing an expert witness for their deposition is also often essential to a positive outcome. Many experts are busy working in their selected field and spend relatively little of their time in litigation matters. They can be equally unprepared for the trips and traps lawyers commonly use during depositions. Some experts, unfortunately, ignore their own preparation for the deposition until the last minute. To avoid this, it is best to schedule at least two conferences with the expert to review the facts of the case, the basis for their opinions and the scope of their testimony. I also frequently take this time to review my anticipated direct examination of the expert. I do this if it appears the expert might be expensive to bring live to trial.

Review the materials sent to the expert prior to the start of the deposition. I try to ensure that the expert has a copy of every pertinent document, deposition or other form of evidence before the deposition starts. An expert who ignores a crucial piece of evidence or testimony before testifying creates a nightmare of cross examination possibilities. If you are fortunate to stumble across this situation with an opposing expert, ask hypothetical questions based on the missing testimony to determine if having it would change their opinions. If you are unlucky enough to be on the receiving end of this line of questioning, I think it is important to get the evidence to the expert before the deposition ends and give them a chance to respond.

Review the expert's files well before you walk into the deposition. I have, on occasion, been fortunate enough to find files from other cases tucked away inside the expert's materials. This does not always lead to anything admissible, but can be another source of cross examination materials. In one instance, for example, I deposed an expert that had mistakenly relied on documents from another case he had with the defense firm. He dug himself in deep before the opposing lawyer realized what had happened. This could have easily been avoided by going through the materials.

Rule 202 Depositions

At the time I wrote this paper, the procedure rules allowed parties to conduct depositions to investigate potential claims. T.R.C.P. 202. These deposition can be very useful in evaluating a case and, if you do your homework, can give you an advantage in the case after it is filed. The scope of these

depositions is usually fairly limited but can give a Plaintiff a unique opportunity to control the flow. Often, the 202 deponents have not had a chance to review all of the pertinent records or documents nor have they had time to formulate a defense. As a result, you often get more of the truth during these pre-suit depositions. When taking 202 depositions, I work hard to get and review as many of the pertinent records and evidence as possible. I have not had the opportunity to defend a 202 deposition, but would reluctantly encourage lawyers doing this work to be sure to review the evidence with their clients before the deposition. Most judges do not allow discovery of pure opinion testimony during 202 depositions, but do allow complete examinations concerning what the deponent knows about the facts of the case. It is always worth trying to inquire into these areas but I would advise those defending them to prevent this testimony.

“The Dry Stuff”

III. DISCOVERY CONTROL PLANS

1. Since January 1, 1999, every case must be governed by a discovery control plan under TRCP 190.
2. A plaintiff has the ability to select a discovery control plan level as part of their original petition. The plan selected will control the amount of discovery that will be allowed and help determine the dates it must be completed.
3. A trial court retains the authority to impose Rule 190 limitations on depositions, in the interest of the fair administration of justice.

III. LIMITATIONS

A. Level 1: Rule 190.2.

1. For suits involving \$50,000 or less.
2. Each party has 6 hours in total to examine and cross-examine witnesses in depositions.
3. The parties may agree to increase time limits, but not beyond 10 hours per party, without a court order.
4. No depositions may be taken beyond the discovery period, except by agreement or court order. [Rule 109.2(c)(1)].
5. The court may modify the deposition hours so that no party is given unfair advantage. [Rule 109.2(c)(2)].
6. If the discovery period is reopened, a witness may be re-deposed. [Rule 190.2(d)].

B. Level 2: Rule 190.3.

1. May parties modify the limitations under Level 2? Reconcile Rule 190.3(a) with Rule 191.1.
 - a. Rule 190.3(a) provides that the discovery limitations *must* be followed.

b. Nonetheless Rule 191.1 reserves the right to the parties to modify rules pertaining to depositions: The answer appears to be YES.

2. Each “side” may have no more than 50 hours in oral depositions.

a. “Side” defined.

(1) “Side” refers to all the litigants with generally common interests in the litigation. [Rule 190.3(b)(2)].

