TEXAS RULE OF CIVIL PROCEDURE 202:
ON YOUR MARK, GET SET, PRE-SUIT DISCOVERY

Updated and Presented by:
ANDREA COOK, *Dallas*
Stewart Law Group

Written by:
AMY M. STEWART, *Dallas*
Stewart Law Group

State Bar of Texas
36TH ANNUAL
ADVANCED EVIDENCE AND DISCOVERY
Houston – April 13-14, 2023
San Antonio – May 18-19, 2023

CHAPTER 8

Stewart Law Group PLLC
We're on Defense.

1722 Routh Street, Suite 745
Dallas, Texas 75201

www.stewartlawgrp.com
acook@stewartlawgrp.com

Andrea Cook

Partner

Dedicated. Diligent. Tenacious.

Andrea delivers results. Ultimately what sets her apart is her tenacity, vision and ability to develop and execute game plans necessary to meet the client's goals. Andrea is a team player who wants her clients to know that as a team, she will always work with them to get the win.

READY TO BE ON DEFENSE FOR HER CLIENTS

With over ten years of experience litigating a substantial variety of insurance defense cases, Andrea has an extensive advantage to thrive in many sectors; including but not limited to handling and defending complex expert and corporate matters. Additionally, she is experienced in defending clients in complex litigation involving product liability, trucking claims, business litigation, and catastrophic injuries.

UNIQUE PROFESSIONAL BACKGROUND

Before heading to Texas, Andrea served as a municipal attorney for the City of Chicago where she gained valuable trial experience defending in police misconduct cases involving false imprisonment, excessive force, and wrongful death. She has litigated first-party insurance claims involving catastrophic injuries, property, and personal insurance claims, as well as third-party casualty matters.

LEAVES IT ALL ON THE COURT

Andrea prides herself on being responsive, tenacious, and grounded. She believes her job is to fulfill the task at hand while putting forth her best effort. Andrea's drive stems from her inability to give up. She fearlessly addresses legal issues and takes full responsibility of every project she manages, working tirelessly to ensure that clients come first, and their needs are met. Andrea is the lawyer you can count on.

Bar Admissions

- State Bar of Texas
- U.S. District Court for the Northern District of Texas
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Western District of Texas
- U.S. Illinois State Bar Association
- U.S. District Court for the Western District of Illinois
- Trial Bar, Northern District of Illinois

ANDREA'S BACKGROUND

"Andrea works day and night to ensure that the client comes first, and their needs are met."

Matters

- Negotiated a favorable settlement for an extremely contentious fault catastrophic transportation matter for a major furniture company
- Won a summary judgment for a national logistics company concerning third-party liability and indemnity that is being used for all similar cases filed across the country
- Represented several retail companies and developed a strategic approach to early settlements in Texas to keep costs low
- Managed a large docket of cases involving a national home goods store with cases stemming from premises liability to wrongful detentions
- Negotiated numerous favorable settlements regarding fitness equipment for major national manufacturers
- Prepared trial team for novel secondary liability cases involving wrongful death and catastrophic injuries
- Constitutional law/Section 1983: Prepared for numerous police misconduct trials and took 5 to verdict in first, second, and third chair roles

Education

- J.D., Howard University School of Law
- M.P.S., DePaul University-School of Public Services, Metropolitan Planning and Urban Affairs
- B.S., Northwestern University, Communication Studies

Legal Experience

- Partner, Stewart Law Group PLLC | 2022 - Present
- Senior Counsel, Clark Hill, LLP | 2022
- Partner, Gordon Rees Scully Mansukhani LLP | 2019 - 2021
- Senior Associate, Hawkins, Parnell, Thackston & Young, LLP | 2017 - 2019
- Senior Associate, Thompson, Coe Cousins, and Irons LLP | 2013 - 2017
- Assistant Corporation Counsel, City of Chicago Department of Law, Federal Civil Rights Litigation Division | 2006 - 2013
- Law Clerk and Prosecutor, Cook County States' Attorney's Office, Criminal Appeals Section | 2005 - 2006

