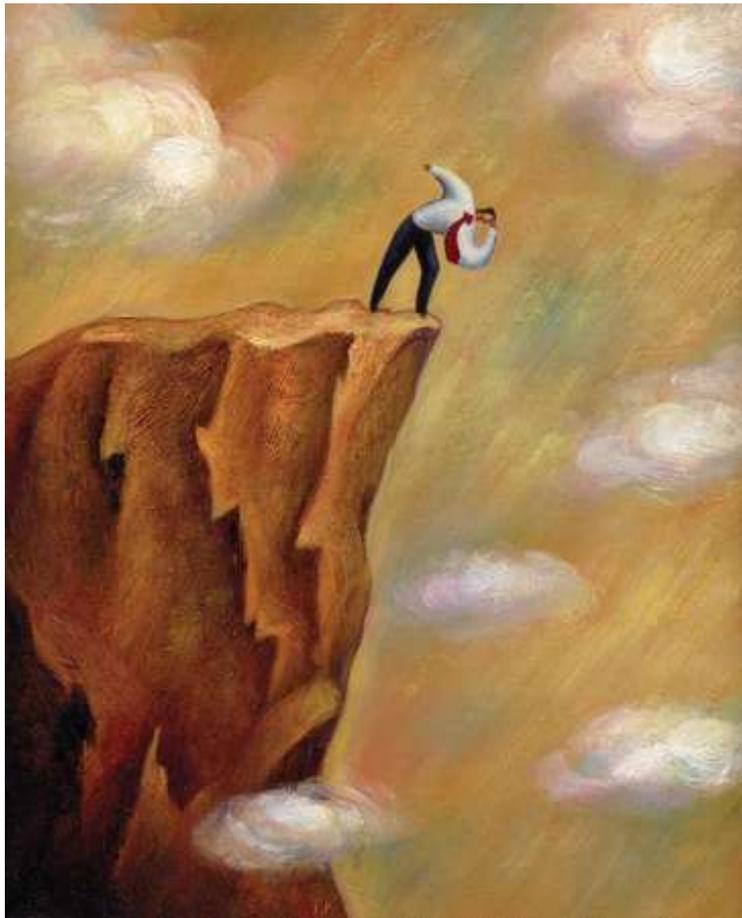


**THE LOOK BEFORE THE LEAP:**  
PRE-SUIT DISCOVERY IN TEXAS,  
A REVIEW OF TEX. R. CIV. P. 202



PAUL N. GOLD

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## **ACKNOWLEDGMENT**

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**THE LOOK BEFORE THE LEAP**  
**PRE-SUIT DEPOSITIONS**  
**TEX. R. CIV. P. 202**  
**Paul N. Gold**

**A. INTRODUCTION**

Tex. R. Civ. P. 202 is a discovery tool that was added to the Texas Rules of Civil Procedure in 1999. It uniquely provides for discovery through depositions before a lawsuit is filed. It is a combination of two prior rules, the deposition to perpetuate testimony (Tex. R. Civ. P. 183) and the equitable bill of discovery (Tex. R. Civ. P. 737).<sup>1</sup> The purpose of the rule is to allow limited pre-suit discovery under specific circumstances. If a witness may become unavailable, because of death or moving from the jurisdiction, a party may seek a pre-suit deposition to preserve or perpetuate the individual's testimony. In such a situation, to make the testimony admissible in a subsequent trial, all potential parties must be given timely notice and an opportunity to participate in the deposition. The more common circumstance, however, is for a party to seek pre-suit discovery to investigate circumstances to evaluate whether legal action could be warranted or meritorious or to aid in an anticipated lawsuit. It is this latter situation that has given rise to a growing body of law and which will be the focus of this paper.

**B. SCOPE OF DISCOVERY**

1. **Tex. R. Civ. P. 202.5** provides, "The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed."

2. The scope of discovery under Rule 202 is mediated by both Tex. R. Civ. P. 192 and the specific requirements of the rule itself. Still, the scope of pre-suit discovery potentially available is according to the Texas Supreme Court broader than any other device in any other jurisdiction in the United States. *In re Doe*, 444 S.W.3d 603 at \*3 (Tex. 2014). In view of the broad scope of this tool, the Texas Supreme Court has admonished Trial Courts to "strictly limit and carefully supervise pre-suit discovery..." *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding) (per curiam). The Texas Supreme Court in *In re Jorden*, 249 S.W. 3d 416 (Tex. 2008), warned "Rule 202 depositions are not now and never have been intended for routine use."

3. As this author has noted in numerous papers and presentations over the last decade, the scope of discovery in Texas presently is defined by the pleadings.

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<sup>1</sup> For an informative history of the equitable bill of discovery see, *In re Does 1-10*, 242 S.W.3d 805,816 (Tex. App. – Texarkana 2007, orig. proceeding).

For discovery to be proper, it must be relevant to a pled claim or defense. This concept is somewhat broader in the context of a petition for pre-suit discovery under Rule 202 because the Petitioner is not required to plead a cause of action or claim and arguably may not have sufficient facts with which to do so ethically under Rule 13. See *In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, orig. proceeding).

Rule 202 does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition. See, e.g., *City of Houston v. U.S. Filter Wastewater Group, Inc.*, 190 S.W.3d 242, 245 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, orig. proceeding) (“There is no requirement in Rule 202 that the person sought to be deposed be a potentially liable Defendant in the claim under investigation.”)

However, the discovery sought must still be relevant to the subject matter of the anticipated claim. As the Court in *In re Reassure America Life Insurance Company*, 421 S.W.3d 165 (Tex. App. – Corpus Christi 2013, orig. proceeding) noted:

In this regard, we note that the scope of discovery is delineated by the subject matter of the anticipated action. See TEX. R. CIV. P. 192.3(a); see also *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding). A petition that merely tracks the language of Rule 202 in averring the necessity of a pre-suit deposition, without including any explanatory facts regarding the anticipated suit or the potential claim, is insufficient to meet the Petitioner’s burden.

The Court should ask, and the attorney seeking the petition should explain, what is being investigated and why. What is the goal?

### **C. UNAVAILABILITY OF PRE-SUIT DEPOSITION UNDER CHAPTER. 74 TEX. CIV. PRAC. & REM. CODE**

1. *In re Jordan*, 249 S.W. 3d 416 (Tex. 2008) holds that a pre-trial deposition is unavailable for use in investigating a potential healthcare liability claim.