(2) Comment 6. The 50-hour limit only applies to examination and cross-examination of the opposing side, including its designated experts and persons who are subject to the side’s control. [Rule 190.3(b)(2)].

b. If one side designates more than two experts, the opposing side may have an additional 6 hours of total deposition time for each additional expert designated.

c. The court may modify the deposition hours and *must* do so when a side or party would be given unfair advantage.

d. While the 50-hour limit does not apply to written depositions, the comments made clear that depositions on written questions may not be used to circumvent the limitations on interrogatories under Levels 1 and 2. [Comment 5, Rule 190].

3. Depositions under Level 2 must be completed within the discovery control plan, which ends nine months after the earlier of the first response to written discovery or the first oral deposition. [Rule 190.3(b)(1)].

4. While tacitly the rules allow a notice of deposition to be served with the petition (there is nothing in the rules proscribing such an approach) the practitioner should be aware that under Level 2, the discovery period will begin to run from the date of the first response to written discovery or the first oral deposition. [Rule 190.3(b)(1)(B)(ii)].

C. Level 3: Rule 190.4.

1. There are no *per se* limitations on depositions prescribed under Level 3.

2. The parties may agree to limitations, or the court may impose limitations as part of a discovery control plan.

3. If the parties do not agree on limitations, the limitations under Level 2 apply by default. [Rule 190.4(b)].

4. Level 2 limitations on depositions apply even if a party requests a Level 3 control plan, until the court enters a Level 3 order.

5. Court-ordered Level 3 discovery control plan.

a. A court-ordered discovery control plan under Level 3 *must* provide a “discovery period” during which all discovery, including depositions must be completed. [Rule 190.4(2)].

b. The court-ordered discovery control plan under Level 3 *must* provide limits on discovery, presumably also on depositions. [Rule 190.4(3)].

c. A court, as part of a Level 3 control plan, may order that Level 2 limitations on discovery apply (i.e., the 50 hour limitation).

D. Rules Unaffected By Limitations.

1. The limitations on discovery under Rule 190 do not apply or include discovery conducted under Rule 202 (“Depositions Before Suit or to Investigate Claims”) or Rule 621a (“Discovery and Enforcement of Judgment”). [Rule 190.6]

2. But, Rule 202 cannot be used to circumvent the limitations of Rule 190.

IV. NOTICING AND OBJECTING TO NOTICES OF DEPOSITIONS.

A. Filing.

1. *Neither* notices *nor* responses to notices are filed. [Rule 191.4(a)].

2. Notices and subpoenas regarding nonparties *must* be filed. [Rule 191.4(b)(1)].

3. Motions for protection and motions to quash *must* be filed. [Rule 191.4(b)(2)].

4. Agreements regarding depositions *must* be filed. [Rule 191.4(b)(3)].

5. Notices must be served on all parties of record. [Rule 191.5].

B. Timing.

1. There is no provision stating the earliest time a notice may be served.

2. Discovery may be taken in any sequence or order. [Rule 192.2]. Keep this in mind when dealing with the order that parties are deposed. It is often claimed that there is a rule requiring a Plaintiff to be deposed before a Defendant in a case. However, this is not the case. 9

3. A deposition may not be noticed for a date beyond the discovery period without an agreement or order of the court. [Rules 190.3(b), 190.4(b), and 199(2)(a)].

4. Question whether a court may provide in a discovery control plan that a deposition may be taken beyond the discovery period, if noticed before the conclusion of the discovery period. [See Comment 4; Rule 190].

5. A notice of a party must provide reasonable advance notice. Neither the rule nor the comments provides any more specific time period in this regard.

6. Experts.

a. An expert that is “employed” by a party is considered under the control of the party and presumably would be under the same requirements for advance notice as a notice of a party’s deposition.

(1) Reasonable notice;

(2) No subpoena *duces tecum* required. [See Rule 196 regarding requests for production from parties].

b. A non-retained expert (i.e., one not specifically retained or employed by a party as an expert witness) would arguably be treated the same as a nonparty witness.

7. A notice of a party, including a request for production, must allow the responding party at least 30 days from the date of the notice within which to respond to the request for production.

8. A notice for a deposition on written questions must give at least 20 days advance notice.

9. A notice with subpoena for just documents, without written questions must provide at least 10 days advance notice.

10. A notice for an oral deposition of a nonparty has no requirements with regard to advance notice, but arguably must provide reasonable notice, even though this is not clearly expressed in the rules. If documents are subpoenaed, the witness must be served with notice 10 days before the subpoena is issued.