Legal Associations

- Dallas Bar Association
- J.L. Turner Legal Association
- Dallas Women Lawyers Association
- Black Women Lawyers Association

Affiliations

- DWLA- The Pitch Participant
- Defense Research Institute
- The NEW Roundtable, Provisional Member
- "We Lead." Leadership Program, 2021 Member
- Howard University School of Law Alumni Association
- Academy of Our Lady Alumna Association
- Northwestern University Alumni Association
- University of North Texas, Adjunct Professor
- Junior League of Collin County, Provisional Member

TABLE OF CONTENTS

I. IDENTIFYING THE "PROPER COURT" FOR RULE 202 PETITIONS 1

II. VERIFIED PETITION MUST ALLEGE FACTS TO SUPPORT INVESTIGATION INTO THE ANTICIPATED SUIT..... 2
A. Rule 202 Petition Must Investigate Ripe Claims..... 2
B. Keep an Eye on Statute of Limitations related to Potential Claims. 2
C. Is a Rule 202 Petition a "legal action" or Not?..... 2
D. A Rule 202 Petition is Rendered Moot if a Lawsuit is Filed..... 3

III. PROACTIVELY SEEK DOCUMENTS IN THE VERIFIED PETITION BUT BE READY FOR A FIGHT. 3

IV. WHETHER RULE 202 DEPOSITIONS APPLY TO NON-PARTIES IS UNCLEAR..... 4

TEXAS RULE OF CIVIL PROCEDURE 202: ON YOUR MARK, GET SET, PRE-SUIT DISCOVERY

A new client walks in your office to discuss a potential new case. After the discussion, you think the case *may* have merit, but not exactly sure. If only there was a procedure where you could learn more about the possible causes of action, red flags, or other potential parties before investing the time and expense of filing a lawsuit. This article will provide you with some of the tools provided by Texas Rule of Civil Procedure 202 to conduct pre-suit discovery to analyze the merits of your case early in the process so you can advise your client of the best steps to resolve the potential dispute.

As is normally the case, Texas leads the way in providing significantly broader power for litigators to investigate potential claims under Texas Rule of Civil Procedure 202. Additionally, Rule 202 is an investigatory tool the Supreme Court of Texas has declared trial courts must "strictly limit and carefully supervise pre-suit discovery," and explained that Rule 202 "is not a license for forced interrogations." *In re Wolfe*, 341 S.W.3d 932, 932-33 (Tex. 2011) (orig. proceeding) (per curiam) (rule providing for pre-suit discovery "is not a license for forced interrogations").

In general, Rule 202 states "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. However, as the practice of law teaches us, there are no shortcuts and litigators must follow the process set forth in Rule 202 so she can persuade the court to allow pre-suit discovery. The following article outlines how to be prepared to win at pre-suit discovery.

I. IDENTIFYING THE "PROPER COURT" FOR RULE 202 PETITIONS

Rule 202 is silent on the issues of standing and jurisdiction, although it does contain a venue directive. The rule states a person must submit a verified petition to the "proper court" of any county where either the "venue of the anticipated suit may lie, or where the witness resides, if no suit is yet anticipated." The verified petition is filed with the court to seek authorization for one of two actions—one, to take a deposition to either perpetuate testimony for use in an anticipated suit, or two, to investigate a potential claim or suit. The petition does not need to set forth an actual claim—hence, the need for pre-suit discovery—but must include the subject matter of the potential cause of action. Additionally, the verified petition must also state the deposition's purpose, who the intended witnesses are, including adverse parties to any potential lawsuit.

Courts must grant the petition and order the deposition to proceed if allowing the pre-suit discovery to go forward will prevent a failure or delay of justice. Also, the court will consider and must find that the benefit of proceeding with pre-suit discovery outweighs the burden or expense of taking this action.