Because the statute prohibits “all discovery” other than three exceptions- and Rule 202 depositions are not listed among them-we hold the statute prohibits such depositions until after an expert report is served.

The Plaintiff attempted to make the argument that a petition for a 202 deposition is not a healthcare liability claim. However, the Texas Supreme Court rejected such argument by observing that what is dispositive is whether there is a cause of action which may derived

from the facts. A 202 petition would, at a minimum, need to demonstrate a potential cause of action.

**2. Rule 202 is available for an anticipated product liability case.** *In re Temple*, 239 S.W.3d 885 (Tex. App. – Texarkana 2007, orig. proceeding) was decided before *Jorden*, but the Appellate Court acknowledged appellate cases holding that Chapter 74 precluded pre-suit depositions in a healthcare liability case and held that it too would preclude pre-suit depositions for an anticipated healthcare liability claim. But the Petitioner in *Temple* argued that he was seeking the depositions of physicians to aid in an anticipated product liability claim against the manufacturer of a surgical knee replacement apparatus. The Appellate Court held that such a purpose would be acceptable and that an order limiting the deposition to aiding an anticipated claim against the manufacturer and not the healthcare providers would be permissible. Unfortunately, the Trial Court’s order did not contain such a limitation, leaving open the opportunity for the deposition to be used for an improper purpose. Therefore, the Appellate Court found that the Court had abused its discretion in granting a deposition without proper constraints.

#### **D. RULE 202 CANNOT BE USED TO CIRCUMVENT OTHER PROCEDURES**

Rule 202 cannot be used to circumvent other laws, such as the labor code, which requires that all administrative remedies must be exhausted before filing a civil action. Rule 202 is a civil action, albeit not a claim. The 202 Procedure cannot expand the scope of discovery of the anticipated litigation it precedes. In *In re Bailey–Newell*, 439 S.W. 3d 428 (Tex. App. – Houston [1st Dist.] 2014, orig. proceeding), Petitioner stated that she sought pre-suit discovery to “investigate a potential retaliation claim or suit under the Texas Labor Code.” “It is beyond serious dispute that the Texas Commission on Human Rights Act requires a complainant to first exhaust his administrative remedies before filing a civil action.” *Lueck v. State*, 325 S.W.3d 752, 761-762 (Tex. App. – Austin 2010, pet. denied).

#### **E. PRIVILEGED MATTERS (Trade Secrets)**

**1. In re Cauley**, 437 S.W.3d 650 (Tex. App. – Tyler 2014, orig. proceeding). The same rules that apply for the assertion of privileges and protection of privileged data in litigation apply in the context of Rule 202. The *In re Cauley* opinion examines not only the evidentiary value of a verified petition in support of a petition for pre-suit depositions, but also examines the sufficiency of an affidavit asserting trade secrets. When the affidavit merely is conclusory and does not set out any facts, the affidavit is inadequate to raise the privilege. The respondent asserted trade secrets, but its affidavit failed to set out any factual basis for its assertions. Therefore, the Appellate Court found that the Trial Court would not have abused its discretion in allowing questions

to delve into the information for which the trade secrets privilege was asserted. Ironically, however, the Appellate Court found that the Trial Court abused its discretion in permitting the deposition because the Petitioner's proof needed to establish entitlement to the deposition was inadequate.

2. So, what happens when the respondent does allege sufficient facts to sustain its burden for asserting a trade secrets privilege? This question is answered in *In re PrairieSmarts LLC*, 421 S.W. 3d 296 (Tex. App. – Ft. Worth 2014, orig. proceeding). This case involved a potential claim for appropriation of trade secrets against several ex-employees of TD Ameritrade. The Appellate Court made the following initial legal observation before launching into an analysis of the facts:

In summary, a Rule 202 Petitioner seeking pre-suit discovery of information that has been proven to be trade secret information must satisfy both of the two distinct and separate burdens imposed under rule 507 of the rules of evidence and under Rule 202 of the rules of civil procedure. See, *In re Hewlett-Packard*, 212 S.W.3d 356, 363-64 (Tex. App. – Austin 2006) (addressing both burdens); *In re Rockafellow*, No. 07-11-00066-CV, 2011 WL 2848638, at \*3 (Tex. App. – Amarillo 2011, orig. proceeding) (mem. op.)

*In re PrairieSmarts LLC*, 421 S.W. 3d at 306. The Appellate Court found that PrairieSmarts met its burden of establishing that almost all of the matters in dispute constituted trade secrets and that the burden then moved to TD Ameritrade to prove both its entitlement to a 202 deposition and that the trade secrets should be divulged. TD Ameritrade established that it was entitled to a 202 deposition, but it did not prove that it was entitled to overcome the trade secret privilege. Therefore, the Appellate Court found that the Trial Court had abused its discretion in ordering the deposition and the production of trade secret documents.

In summary, the facts presented by TD Ameritrade as justifying an investigation are relevant to a determination of rule 202.4(a)(2)'s requirement that "the likely benefit of allowing the [Rule 202] Petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure," but they do not satisfy TD Ameritrade's burden under rule 507 to establish "with specificity exactly how the lack of the [trade secret] information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003) (orig. proceeding).

*In re PrairieSmarts LLC*, 421 S.W. 3d at 309-10.

## F. JURISDICTION: THE "PROPER COURT"

1. A Trial Court must have personal jurisdiction over the potential

Defendant to issue an order granting a petition for a 202 deposition. Although Rule 202 is silent regarding jurisdiction, the Texas Supreme Court observed that it is implicit that if the Trial Court does not have subject matter jurisdiction, then it does not have the authority to order the requested relief. In *In re Doe*, 444 S.W.3d 603 (Tex. 2014), the potential Defendant could neither be identified, nor his residence confirmed (he appeared by attorney subject to a rule 210a special appearance to contest jurisdiction). Petitioner sought to prevent a blogger from posting disparaging comments about it on the blogger's blog. Petitioner sought to take the Rule 202 deposition of Google, which hosted the blog, to learn the blogger's identity. The blogger claimed that he did not live in the jurisdiction and that his only contact with the jurisdiction was his blog. The Court recognized that this placed the petition at an extreme disadvantage in meeting the jurisdiction requirement. Nonetheless, the Court drew a clear line regarding the burden:

The burden is on the Plaintiff in an action to plead allegations showing personal jurisdiction over the Defendant. The same burden should be on a potential Plaintiff under Rule 202. We recognize that this burden may be heavier in a case like this, in which the potential Defendant's identity is unknown and may even be impossible to ascertain. But even so, Rule 202 does not guarantee access to information for every Petitioner who claims to need it.

The Court held that since the Court could not meet the threshold requirement of having personal jurisdiction, it could not grant the requested relief.

**2. *Vestal v. Pistikopoulos*, 2016 WL 4045081 (Tex. App. – Waco 2016)** illustrates the importance of the Court having subject matter jurisdiction to decide an anticipated claim. In *Vestal*, Prof. Pistikopoulos sought a 202 petition of Vestal, claiming she had falsely defamed him causing him to lose his university position. Vestal filed a special appearance arguing that she was an employee of a state university which granted her sovereign immunity from being named as a party under Tex. Civ. Prac. & Rem. Code §101.106(f) and the Texas Supreme Court's decision in *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011). The Court's opinion pivoted on the overbreadth of the Petitioner's petition.

Because we cannot say unequivocally that the scope of Pistikopoulos's petition does not implicate statements made in the course and scope of Vestal's employment, we conclude that the Trial Court erred in denying Vestal's plea to the jurisdiction and granting the Rule 202 petition.

*Franka v. Velasquez*, *supra* at \*6. Vestal was, however, on remand allowed to amend.

**3. Ripeness: *In re Depinho*, 505 S.W. 621 (Tex. 2016).** In this case, an employee of M.D. Anderson sought to take the deposition of the head of M.D. Anderson in aid of a tortious inference claim which was premised on Depinho, the head of M.D. Anderson, wrongly appropriating a patent that the employee was instrumental in

obtaining. The problem was that the claim was not “ripe” as the employee had not yet been terminated and the patent had not yet been wrongly appropriated. Further, even if the patent had been wrongly appropriated Texas would not have jurisdiction as this would be a Federal question, for which only Federal Court would have jurisdiction.

“[t]he rule cannot be used, for example, to investigate a potential federal ... patent suit, which can be brought only in Federal Court.” *In re Doe (Trooper)*, 444 S.W.3d 603, 308 (Tex. 2014)

Since the “potential claim” was not yet ripe, the Trial Court was held to have abused its discretion in granting a Rule 202 deposition.

The rule cannot be used as “an end-run around discovery limitations that would govern the anticipated suit.” . . . a “suit” for patent infringement—while a suit in the broad sense of the word—is not a “potential” suit under Rule 202 because Texas Trial Courts lack subject-matter jurisdiction over the underlying claim. See *Trooper*, 444 S.W. 3d at 608. Bornmann apparently confuses potential future *events*—which may or may not occur and cannot form the basis of a cause of action—with potential *claims*—which a Plaintiff may or may not assert in the future based upon actual events that have already caused some sort of injury.

**4. Jurisdictional Limits of Court:** One would think that it would make little difference whether a 202 motion were filed in a District Court or a Statutory County Court. However, the Texas Supreme Court has held that it does and could render an order to be an abuse of discretion. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016), dealt with a claim by Navarro County that the City of Dallas had basically stolen a number of potential employees (and taxes) from the county and the county wanted to investigate a potential tortious interference claim. The problem was that the County has a statutory jurisdictional limit of \$200,000 and there was not evidence or determination that the anticipated claim would be within the subject matter limits of the Court. If the Court does not have subject matter jurisdiction of the anticipated claim, then it cannot have jurisdiction to issue and order granting a 202 petition.

**5. Arbitration Clauses:** *In re Amarillo II Enterprises, LLC*, 2017 WL 491938 (Tex. App. – Amarillo 2017, orig. proceeding). Plaintiff in this case sought a Rule 202 deposition to establish breach of contract and discrimination. The employer countered that the Petitioner had agreed to arbitrate employment claims. The Appellate Court found that the Trial Court lacked jurisdiction to order a Rule 202 petition, citing *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) for the proposition that “a party ‘cannot obtain by Rule 202 what it would be denied in the anticipated action.’”

Following the reasoning of and policy underlying these opinions, it would be logical to infer that if the Trial Court is barred from adjudicating the anticipated suit, it cannot permit pre-suit discovery on claims underlying that suit. And, this leads us to the conclusion we reach today. If the Trial Court is precluded from trying the anticipated suit due to the existence of an

enforceable arbitration provision (a proposition supported by *G.T. Leach*), it may not permit pre-suit discovery on the claims to be raised in that suit and encompassed within the arbitration clause.

## G. VENUE

1. Venue is specifically addressed in Rule 202.2(b) The petition must be filed in a proper Court of any county where venue of the anticipated suit may lie, if suit is anticipated, or where the witness resides, if no suit is yet anticipated.

Venue, therefore, depends on whether the deposition is being requested for use in an anticipated suit or merely to investigate. Some of the complexities that can arise in this area are revealed in *In re Campos*, Not Reported in S.W.3d, 2007 WL 2013057 (Tex. App. – Ft. Worth 2007). In that case, the respondent argued that the Petitioner actually intended to file a lawsuit in Oklahoma and that the deposition was being sought for use in anticipated case. Therefore, no venue in Texas would be proper. Petitioner, on the other hand, argued that the deposition was sought only for investigation and that the deposition could and should take place in the county in which the respondent resided. Ultimately, the Appellate Court found that since there was conflicting evidence about whether a suit was anticipated, there was insufficient evidence that the Trial Court had abused his discretion in finding that the residence of the witness was a proper venue. However, the Court went on to find that there was no benefit to be derived from the deposition because the witness had already testified at the Rule 202 hearing that she did not possess the information that the Petitioner was seeking.

2. What happens if the Petitioner wishes to take a corporate representative deposition of a corporate entity pursuant to Rule 199? There is nothing in the rule that disallows this tactic. To the contrary, Tex. R. Civ. P. 202.5 provides that except as otherwise provided in this rule, “depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit.” This means the deposition would be taken under Tex. R. Civ. P. 205, which allows oral depositions to be taken by subpoena under Tex. R. Civ. P. 176. Tex. R. Civ. P. 176.6(a) allows for the taking of a corporation through the corporate representative procedure outlined in Tex. R. Civ. P. 199. So, if the deposition of the corporation is for an anticipated suit, the suit could be filed in the county of the anticipated suit. But, if the deposition is sought for investigation, does this mean that the petition would need to be filed in the county of the corporation’s residence. If so, then a situation similar to what arose in *In re Campos*, above, could arise, in which the respondent claims that because the respondent’s residence is in a different state and the claim is sought to investigate a claim, the Court is not a proper venue for the petition.

3. In many instances, the Petitioner, in the interest of efficiency and reduction in aggravation, if practicable, is going to want to claim that the purpose of the petition is to investigate rather than to aid an anticipated claim or cause of action (unless the county in which the witness resides simply is just an unfavorable venue for such an exercise). The reason is that if the petition is to aid an anticipated claim, then all the proper

parties need to be given proper and timely notice so that they can participate. If there were a deficiency in naming all the parties, it is possible that the remedy could be that the Petitioner could not use the testimony at the trial of a subsequent action. This would allow the Petitioner to obtain the discovery, but protect later parties to the lawsuit from being blind-sided by what is effectively as to them inadmissible hearsay.

4. The rule does not specifically address or provide a procedure in the event that the Court finds that the deposition is to aid in an anticipated claim, but the venue for one reason or another is not proper for the anticipated claim and hence not proper for the pre-suit deposition. Arguably, the venue rules would apply to the pre-suit determination as they would for the anticipated claim or lawsuit.

## H. STANDING

The Petitioner must have standing to pursue a claim. In other words, if the Petitioner would not have standing to bring an action either for anticipated lawsuit or for a potential claim for which the Petitioner is seeking investigation, then the Court abuses its discretion in granting a Rule 202 deposition. *In re Wolfe*, 341 S.W. 3d 932, 932-33 (Tex. 2011) (orig. proceeding) (orig. proceeding) (holding that when parties did not have standing on their own to bring a suit for removal of a county official, they could not obtain pre-suit discovery under Rule 202 to investigate the potential removal suit). *Cf. In re Meeker*, 497 S.W.3d 551, 556 (Tex. App. Ft. Worth 2016) (holding that a party who accepts an interest under a will may still have standing to seek a Rule 202 petition under the exception that when a successful challenge to a transaction would *not* affect the entitlement to benefits already received, there is no inconsistency inherent in the challenge and, thus, no estoppel).

## I. PROCEDURAL REQUIREMENTS

1. *In re Reassure America Life Insurance Company*, 421 S.W.3d 165 (Tex. App. – Corpus Christi 2013, orig. proceeding) provides a comprehensive overview of the policy considerations underlying the rule, the scope of permissible discovery allowed, and the requirements that must be met to proceed with discovery under the rule. The Court's initial observations are noteworthy:

There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are.” *In re Jorden*, 249 S.W. 3d 416, 423 (Tex. 2008). Accordingly, Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule. *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding).

*In re Reassure America Life Insurance Company*, 421 S.W.3d 165 (Tex. App. – Corpus Christi 2013, orig. proceeding).

The rule recognizes and attempts to reconcile competing interests. On the one

hand, there are legitimate instances when pre-suit discovery may aid the interests of justice and in which the benefits exceed the costs. However, the rule also acknowledges that an individual or entity is entitled to know the purpose for which the pre-suit discovery is sought. The tension that must often be addressed in determining the scope of discovery and limiting fishing when the Petitioner seeking the pre-suit discovery is not required to plead a claim. If a Petitioner is not required to plead a valid claim to obtain pre-suit discovery, what is it that the Petitioner must plead? This is the question that is excellently addressed and answered in ***In re Reassure America Life Insurance Company***.

Ironically, it is difficult to tell what the nature of anticipated litigation was that gave rise to the petition for Rule 202 pre-suit discovery in ***Reassure America***, which essentially was one of the main bases for the Reassure America's complaint. The Petitioner never set out or provided the Court the factual basis for his anticipated litigation for which presumably he was seeking investigatory information. Because this is such an important aspect of the opinion, the Petitioner's allegation in this regard is set out for instructional purposes:

Garcia further alleged that he sought to obtain the depositions "for use in an anticipated suit in which [he] may be a party," the "subject matter of the anticipated suit is with regard to the policy number MP0153991 belonging to [Garcia]," and [his] "interest in the anticipated suit is that he holds potential legal causes of action."

While Garcia in his petition tracked the wording of the rule in checklist fashion, he failed to provide any factual bases for the statements. This was key. The opinion focuses on what must be set out in the Rule 202 petition to define the parameters of the scope of discovery.

2. It is important to recall that Rule 202 does not require a Petitioner to set forth a claim, rather only the subject matter of the anticipated action, if any, and the Petitioner's interest in the anticipated action. See ***In re Emergency Consultants, Inc.***, 292 S.W.3d 78, 79 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, orig. proceeding). Garcia's allegation that the suit is with regard to his insurance policy did not meet this requirement. It did not set out the factual basis for the anticipated action, if any.

The petition does not otherwise describe the "incident made the basis of this cause," identify the date or dates that the "incident" occurred, the anticipated suit, or the potential claim or suit. See TEX. R. CIV. P. 202.2. The petition does not name any adverse parties or state that they cannot be identified through diligent inquiry. See *id.* Further, the petition does not state why the depositions would prevent a failure or delay of justice in an anticipated suit or why the likely benefit of the depositions outweighs their burden or expense. See *id.*; R. 202.1, 202.4.

The opinion also addresses the scope of written discovery under Rule 202. Garcia, in conjunction with the requested deposition, also requested that Reassure America produce four categories of documents. This also was significant because the Trial Court's actual order required that Reassure America produce eight categories of documents. One of the primary holdings in Reassure is that the Trial Court abused its discretion in ordering that Reassure produce more documents than were requested.

We agree that a party cannot be compelled to produce discovery that has not been requested. See *In re Exmark Mfg. Co. Inc.*, 299 S.W. 3d at 531; *In re Lowe's Companies, Inc.*, 134 S.W.3d 876, 880 n. 1 (Tex. App. – Houston. [14<sup>th</sup> Dist.] 2004, orig. proceeding). Accordingly, the Trial Court abused its discretion to the extent that it ordered the production of discovery that was not requested.

**3.** As mentioned above, TEX. R. CIV. P. 202 authorizes a Court to permit depositions pre-suit either to investigate a potential claim, to aid an anticipated suit, or to perpetuate testimony in an anticipated suit, provided the requirements of the rule are met in each instance.

**4. The purpose of the discovery matters.** While the difference between seeking a deposition to aid in an anticipated suit and seeking a deposition to investigate a potential claim may seem semantical, the difference can have significant consequences. As the Dallas Court of Appeals observed in *In re Dallas Cty Hosp. Dist.*, 2014 WL 1407415 at \*2 (Tex. App. – Dallas 2014)

Ultimately, the decision a Petitioner makes as to which reason he requests a Rule 202 deposition affects the finding the Trial Court is required to make to support an order allowing a Rule 202 deposition.

If seeking a deposition to aid in anticipated suit, the parties who may be adverse to the petition must be given notice or the reason for not being able to identify and provide notice to such persons must be stated. The petition should be brought in the county in which the anticipated lawsuit would be proper, as opposed to the county in which the witness resides, if the purpose is to investigate a potential claim. If the Petitioner requests a deposition to obtain testimony for use in an anticipated suit, the Trial Court must find that allowing the Petitioner to take the requested deposition may prevent a failure or delay of justice. Tex. R. Civ. P. 202.4(a)(1). If the Petitioner requests a deposition to investigate a potential claim, however, the Trial Court must find that 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. Tex. R. Civ. P. 202.4(a)(2).

**5. The petition must be verified.** The party filing the petition must state what the purpose is in seeking the pre-suit deposition, whether it is to investigate a

claim or to aid in an anticipated suit. If the latter, the Petitioner must also state the subject matter of the anticipated suit and the Petitioner's interest therein. In addition, the petition must state the names, addresses, and telephone numbers of persons the Petitioner expects to have an adverse interest in the anticipated suit, or 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.

**6. No claim requirement.** Rule 202 does not require a Petitioner to set forth a claim, rather **only the subject matter of the anticipated action**, if any, and the Petitioner's interest in the anticipated action. See *In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, orig. proceeding). But there must be a factual basis for the anticipated action. Also, the person whose deposition is sought does not need to be a potential Defendant in the anticipated litigation or claim under investigation. *City of Houston v. U.S Filter Wastewater Group, Inc.*, 190 S.W.3d 242, 245 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, orig. proceeding).

**7. The pleading must plead a sufficient factual basis for the requested relief.** Regardless of whether the deposition is sought for investigation of a claim or to aid in anticipated claim, the verified petition must identify the witnesses to be deposed, the substance of the testimony the Petitioner seeks to obtain, and the reason for seeking the testimony. Presumably Tex. R. Civ. P. 13 and 191.3 would be applicable to all such representations. It is an abuse of discretion for the Court to issue an order if the pleadings do not plead a sufficient factual basis for the requested relief. *In re Reassure America Life Insurance Company*, 421 S.W.3d 173; *In re Campo*, 2013 WL 3929251, at \*1 (Tex. App.- Dallas 2013, orig. proceeding). In *In re Time Warner Cable Enterprises, L.L.C.* 2015 WL 5837685 (Tex. App. San Antonio 2015), a terminated employee sought the deposition of his supervisor. While the employee stated in an affidavit that the individual was his supervisor and that she was present at his termination, he did not state any basis for for investigating a potential claim. Without such facts, the Court could not credibly find that the benefits of taking the deposition outweighed the costs.

Ozuna does not indicate what information he would need—beyond what is available to him through both his own personal knowledge and the employment and termination records already provided—that Joy would be expected to testify about, the likely benefit to be obtained by allowing him to take the pre-suit deposition, and how or why that benefit outweighs the burden and expense of the deposition to Joy and Time Warner.

*In re Time Warner Cable Enterprises, L.L.C.* at \*3.

**8. Evidence requirement.** While the pleading must contain factual allegations and not merely parrot the rule, neither verified pleadings nor argument of counsel are generally considered competent evidence to prove the basis for granting a

Rule 202 petition. See *In re Dallas Cty. Hosp. Dist.*, 2014 WL 1407415 at \*2 (Tex. App. – Dallas 2014). See also, *Glass Door, Inc. v. Andra Group*, Not Reported in S.W.3d, 2017 WL 1149668 at fn 3 (Tex. App. – Dallas 2017):

The two hearings in this case were non-evidentiary. In prior cases, we have stated that the party seeking Rule 202 deposition must provide evidence on which the Trial Court can make its finding, that evidence ordinarily must be presented to the Trial Court at the hearing, and that neither sworn or verified pleadings nor counsel's arguments are evidence. *In re Dallas Cty. Hosp. Dist.*, 2014 WL 1407415, at \*3; see also *In re Noreiga*, No. 05-14-00307-CV, 2014 WL 1415109, at \*2 (Tex. App. Dalls Mar. 28, 2014, orig. proceeding) (mem. op.) (party seeking Rule 202 deposition must provide evidence on which Trial Court can make finding); *In re Campo*, 2013 WL 3939351, at \*1 (mandamus conditionally granted where no evidence was presented to the Trial Court at the hearing on the motion and party seeking Rule 202 deposition did not formally offer or admit its verified pleading at the hearing). However, in the case before us, unlike the cases cited above, the Trial Court's record contained numerous affidavits—a result of the Chapter 27 proceeding—in addition to the verified petition generally found in the record. Additionally, the Trial Court's order states it considered “the pleadings, evidence, and arguments of counsel.” Mindful of the Texas Supreme Court's statement that when “all the evidence is filed with the clerk and only arguments by counsel are presented in open court, the appeal should be decided on the clerk's record alone,” *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) (footnote omitted), we will consider the evidence in the clerk's record to resolve Glassdoor's second issue.

See also, *In re Heaven Sent Floor Care*, 2017 WL 462352 (Tex. App. – Dallas, 2017) to the same effect.

**9. Court may not make up procedure. *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. – Texarkana 2007, orig. proceeding).**

An extensive system is in place governing procedures applicable to this situation; in the absence of some extraordinary reason to depart from those procedures, Trial Courts do not have the inherent authority to create their own ad hoc procedures.

*In re Does 1-10*, *supra* at 305. *In re Does 1-10* was one of the first Texas cases to attempt to deal with the conflicting interests involved in an internet defamation matter. The hospital sought the identity of a blogger who the hospital claimed was defaming it and its employees. The hospital thought that, pursuant to 47 U.S.C.A. §551(c) (West 2001 & Supp. 2007) known as the Cable Communications Policy Act of 1984 (CCPA), it could obtain an order from the Court and the identity of the blogger would have to be revealed.

As the Appellate Court meticulously lays out, the Cable Communications Policy Act of 1984 (CCPA) does not provide a procedure for obtaining such an order in a civil action. The party seeking the order must follow state procedures. *In re Does 1-10, supra* at 814. The Texas procedure for obtaining a pre-suit deposition is Rule 202. The Appellate Court found that the Trial Court had abused its discretion in ordering the blogger to reveal his identity without following the procedures outline in Rule 202.

As will be discussed below in the context of Anti-Slapp cases, Texas Courts continue to be bedeviled by the lack of clear procedure for ruling on Rule 202 petitions when the Anti-Slapp statute is invoked.

## J. REMOVAL AND REMAND

1. The apparent consensus of the cases that have dealt with motions for removal in the face of petitions for Rule 202 depositions is that such proceedings are not removable.

The majority of Texas Courts that have considered whether a Rule 202 proceeding is removable have held that it is not.

*In re Enable Commerce, Inc.*, 526 F.R.D. 527, 530 (N.D. Tex. Dallas Div. 2009). (citations omitted)

2. The Court in *In re State of Texas*, 110 F. Supp. 2d 514 (N.D. Tex. - Texarkana Div. 2000), found that a Rule 202 proceeding constituted a “civil matter,” and therefore was removable. This case dealt with the State of Texas’ challenge to the attorneys’ fee awarded to the private attorneys in the Tobacco litigation. The state ultimately filed a petition for Rule 202 depositions to depose the individual attorneys. The individual attorneys filed a motion under 28 U.S.C. §1441 to remove the case to the Federal Court in which the tobacco litigation had been prosecuted. The federal judge first found that the Rule 202 proceeding constituted a “civil action,” under 28 U.S.C. §1441. Therefore, it was removable. *In re State of Texas, supra* at 521. Judge Folsom noted that the Fifth Circuit had yet to weigh in on the issue of removability, but that the Northern District had and that it had determined that a Rule 202 proceeding was not removable. See *Mayfield-George v. Tex. Rehab. Comm’n*, No. 3:99-CV-3735X, 2000 WL 626853 (N.D. Tex. May 15, 2000). Nonetheless, Judge Folsom rejected the reasoning and refused to follow suit. *In re State of Texas, supra* at 522. Interestingly, to further explain the nature of a Rule 202 proceeding, Judge Folsom examines the holding in *Valley Baptist Medical Ctr. v. Gonzalez*, 18 S.W.3d 673, 678 (Tex. App. – Corpus Christi, 199, pet. filed March 21, 2000) [vacated 833 S.W.3d 821 (Tex. 2000) (issue became moot during appeal)], noting that it was ruling upon by the judge in *Mayfield-George v. Tex. Rehab. Comm’n*. The unique appellate considerations in a Rule 202 proceeding further complicate the determination of the rule’s nature. As discussed above, if the petition is sought for investigation of a potential claim, then the order is considered final and

appealable. However, if the purpose is to aid in an anticipated action, then it is considered ancillary, and not final. Hence, the order cannot be challenged by an interlocutory appeal. The independent/ancillary dichotomy Judge Folsom notes is very important. “The question of whether a proceeding is separate or ancillary to a State-Court proceeding is important for purposes of removal. If the proceeding is separate, it is removable. If it is ancillary, it is not. See 14B WRIGHT, ET AL. §3721.” Judge Folsom was mystified by the **Valley Baptist** finding that the proceeding was ancillary and not independent, noting that it is hard to understand how something can be ancillary to something that does not yet exist. *In re State of Texas*, *supra* at 523.

3. **Davidson v. Southern Farm Bureau Casualty Insurance Company**, Not Reported in F.Supp.2d, 2006 WL 1716075 (S.D.Tex.) disagrees with the holding in *In re Texas*, finding that a Rule 202 proceeding is not a “civil action” activating 28 U.S.C. §1441, and in like the next case discussed, **In re Enable Commerce, Inc.** finds that it would be difficult to determine whether the claim would meet the jurisdictional threshold because no amount in controversy needs to be pled in a Rule 202 action.

4. In **In re Enable Commerce, Inc.** 526 F.R.D. 527 (N.D. Tex. Dallas Div. 2009) the Chief Justice for the Northern District, Judge Fitzwater, found that the 202 proceeding was not removable because an amount in controversy could not be determined.

As a threshold matter, the inherent difficulty in determining the amount in controversy in a Rule 202 petition offers a compelling rationale for concluding that such a petition is not removable based on diversity.

*In re Enable Commerce, Inc.*, *supra*, at 531.

## K. REQUIRED FINDINGS

1. The Texas Supreme Court, in **In re Jordan**, observed that a Rule 202 deposition is available only if a Trial Court makes the two findings below:

- allowing the Petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
- 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.

*In re Jordan*, *supra* at Tex. R. Civ. P. 202.4(a).

2. It is critical that when fashioning an order allowing a pre-suit deposition, the Court consider whether the benefits of taking the deposition outweigh the potential undue burden (for an investigative deposition) or whether the deposition will prevent the failure or delay of justice (for a deposition taken in anticipation of litigation). Pre-suit discovery under Rule 202 expressly requires that discovery be ordered “only if the required findings are made.” *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam). Failure of an order to contain one of these findings could be fatal and result in a finding that the Trial Court abused its discretion in granting the petition. *In re Cauley*, 437 S.W.3d 650 (Tex. App. – Tyler 2014, orig. proceeding) and *In re Denton*, Not Reported in S.W.3d, 2009 WL 471524 (Tex. App. – Waco 2009).

3. A Petitioner seeking pre-suit depositions under Rule 202 must do more than merely “parrot” the requirements of the rule. A Petitioner must present evidence that the deposition either will prevent the failure or delay of justice or that the benefit outweighs the potential burden. *In re East*, 476 S.W.3d 61 (Tex. App.- Corpus Christi 2014, orig. proceeding). There is some controversy about whether a verified petition is sufficient evidence. However, in this instance, the verified petition apparently was not introduced into evidence. Regardless, this Court does not resolve the debate about the adequacy of a verified petition as evidence. It does not reach that issue. Instead, the Court holds that in this instance the verification was inadmissible evidence because it was conclusory and provided no factual basis for the claims.

The Dallas, Tyler, and Amarillo Courts of appeals have rejected Salinas’s assertion that a verified petition constitutes competent evidence in support of a pre-suit deposition. See, e.g., *In re Dallas Cnty Hosp. Dist.*, 2014 WL 1407415, at \*2, *In re Noriega*, 2014 WL 1415109, at \*2; *In re Contractor’s Supplies, Inc.*, 2009 WL 2488374, at\*5; *In re Rockafellow*, 2011 WL 2848638, at 4. We need not reach that issue here; however, because the verified petition did not contain sufficiently detailed recitations to satisfy the burden of proof. The petition is vague and conclusory insofar as it merely tracks the language of the statute and does not include any explanatory facts regarding why allowing the depositions would prevent an alleged failure or delay of justice in an anticipated suit, or why the benefit of allowing the depositions outweighs the burden or expense of the procedure. A petition that merely tracks the language of Rule 202 in averring the necessity of a pre-suit deposition, without including any explanatory facts, is insufficient to meet the Petitioner’s burden. See *In re Does*, 337 S.W.3d at 865 (noting that the Petitioner “made no effort to present the Trial Court with a basis for the [Rule 202] findings” where the allegations in its petition and motion to compel were “sketchy”);

*In re East*, 476 S.W.3d at 69.

4. See also, *In re Reassure Am. Life Ins. Co.*, supra, stating that the petition must do more than reiterate the language of the rule and must include explanatory facts. It is not sufficient to articulate a “vague notion” that evidence will become unavailable by the passing of time without producing evidence to support such a claim. *In re Pickrell, Not Reported in S.W.3d, 2017 WL 1452851 (Tex. App. – Waco 2017)* to the same effect.

## L. PRODUCTION OF DOCUMENTS AND THINGS

*In re Pickrell, Not Reported in S.W.3d, 2017 WL 1452851 (Tex. App. – Waco 2017)*. This case provides us the opportunity to discuss the somewhat controversial issue of whether a Trial Court may order the production of documents in conjunction with a Rule 202 petition. The Waco Court, in *Pickrell*, citing the holding in *In re Akzo Nobel Chem., Inc.*, ruled that Rule 202 does not provide the Court discretion to order anything but an oral deposition and that nothing in the rule provides the Court discretion to order the production of documents in conjunction with a pre-suit deposition either in anticipation of a lawsuit or to investigate a potential claim.

“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.” *In re Akzo Nobel Chem., Inc.*, 24 S.W.3d 919, 921 (Tex. App. -- Beaumont 2000, orig. proceeding).

I believe the Waco Court of Appeals is incorrect both in its interpretation of the holding in *Akzo* and on the interpretation of Rule 202 to the extent it has held that a notice of oral deposition under Rule 202 cannot contain a request for production.

1. Rule 202.5 specifically allows the Court to order a deposition pursuant to Tex. R. Civ. P. 205.

Except as otherwise provided in this rule, **depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit.** The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A Court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule. [emphasis added]

Rule 205 (c) 1 expressly allows for the issuance of a notice of deposition and subpoena on a non-party, which includes a request for production of documents.

a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions;

Tex. R. Civ. P. 205(3)(a) expressly address the method of issuing a notice of oral deposition and production of documents on a non-party:

**Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving, a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period, the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

Those Courts that state that nothing in Rule 202 allows for the production of documents overlook the fact that Rule 202 incorporates by reference the method and scope of discovery from non-parties under Tex. R. Civ. P. 205.

2. The Waco Court of Appeals in *Pickrell* arguably misinterprets the holding in *Akzo*. *Akzo* did not deal with production of documents, but a request to enter onto and inspect property. The Court in *Akzo* correctly ruled that nothing in Rule 202 allows a Trial Court to order a pre-suit entry on to property for inspection and copying. *Akzo*, supra at 920.

The Respondent issued two orders. One ordered the depositions of Anthony Semien and of witnesses designated by the Relators. **The other required the Relators to make the accident scene available for inspection, photographing and videotaping.** [emphasis added]

*Akzo* properly states that the rule only allows for a deposition. *Akzo*, supra at 921. However, *Pickrell* arguably overstates this proposition when it holds that *Akzo* says that a notice for oral deposition ordered under Tex. R. Civ. P. 202 cannot contain a request for production for the reasons set out above, particularly that a notice of oral deposition of a non-party under Tex. R. Civ. P. 205 inherently may contain a request for production of documents.

## M. APPLICATIONS

1. **Personal Injury claims:** *Houston ISD v. Durrell*, 2018 WL 1528336 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2018, orig. proceeding).

2. **Probate issues:** *In re Wolfe*, 341 S.W. 3d 932 (Ex. 2011) (orig. proceeding); *In re Meeker*, 497 S.W.3d 551, 556 (Tex. App. Ft. Worth 2016).

### 3. Employment claims

a. ***Patton Boggs LLP v. Moseley***, 394 S.W.3d 565 (Tex. App. Dallas 2011, orig. proceeding) (an order that does not set out findings that the benefits of the pre-suit likely will outweigh the costs is an abuse of discretion);

b. ***In re Hewlett-Packard***, 212 S.W.3d 356 (Tex. App. – Austin, 2006, orig. proceeding). See discussion below under Trade Secrets.

c. ***In re Bailey-Newell***, 439 S.W.3d 428 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2014 orig. proceeding) Petitioner sought a Rule 202 deposition in aid of a potential employment discrimination case, which the Trial Court granted. The Hospital employer contended that the Trial Court abused its discretion because the petition permitted the employee to use Rule 202 to circumvent the Texas Labor Code’s mandatory jurisdiction requirement that the employee exhaust her administrative remedies before seeking redress for her allegedly wrongful termination. The Appellate Court agreed.

“It is beyond serious dispute that the Texas Commission on Human Rights Act requires a complainant to first exhaust his administrative remedies before filing a civil action.” ***Lueck v. State***, 325 S.W.3d 752, 761-62 (Tex. App. – Austin 2010, pet. denied) (noting that authorities of Texas Supreme Court hold that administrative procedures are an “essential feature of the statutory framework” and are jurisdictional).

The Petitioner cleverly attempted to argue that she anticipated making common law claims, as well, including intentional infliction of emotional distress, libel, and slander which would not be subject to the Labor Code administrative proceedings. The Court held that such claims would be intrinsically intertwined with the administrative claims and thus could not be used to skirt the Labor Code requirement.

4. **Business litigation (fraud and breach of fiduciary duty): *In re State of Texas***, 110 F. Supp. 2d 514 (N.D. Tex. -Texarkana Div. 2000)

5. **Appropriation of trade secrets claims: *In re Hewlett-Packard***, 212 S.W.3d 356 (Tex. App. – Austin, 2006, orig. proceeding). To be entitled to trade secret information under Rule 202, the Petitioner must demonstrate the same requirements of necessity that would be required in a civil action. See also, ***In re PrairieSmarts LLC***, 421 S.W. 3d 296 (Tex. App. – Ft. Worth 2014, orig. proceeding).

6. **Defamation, Business Disparagement claims and the Anti-SLAPP Statute**

a. ***In re Elliott***, 504 S.W.3d 455 (Tex. App. – Austin 2016, orig. proceeding). If you were going to read only one case to get a feel for how Rule 202

functions and its interplay (or conflict, depending on your perspective) with the anti-slapp provision, this opinion should be near or at the top of the list. The complexity of the legal analysis is only outdone by complexity of the conflict between goal of Rule 202 and the goal of the TCAP.

MagneGas filed a petition seeking to take a pre-suit deposition of the alleged owner of Internet website in order to investigate potential claims related to an article about MagneGas that was written by an anonymous author and published on the website. The author appeared anonymously in the proceeding and filed a motion to dismiss the petition under Texas Citizens Participation Act (TCPA) also referred to as the anti-SLAPP statute. The District Court in Travis County ordered the alleged owner's pre-suit deposition without ruling on the motion to dismiss. The alleged owner of the website sought mandamus relief, which was granted. The petition for pre-suit discovery was held to be precluded by the alleged owner's motion to dismiss under the TCPA. It was held to be an abuse of discretion to grant the Rule 202 petition without first conducting a hearing and ruling on the motion to dismiss under the TCPA. A discussion of the procedural history is informative.

MagneGas sought to take the pre-suit deposition of Elliott, alleging that the domain to the website, Pumpstopper.com, was registered to her, and the website had published a negative article about MagneGas, which had damaged its business reputation. MagneGas wanted to find out the identity of the author of the negative article. In its petition for pre-suit deposition, MagneGas made the following allegations:

Specifically, the "PumpStopper" creates anonymous reports baselessly bashing reputable companies such as MagneGas in hopes of driving down the stock price of the targeted companies. On information and belief, the "PumpStopper" shorts the stock of the targeted companies in advance of releasing its reports, hoping to make money from the artificial price deflation caused by its reports.

***MagneGas seeks to investigate potential claims against the authors, publishers, and distributors of the false and misleading materials,*** and MagneGas has reason to believe that Mr. Elliott has knowledge that will facilitate that investigation.

Before we begin our discussion of the tension between Rule 202 and the TPAC, it is worth discussing how badly MagneGas fouled up the procedural process under Rule 202. First, it did not wait to get a ruling on its petition before issuing a subpoena for Mr. Elliott's appearance at the deposition. Then, when Mr. Elliott was a no-show, MagneGas filed a motion to compel. Elliott, however, also filed motions to quash the subpoena and the petition, and sought a protective order, which were set for hearing. In the meantime, John Doe 1, identifying himself as "an author, publisher, and/or distributor who utilizes PumpStopper.com," filed a TCPA motion to dismiss both MagneGas's Rule 202 petition and its motion to compel Elliott's deposition. See Tex. Prac. & Rem. Code §27.003. He also joined in Elliott's motion to quash and motion for protection. The motion to dismiss

asserted that MagneGas's Rule 202 petition and motion to compel "both are based on, related to, or in response to John Doe 1's exercise of his right of free speech and the rights of free speech of other potential Defendants and adverse parties." These motions were set to coincide with the hearing on Elliott's motions. Before these motions were heard, the Court conducted what is described as a non-evidentiary hearing, at which time it granted MagneGas's motion for leave to file a 202 petition and compelled Elliott to comply with the subpoena issued for the deposition within thirty days. MagneGas filed a motion to compel compliance with the Court's order and Elliott file a petition for writ of mandamus.

The unique rules that apply to appealing a Trial Court ruling under Tex. R. Civ. P. 202 will be discussed in more detail in a later section. However, in a nutshell, if the petition is sought in aid of future litigation then the order is not appealable, and only mandamus is available because the order is not a final disposition of the potential claim. Here, MagneGas made it clear that it was not just investigating a potential claim, but seeking information to bring a claim against a particular wrongdoer for what it considered wrongful acts:

Here, although MagneGas's petition states that it is investigating a potential claim (as opposed to seeking to perpetuate testimony in an anticipated suit), the petition also states that MagneGas is investigating a potential claim *against the authors, publishers, and distributors of the allegedly false and misleading information*. Elliott is a potential Defendant because MagneGas alleges that the Pumpstopper.com website is registered to him and that the website created, published, or distributed the allegedly false and misleading information. In addition, the petition states that MagneGas would benefit from the knowledge "that bringing a lawsuit against those individuals [affiliated with the Pumpstopper or Pumpstopper.com] is warranted."

At this point, the Court acknowledges that the question of a motion to dismiss under the Texas Citizen's Participation Act in a 202 proceeding is a matter of first impression. The Court focuses on the "early dismissal of legal proceedings" provision of the Act.

A key component of the TCPA is the provision of a mechanism for early dismissal of "legal actions" that are based on a party's exercise of the right of free speech, the right to petition, or the right of association. *Id.* §27.003. . . A "legal action" is defined very broadly in the TCPA and means "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* §27.001(6).

It is important to note the importance of determining whether a petition for 202 Petition is a "legal action" and whether the movant on the motion to dismiss must do anything more than file a motion to dismiss to abate all discovery related to the 202 Petition. The Elliott Court first finds that a Rule 202 proceeding does constitute a "legal

action” suit under the liberal interpretation standards of the TCPA.

On its face, the Rule 202 petition fits the description of covered filings under the TCPA—i.e., it is a petition or other judicial pleading or filing that seeks legal or equitable relief against Elliott—a presuit deposition—to enable MagneGas to investigate potential claims against the authors, publishers, and distributors of statements that MagneGas alleges are false and misleading, including Doe. See Tex. