

**THOUGHTS ON
DEPOSITION PRACTICE
IN TEXAS
2010**



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Thanks to my partner,
DONNA AVERSANO
for reading and editing the final draft...
so that I may blame her if cites are
wrong.



RULES



TRCP 199

TRCP 205



THE NOTICE



SCOPE



**We reject the notion that any
discovery device [including
depositions] can be used to fish.**

***In K Mart v. Sanderson,
937 S.W. 2d 429 (Tex. 1996)***



DEPOSITIONS ON WRITTEN QUESTIONS



SUBPOENA DUCES TECUM
v.
REQUEST FOR PRODUCTION



MOTION TO QUASH



PROTECTION



MASINGA v. WHITTINGTON



In re Toyota Motor Corporation
191 S.W.3D 498 (Tex. App. -Waco,
2006)



PRIVILEGES



NON-PARTIES



APEX DEPOSITIONS



*In re BP Products North America,
Inc.*

--- S.W.3d ----, 2008 WL
204506 (Tex. 2008)



Gauthier v. Union Pacific R. Co.
Slip Copy, 2008 WL 2467016
(E.D.Tex.)



COURT DISCRETION



COURT HAS DISCRETION TO MODIFY SCOPE OF DEPOSITIONS

In re West

--- S.W.3d ----, 2009 WL 946847
(Tex.App.-El Paso)



CONDUCTING THE DEPOSITION



TEXAS

RULE 199.5(d)

Conduct during the oral deposition; conferences. The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. . .
[emph. added]



OBJECTIONS, CONSULTATIONS AND INSTRUCTIONS NOT TO ANSWER



COMMENT-RULE 199- NO. 4

Abusive questions include question inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.



SANCTIONS



In re Campbell

Not Reported in S.W.3d, 2010 WL
3431712 (Tex.App.-Austin)



Ibarra v. Baker

**338 Fed.Appx. 457, 2009 WL
2244659 (C.A.5 (Tex.))**



*In re Harvest Communities of
Houston, Inc.*

**88 S.W.3d 343 (Tex.App.-San
Antonio, 2002)**



VIDEOTAPE DEPOSITIONS



*Roberts v. Homelite Division of
Textron, Inc.,
117, F.R.D. 637(N.D.Ind.1987)*



**[DCR DEPOSITIONS]
DEPOSITIONS OF CORPORATE
REPRESENTATIVES**



FED. R. CIV. P. 30(b)(6)



THE CORPORATE REPRESENTATIVE



Only a notice of a party is required to compel attendance. No subpoena or subpoena *duces tecum* is necessary.



The place of deposition is the same as for a party.



**Do not seek the individual with the
“most knowledge” on a topic.**

**If you are. . . STOP IT; it's
wrong and counter-productive.**



A party has two options when it comes to seeking a deposition from a corporation. It may notice a particular officer, director or managing agent pursuant to Fed. R. Civ. P. 30(b)(1) or it may notice the corporation and list “. . . with reasonable particularity [of] the matters on which examination is requested.” Fed. R. Civ. P. 30(b)(6).

GTE Products Corporation v. Gee, 115 F. R.D. 67 (D. Mass. 1987)

**TEXAS RULE PROVIDES FOR
DEPOSITION ONLY OF DCR,
NOT MANAGER.
NOT CEO, EXCEPT IF UNIQUE
KNOWLEDGE
[APEX DEPOSITION]**



In re Reaud,
--- S.W.3d ----, 2009 WL
1351453 (Tex.App.-Beaumont)



The notice for a corporate representative must with “reasonable particularity” set out the topics upon which the party seeking the deposition wishes to depose the corporation.

VERY IMPORTANT CONSIDERATION



The notice must set out discrete topics, which cannot be open-ended. . .
“included, but not limited to”
is too broad.

Reed v. Bennett, 193 F.R.D. 689 (D.Ks.2000)



EXAMPLE:

The relationship between each of the Yellow Transportation Entities on the date in question, including the terms of the relationship, the respective rights and obligations of the parties to the agreement, the relationship specifically with regard to the operation of the Yellow Transportation vehicle Huffman was operating at the time of the incident in question, and responsibility and accountability for Huffman's conduct in operating the Yellow Transportation vehicle at the time of the incident in question:



The party noticing the deposition
does not get to select the corporation's
representative (s).

CORPORATE ENTITY SELECTS



The corporation is free to select as a representative anyone it likes.

Cleveland v. Palmby, 75 F.R.D. 654 (W.D.Ok.. 1977).



The corporation may designate more than one representative on each topic.