C. Content.

1. Individuals.

The name of the individual to be deposed, whether a person, an organization or corporation, must be stated in the notice.

2. Corporations and Organizations.

Designated Corporate Representatives. If an organization is named as a witness:

a. The notice must describe with reasonable particularity the topics on which examination is requested.

b. In response, the organization must designate one or more individuals to testify on its behalf:

(1) the response to the notice must be within a reasonable time before the deposition;

(2) for each individual designated, the response must state the matters on which the individual will testify;

(3) presumptively, the response should be in writing, although this is not expressly stated in the rule.

c. Each individual designated must testify as to matters that are known or reasonably available to the *organization*.

d. Merely because an individual is deposed as a representative does not preclude taking a deposition of the person in their individual capacity (or as a representative on other matters) by any other procedure authorized by the rules.

e. Each person designated as a representative constitutes a separate witness for purposes of the 6 hour limit per witness. [See Comment 2; Rule 199.5].

3. Time and Place.

This notice must state a reasonable time and place. The deposition may be noticed for the following places:

a. The county of the witness' residence;

b. the county where the witness is employed or regularly transacts business in person;

c. The county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);

d. The county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

e. Subject to the foregoing, at any other convenient place directed by the court in which the cause is pending. [Rule 199.2(b)(2)].

4. Notice must state if an alternative means of recordation is to be employed.

5. Notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

6. Requests for Production.

A notice may contain a request for production:

a. Nonparty.

The request must comply with Rule 205 and the documents to be subpoenaed must be identified in the notice, or in an attachment.

b. Party.

When the witness is a party or subject to the control of a party, document requests are governed by Rules 193 and 196.

(1) The requesting party must provide at least 20 days from service, within which to respond to the request;

(2) The responding party must respond in writing;

(3) Rule 193 will govern objections and claims of privilege.

7. Compelling Attendance.

a. Nonparty.

The notice may request issuance of a subpoena pursuant to Rule 176. (*See* Subpoenas, below);

b. Parties.

A notice has the same effect as a subpoena with regard to a party or an individual under the party's control.

D. Objections to Time and Place [Rule 199.4].

1. An individual may object to the time and place specified in a notice by either a motion for protection or a motion to quash.

2. If the motion is filed by the 3rd business day after service of the notice, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

V. CONDUCTING THE ORAL DEPOSITION [Rule 199.5]

A. Attendance [Rule 199.5(a)].

The witness must stay in attendance when the deposition is begun and until completed.

B. Time Limits [Rule 199.5(c)].

No side may examine or cross-examine an individual witness for more than six hours. Breaks during the depositions do not count against this limitation.

C. Conduct During the Deposition.

1. Guidelines.

a. The deposition must be conducted as though the testimony were being received in a courtroom during trial.

b. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.

c. Counsel should cooperate and be courteous to each other and to the witness.

d. The witness must not be evasive or unduly delay the deposition.

2. Conferences.

a. Private conferences between witness and witness' attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted.

b. Under the federal rules, it has been held that when a question is pending, neither the witness or the attorney may interrupt the deposition to confer. It was also held however that an attorney may consult with a witness during breaks in the deposition. *In re Stratosphere Corp. Securities Litigation*, 1998WL640325 (D. Nev. 1998).

c. Private conferences may be held during agreed recesses and adjournments.

3. Objections [Rule 199.5(e)].

a. Objections to *questions* during the oral deposition are limited to “Objection, leading” and “Objection, form.”

(1) Comment

An objection to the form of a question include objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous.

(2) Ordinarily, a witness must answer a question at a deposition subject to the objection.

b. Objections to *testimony* during the oral deposition are limited to “Objection, non-responsive.”

c. Waiver.

(1) The above objections are *waived* if not stated as phrased during the oral deposition.

(2) The objecting party must give a clear and concise explanation of the objection if requested by the party taking the oral deposition, or the objection is waived.

(3) Argumentative or suggestive objection or explanations waive objections and may be grounds for terminating the oral deposition.

4. Instructions Not to Answer [Rule 199.5(f)].

a. An attorney may instruct a witness not to answer a question during an oral deposition under the following circumstances:

(1) only if necessary to preserve a privilege;

(2) comply with a court order or the rules of discovery;

(3) protect a witness from an abusive question or one for which any answer would be misleading;
or

(4) secure a ruling.

b. An objection may be inadequate if a question incorporates such unfair assumption or is worded so that any answer would necessarily be misleading, i.e., whether he has yet ceased conduct he denies ever doing.

c. Abusive questions include questions that inquire into matters (a) beyond the scope of discovery; (b) that are argumentative; (c) that are repetitious or harassing.

d. The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

5. Suspending the Deposition.

a. If time limits have been exceeded;

b. If there has not been compliance with the rules of conduct.

D. Sanction for Noncompliance with Conduct Rules [R199.5(d)].

If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

VI. SCOPE OF DEPOSITION DISCOVERY

A. No Express Changes.

1. Rules 192.3 continues generally to allow discovery regarding any matter that is relevant to the subject matter in the pending action.

2. No “Fishing”

a. Discovery devices are not allowed to be used to explore or “fish” for additional causes of action or theories of recovery. *Dillard Dept. Stores, Inc. v. Hall*, 909 S.W.2d 491 (Tex. 1995).

b. Fishing is not a proper use of any discovery device.

c. A question clearly beyond the scope of discovery may be considered abusive. [Comment 4; Rule 199].

B. Contentions.

1. Rule 192.3(j) provides that a party may obtain discovery of any other party’s legal contentions and the factual basis for them, but does not require a marshaling of evidence. [See Comment 5; Rule 192].

2. The Texas Supreme Court has indirectly held that a party may inquire into another party’s contentions during a deposition. *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991).

C. Any Individual.

1. Non Compos Mentis.

A party to a suit has the right to depose the opposing party even if that party has been declared *non compos mentis*. *Mobil Oil Corp. v. Floyd*, 810 S.W.2d 321 (Tex. App. – Beaumont 1991).

2. Attorneys.

a. An attorney may be an individual with knowledge of facts relevant to the subject matter of the lawsuit.

b. An attorney's deposition may be taken in a case even if he is representing parties in the action. *Smith, Wright & Weed v. Stone*, 818 S.W.2d 926 (Tex. App. – Houston [14th Dist.] 1991, orig. proceeding).

3. Apex.

a. Definition.

(1) An “apex” deposition is one taken of a corporate officer at the apex of the corporate hierarchy.

(2) The “apex” deposition rule is not just confined to the chief executive officer; it may also be applied to other “high level” corporate officers. *In re El Paso Healthcare System*, 969 S.W.2d 68 (Tex. App. – El Paso 1998).

b. Crown Central Guidelines.

(1) After a motion is filed for a protective order to prohibit the taking of a deposition of a “high corporate official,” the trial court must determine whether the party seeking the deposition has shown the official has **any unique or superior personal knowledge** of discoverable information. *In re Bunch*, No. 05-98-01204-CV, 1998WL851123 (Tex. App. – Dallas, December 10, 1999).

(2) If unique or superior personal knowledge cannot be shown, then the trial court shall require the requesting party to **obtain the discovery through less intrusive means**. *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995).

(a) It is not necessary to **first** attempt to obtain discovery through less intrusive means if the “apex” witness can be shown to have unique or superior knowledge. *Frozen Food Express Ind., Inc. v. Goodwin*, 921 S.W.2d 547 (Tex. App. – Beaumont 1996).

(b) Motion for protection granted when V.P. of operations had not been deposed prior to seeking discovery from the CEO because the trial court found that less intrusive methods had not been utilized. *In re Daisy Manufacturing Co., Inc.*, 976 S.W.2d 327 (Tex. App. – Corpus Christi 1998).

c. Application.

(1) The affidavit which accompanies the motion to quash must contain a **broad denial** of “any knowledge of relevant facts” according to the threshold requirements of *Crown Central*. *In re Columbia Rio Grande Healthcare, L.P.*, No. 13-98-440-CV, 1998WL667996 (Tex. App. – Corpus Christi, August 12, 1998).

VII. EXPERT DEPOSITIONS

A. Scope.

1. Discovery regarding experts may only be obtained through requests for disclosure, reports and depositions.
2. The following information may be obtained about an expert through depositions. [Rule 195.4].
 - a. Subject matter;
 - b. Mental impressions and opinions;
 - c. Facts known (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions; and
 - d. Other discoverable matters, including documents not produced in disclosure (i.e., evidence of bias). [See Rule 192.3(e)(5)].

B. Scheduling.

1. A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:
 - a. If a report is not produced at time of designation, then the party must make the expert available for deposition reasonably promptly after the expert is designated.
 - b. If the deposition cannot – due the actions of the tendering party -- be concluded more than 15 days before the deadline for designating experts, that deadline must be extended for other experts testifying on the same subject.
 - c. If the report is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.
2. A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

VIII. SUPPLEMENTATION

A. Timing.

1. Generally, there is no duty to supplement a deposition.
2. A general duty to supplement deposition testimony would impose too great a burden on the litigants; therefore, there is generally no duty to supplement deposition testimony. *Titus County Hospital District v. Lucas*, 988 S.W.2d 740 (Tex. 1998).

B. Experts.

If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must supplement the expert's deposition testimony, but only with regard to the expert's mental impressions or opinions and the basis for them.

IX. SUBPOENAS

A. Reorganization.

Rule 176 consolidates and clarifies the rules governing trial and discovery subpoenas, which formerly were scattered throughout Rules 176-79 and 201.

B. Substantive Changes.

1. The subpoena range is now 150 miles from the county where the suit is pending. [Rule 176.3(a)].
2. Attorneys are now enabled to issue both trial and discovery subpoenas in order to reduce costs. [Rule 176.4(b)].
3. There is a general duty imposed on persons requesting subpoenas to avoid imposing undue burden and expense on the person served. [Rule 176.7].
4. A protective order may be sought by not only the person to whom the subpoena is directed, but also by **any person** affected by the subpoena. [Rule 176.6(b)].

C. Parties.

1. If the witness is a party or an employee or agent subject to the party's control, he/she can be compelled to produce documents and tangible things simply by service of the notice to take the deposition. [Rule 199.2(b)(5)].
2. If discovery is served on a party with a subpoena, the procedures for responding, objecting, asserting privileges and supplementing would be controlled by the rules governing discovery from the parties, not by those set forth in Rule 176.

D. Nonparties.

1. A party seeking discovery by subpoena from a nonparty must serve on the nonparty witness and all parties a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.
2. A party may compel production of documents and tangible things from a nonparty without the need for a motion or a written or oral deposition by serving the notice required by Rule 205.2 and a subpoena. [Rules 205.1(d) and 205.3(a)].

X. DEPOSITIONS BEFORE SUIT

A. History.

1. Rule 202 incorporates repealed Rule 737 (bills of discovery) and broadens the scope of former Rule 187 (depositions to perpetuate testimony). It expressly permits discovery depositions prior to suit to investigate potential claims.
2. 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. [Rule 202.1].

B. Scope.

1. Pre-suit investigatory depositions are allowed, but they are limited in the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition, to prevent taking unfair advantage of a witness or others.
2. The deposition may be used as a sworn statement to impeach the witness.
3. If Rule 202 is used abusively and/or to circumvent deposition notice requirements, the trial court is authorized to forbid the use of the deposition for any purpose, including impeachment. [Comment 2; Rule 202].

C. The Petition.

The petition must:

1. Be verified;
2. Be filed in a proper court of any county:
 - a. where venue of the anticipated suit may lie, if suit is anticipated; or
 - b. where the witness resides, if no suit is yet anticipated;
3. Be in the name of the petitioner;
4. State either:
 - a. the petitioner anticipates a suit; *or*
 - b. the petitioner seeks to investigate a potential action, if any;
5. State the subject matter of the anticipated action, if any;

6. If suit is anticipated, there are more stringent requirements about who must be named in the petition and provided notice of the action. [*See* Rule 202.2(f)];
7. The expected testimony the petitioner expects to elicit and the reasons for obtaining the testimony must be stated in the petition;
8. An order must be requested.

D. Notice.

1. 15 days before the date of the hearing.
2. To all persons the petitioner seeks to depose.
3. If suit is anticipated, on all parties petitioner expects to have interests adverse to petitioner's anticipated suit.
4. The court may as justice requires lengthen or shorten the notice requirement.

E. The Order.

1. The court must order a deposition to be taken "if, but only if,"
 - a. taking the deposition will prevent a failure or delay of justice; *or*
 - b. the benefit of taking the deposition outweighs the burden and expense.