The *Durrell* case advises us on what is a "proper court" to file the Rule 202 petition. *Houston Independent School District v. Durrell*, 547 S.W.3d 299 (Tex. App. – Houston [14th District], March 29, 2018, no pet.). In his Rule 202 petition, Durrell alleged school officials and others not employed by the school injured his son while being escorted to the principal's office following a "behavior incident." The Houston high school filed a plea to the jurisdiction and alleged the court lacked subject matter jurisdiction over Durrell as a result of the Texas Tort Claims Act. Later, the school raised governmental immunity on appeal as well as failure to exhaust administrative remedies.

The Houston court of appeals held to obtain a Rule 202 pre-suit investigatory deposition from the high school, Durrell did not have to establish the court would have jurisdiction over the institution if a possible action ensued. Instead, Durrell only needed to show the trial court would have subject matter jurisdiction over the anticipated action. Therefore, the Houston court of appeals denied the school district's plea to the jurisdiction. The court pointed out that Rule 202 petitions are not legal actions that would generally be barred by the board by governmental immunity. *See Komes v. Texas Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App. – Austin 2013, pet. denied). Going further, the court of appeals explained that Rule 202 did not even require that the person or entity being deposed was a potentially liable defendant. *In re Donna ISD*, 299 S.W.3d 456, 460 (Tex. App.–Corpus Christi 2009, orig. proceeding).

The Texas Supreme Court dealt with the personal jurisdiction issue when deciding if Google had to disclose the identity of a blogger in the *In re Doe, aka Trooper* case. In re Doe, aka "Trooper," 444 S.W.3d 603, 607–08 (Tex. 2014). Here, Google did not contest the Rule 202 petition. Instead, the blogger, aka Trooper, made an anonymous appearance in the trial court to argue that the trial court lacked personal jurisdiction over him. In its opinion, the Texas Supreme Court outlined Rule 202's history and ultimately held that a trial court must have personal jurisdiction over a potential defendant before ordering a Rule 202 deposition. Despite the Rule being silent on the issues of personal and subject matter jurisdiction, the Texas Supreme Court held that because of the Rule's use of the phrase "proper court," it must have personal jurisdiction over the anonymous blogger. As the Supreme Court explained,

> If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject-matter jurisdiction. . . . We will not interpret Rule 202 to make Texas the world's inspector general.

Id. Accordingly, pre-suit discovery under Rule 202 requires a petitioner to establish both subject matter and personal jurisdiction in the petition.

II. VERIFIED PETITION MUST ALLEGE FACTS TO SUPPORT INVESTIGATION INTO THE ANTICIPATED SUIT

The *In re City of Tatum* case establishes that the courts must rely on evidence that the deposition testimony sought is for use in an anticipated suit, or to investigate a potential claim or suit. *In re City of Tatum*, 567 S. W. 3d 800 (Tex. App. – Tyler, January 9, 2019, orig. proceeding) . This mandamus proceeding arose from Petitioner Linda Peterson's request for two Rule 202 depositions of the City of Tatum's Chief of Police and the custodian of records for the city and/or the Tatum Police Department. The City sought emergency relief including a stay of Peterson's Rule 202 depositions.

The Tyler Court of Appeals held that Peterson failed to introduce evidence to support her request for pre-suit depositions under Rule 202. The Court concluded that the record failed to identify Peterson's reason for actually seeking pre-suit depositions. Instead, her petition indicated she sought pre-suit depositions for use in an anticipated suit. However, at the hearing her arguments suggested she sought the pre-suit depositions to both to obtain testimony for use in an anticipated suit *and* to investigate a potential claim or suit. Either way, the court found that she failed to present evidence supporting her Rule 202 request, regardless of the reason for which she sought the depositions.

Accordingly, the plain language of Rule 202.4 requires that the judge "**must** order a deposition to be taken if, ***but only if***, he makes certain findings before granting relief under either subsection of Rule 202.1. The Tyler appeals court also relied on the 2011 Texas Supreme Court opinion, *In re Does*, that pointed out Rule 202.4 findings cannot be implied from the record. *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011).

A. Rule 202 Petition Must Investigate Ripe Claims.

Rule 202 petitions seek to investigate past actions, not to foresee future misconduct. In the case, *In re DePinho*, the petitioner filed a Rule 202 petition seeking to investigate a potential claim against the MD Anderson Hospital president for alleged tortious interference ***with the discovery*** of a drug to treat Type 2 diabetes and cancer. Notably, the allegation was that the hospital executive was going to take action in the future, not that the action has already occurred. The Texas Supreme Court granted the mandamus petition and held that a trial court cannot order Rule 202 depositions for an unripe claim. The supreme court simply relied on the definition of "claim," which was that a claim is an existing rather than future or speculative right that may be presently asserted.

In conclusion, this petitioner's Rule 202 petition presented a hypothetical that the president would, at some point in the future, take steps that may give rise to a tortious interference claim, which was not the proper use of a Rule 202 petition. *See also In re John Does 1 and 2*, 337 S.W.3d 862 (Tex. 2011) (orig. proceeding) (attempt to use intervention to raise substantive claims in Rule 202 proceeding improper); *In re Hidalgo Cty. Crim. Dist. Atty.*, 581 S.W.3d 859 (Tex. App.—Corpus Christi 2019, orig. proceeding) (Rule 202 petitioner provided sufficient facts to show jurisdiction and no abuse of discretion in ordering pre-suit deposition)

B. Keep an Eye on Statute of Limitations related to Potential Claims.

Additionally, practitioners who rely on Rule 202 pre-suit discovery should monitor closely the limitations statutes related to the potential claims they seek to assert in the future. The filing of a Rule 202 petition does not abate the limitations for any potential future claims. Accordingly, after the Rule 202 investigation is over and before limitations expire, the practitioner must consider whether to file an independent suit to bring substantive claims. *Glassdoor, Inc. v. Andra Group*, 575 S.W.3d 523 (Tex. 2019) ("[W]here the statute of limitations runs on a claim as a matter of law while a Rule 202 petition seeking to investigate that claim is being litigated, the Rule 202 proceeding is rendered moot.") *Id*. At 527 n.3. If a case becomes moot, the court must vacate all previously issued orders and judgments and dismiss the case for want of jurisdiction. *Id*. At 527. (Tex. App.—Corpus Christi 2019, orig. proceeding) (granting mandamus relief when trial court refused to dismiss petition in intervention to bring substantive claims in Rule 202 proceeding); *Hughes v. Giammanco*, 579 S.W.3d 672, 685 (Tex. App.— Houston [1st Dist.] 2019, no pet.)(appeal dismissed, judgment vacated) (holding TCPA did not apply to Rule 202 proceeding because it is not a "legal action").

C. Is a Rule 202 Petition a "legal action" or Not?

Another head scratcher related to Rule 202 is if the petition is a "legal action" for Texas Citizen's Participation Act (TCPA) purposes. Courts are split on that as well. *Compare DeAngelis*, 556 S.W.3d at 847-49; *In re Krause Landscape Contractors*, 595 S.W.3d at 839; *In re Elliott*, 504 S.W.3d 455, 466 (Tex. App.—

Austin 2016, orig. proceeding); with *Houston Tennis Association, Inc. v. Thibodeaux,* 602 S.W.3d 712, 718-19 (Tex. App.—Houston [14th Dist.] 2020, no pet.). To be noted, Texas courts have held that a Rule 202 petition for pre-suit discovery is not a legal claim on the merits, therefore the TCPA does not apply. *Caress v. Fortier, Rooting for Acorns Discovery Update Chapter 9* 22 576 S.W.3d 778 (Tex. App.- Houston [1 Dist.] 2019, no pet.); *see also Hughes v. Giammanco*, 579 S.W.3d 672 (Tex. App.- Houston [1 Dist.] 2019) ("[A] petition under rule 202 is ultimately a petition that asserts no substantive claim or cause of action upon which relief can be granted….We cannot agree that a rule 202 petition is itself a 'suit.'"); *Breakaway Practice, LLC v. Lowther*, No. 05-18- 00229-CV, 2018 WL 6695544, at *2 n.2 (Tex. App.—Dallas Dec. 20, 2018, pet. denied); *Navigating Appellate Minefields Chapter 25,* 5 S.W.3d 565, 572 n.8 (Tex. App.—Dallas 2011, no pet.) (Rule 202 petition for pre-suit discovery "is in aid of an incident to an anticipated suit.").

The Texas Supreme Court did not directly address the issue in a recent 2019 case because the statute of limitations barred the underlying defamation claim so the TCPA challenge to the Rule 202 petition was moot. *Glassdoor, Andra Group, LP*, 575 S.W.3d 523, 525, 527, 531 (Tex. 2019). Therefore, it is critical for litigators to research the relevant circuit court's position related to these TCPA-Rule 202 issues.

D. A Rule 202 Petition is Rendered Moot if a Lawsuit is Filed.

A Rule 202 proceeding in anticipation of a suit can be nullified by a lawsuit. Indeed, a later filed suit may moot the Rule 202 proceeding. *In re Overhead Garage Door, LLC*, No. 07-18-00015- CV, 2018 WL 934814, at *2 (Tex. App.—Amarillo Feb. 16, 2018, orig. proceeding) (mandamus granted and court noted investigation could go forward in the lawsuit; *Leasure v. Jones*, No. 03-17-00015, 2017 WL 1046764, at *1 (Tex. App.— Austin March 8, 2017, no pet.); *In re Denton*, No. 10-08-00255-CV, 2009 WL 471524, at *1 n.1 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (holding ability to obtain deposition in later suit did not moot mandamus but established that use of Rule 202 was unnecessary)("The [Rule 202] proceeding is only an investigatory tool."); *Mayfield-George v. Tex. Rehab. Comm'n*, 197 F.R.D. 280, 283 (N.D. Tex. 2000) (Rule 202 petition not subject to removal because it asserts to a claim or cause of action).

III. PROACTIVELY SEEK DOCUMENTS IN THE VERIFIED PETITION BUT BE READY FOR A FIGHT.

Another key point reflected in the *In re City of Tatum case* was that petitioners should also request documents as a part of the pre-suit discovery. However, be ready to fight because there is caselaw supporting both sides of the issue and the Texas Supreme Court has not yet resolved it. Because the courts have simply denied the Rule 2020 petition, the requested document discovery issue has not been reached. *See e.g. In re Kiberu*, 02-07-00312- CV, 2008 WL 4602070, *3-4 (Tex. App.—Fort Worth Oct. 16, 2008, orig. proceeding); *In re Krause Landscape Contractors, Inc*., 595 S.W.3d 831, 839 (Tex. App.—Amarillo 2020, orig. proceeding) (petitioner failed to clearly and specifically identify how the benefit of the pre-suit depositions would outweigh the costs). Therefore, it is important to determine how the circuit is handling the issue.

For example, if the court is a strictly relying on Rule 202, the rule does not mention document production. *In re Pickrell*, 10-17-00091-CV, 2017 WL 1452851, at *6 App.—Waco Apr. 19, 2017, no pet.) (testimony only); *DeAngelis v. Protective Parents Coalition*, 556 S.W.3d 836, 854 (Tex. App.—Fort Worth 2018, no pet.) ("Indeed, the document requests appear so draconian that they would not be allowed in an actual lawsuit against the Court Watchers, and the time and expense involved in responding to the requests would be significant. Moreover, the request for the production of documents in the Rule 202 Petition is itself improper."); *In re Akzo Nobel Chem., Inc.,* 24 S.W.3d 919, 921 (Tex. App.—Beaumont 2000, orig. proceeding)("Neither 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.").

The 2017 *In Re Pickrell* case puts in doubt the ability to seek documents through a Rule 202 petition. The case involved a company seeking to have pre-suit discovery after an employee resigned and went to work for a competitor. The trial court found that the verified Rule 202 petition was inadequate. The Waco court of appeals stated that "in examining this evidentiary requirement, we are mindful that verified pleadings are generally not considered competent evidence to prove the facts asserted in the pleadings." Further, the court found that the entire petition contained speculation based solely on the employee resigning and going to work for the competitor, which was not sufficient evidence to meet Rule 202's evidentiary requirements. The Waco court of appeals explained that "Rule 202 deposition is not intended for routine use and must be strictly limited and carefully supervised."

Also, the Waco Court of Appeals quickly handled the former employer's request for document production. In denying the request, the court explained "[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." This court relied on the 2000 case, *In re Akzo Nobel Chemical, Inc.*, 24 S.W.3d 919, 921 (Tex. App.—Beaumont 2000, orig. proceeding), in its decision; therefore, expect to see these cases cited when the respondent objects to Rule

202 written discovery. However, it should be noted that the *Akzo* case dealt with the petitioner's request for an accident scene inspection rather than documents requests sought for a future oral deposition.

Alternatively, there are some courts that have read Rule 202 in conjunction with other rules to allow document production in addition to the deposition. Relying on *City of Dallas v. City of Corsicana*, 2015 WL 4985935 (Tex. App. – Waco, August 20, 2015, pet denied), the Tyler Court of Appeals indicated it may not be an abuse of discretion for the Court to authorize the production of documents in conjunction with Rule 202 depositions. In that case, City of Dallas filed a Rule 202 petition that included document production request, which the Court found was permitted by Rule 202. The Waco court of appeals analyzed the Rule's incorporation of standard non-party deposition practice and found that the rules permitted documents requests:

> Under Rule 202, documents can be requested in connection with a deposition. Rule 202.4(b) provides that if 'the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200,' and rule 202.5 provides that 'depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit.'

In conclusion, the court of appeals held that the "language of these rules when read together permits a petition seeking a pre-suit deposition under Rule 202 to also request the production of documents." *Id*. R. 202.4(b); 202.5. *See also In re Anand*, 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, orig. proceeding)." *In re Perrilloux*, 05-19-01584-CV, 2020 WL 2092483 at *4 (Tex. App.— Dallas, July 9. 2020, orig. proceeding).

IV. WHETHER RULE 202 DEPOSITIONS APPLY TO NON-PARTIES IS UNCLEAR.

Rule 202 may allow the petitioner to seek the discovery of information from non-parties pre-suit. Based on the limited caselaw on the subject, it may be granted where the verified petition provides enough evidence to connect the non-party directly to the potential causes of action and establishes the need for such a deposition. Indeed, court may not order pre-suit discovery by agreement of the witnesses over the objection of other interested parties without the findings required by Rule 202.4(a), which requires the Court to find the likely benefit of allowing the deposition to be taken outweighs the burden or expense of the procedure. *See In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016) (subject matter jurisdiction required to authorize Rule 202 relief); *In re John Doe a/k/a "Trooper"*, 444 S.W.3d 603 (Tex. 2014). Also, the issuance of Rule 202 is not supposed to be routine. This plays into due process issues of ordering someone to be deposed before actually advising her the claims and issues to be covered in the actual deposition.

In conclusion, the law is still evolving related to the limits on Rule 202 pre-suit discovery. Prior to attempting to move forward, be sure that you meet the many standards set forth in Rule 202 so you can score an easy win by learning more about the merits of a potential action before investing your time and resources into litigation.