The corporation may designate one representative on all topics.



STRATEGY CONSIDERATION

TIMING AND NUMBER OF TOPICS



The corporation appears vicariously through the corporate representative.



IMPORTANT

The corporate representative speaks on behalf of the corporation *only* with regard to the topics on which the representative is designated.



The representative testifies regarding the composite knowledge of the corporation on the topic on which the representative is designated.



The representative does not have to have personal knowledge about the topics on which the representative is designated.



AN INDIVIDUAL MAY BE BOTH A REPRESENTATIVE AND A FACT WITNESS

The corporate representative may be a representative on some topics and a fact witness on other matters.

A SOURCE OF A LOT OF CONTROVERSY



The representative must be prepared to testify to all information known by the corporation or reasonably knowable by the corporation on the topic for which the representative is designated.



“The corporation . . . must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.”

Marker v. Union Fidelity Life Ins. Co., 125

F.R.D.121 (D. N.C. 1989)



SANCTIONS may be warranted for a corporation failing to designate and produce a representative for deposition **OR** for failing to properly prepare the representative for deposition on the topics on which the representative is designated.

U.S. v. Taylor, 166 F.R.D.356 (M.D.N.C.1996)



The corporation may not avoid the deposition by claiming a lack of knowledge on the topic. The noticing party is entitled to take the deposition of a representative to test this claim.

Ierardi v. Lorillard, 1991 WL 158911 (E.D. Pa. 1991) (unreported).



**The testimony of the representative
binds the corporation on the topics
upon which the representative is
designated.**



**“Bind”
does not equal judicial admission.**



AT TRIAL representative's deposition testimony on the topics for which the representative was designated may be used by opposing party the same as a party's deposition.



Opposing side may use deposition testimony as an admission; however, party that was deposed may not use the deposition testimony offensively because it constitutes hearsay (to the extent the representative has no personal knowledge of the facts to which she has testified).



SCOPE



ISSUES



**ALL DISCOVERY LIMITED TO SCOPE
OF PLEADINGS
[DEPOSITIONS - DCR]**

***In re Ace Credit Services, LLC,*
Not Reported in S.W.3d, 2010
WL 1491780 (Tex.App.-San
Antonio)**



COMPARE

In re Univar USA, Inc.,

--- S.W.3d ----, 2010 WL 1610760
(Tex.App.- Beaumont)



Contentions: OK

Factual Basis
for contentions: Controversial

Beliefs: OK

Interpretation of documents: OK



In re Garcia

Not Reported in S.W.3d, 2007 WL
1481897 (Tex.App.-San Antonio)



TOPICS v. FACTS



PAPARELLI

(Depose only on topics)

v.

KING V. PRATT & WHITNEY

(Also inquire about factual knowledge)



ATTORNEY/CLIENT PRIVILEGE



*In re Boxer Property Management
Corp.*

Not Reported in S.W.3d, 2009
WL4250123 (Tex.App.-Hous. (14
Dist.))



In re Exxon Corp.
208 S.W.3d 70 (Tex.App.-
Beaumont, 2006)



TIME LIMITS



CORRECTING DEPOSITIONS

Reilly v. TXU Corp.

230 F.R.D. 486, 62 Fed.R.Serv.3d
855 (N.D.Tex.,2005)



SUBSTANTIVE CHANGES ALLOWED BUT

- Reopen deposition if substantial changes
- Read conflicting answers
- Attorneys fees and costs born by correcting party



PRESUIT DEPOSITIONS [RULE 202 DEPOSITIONS]



In re Contractors Supplies, Inc.,
Not Reported in S.W.3d, 2009 WL
2488374 (Tex.App.-Tyler)



In re Donna ISD,

--- S.W.3d ----, 2009 WL 3194691
(Tex.App.-Corpus Christi)



*AVCO Corp. v. Interstate
Southwest, Ltd.* --- S.W.3d ----,
2007 WL 4845443 (Tex. App.-
Hous. (14 Dist.)) 2007.



**A footnote and probably dicta, but
informative:**

**The scope of discovery in such a
pre-suit deposition "is the same
as if the anticipated suit or
potential claim had been filed."**



DISCOVERY FROM NON-PARTIES



**YOU HAVE TO USE THE RULES
(TEX. R. CIV. P. 196.7, 202,
205) ; YOU JUST CAN'T MAKE
IT UP AS YOU GO ALONG!**



In re Does 1-10,
--- S.W.3d ----, 2007 WL
4328204 (Tex. App.-Texarkana,
2007)



:)

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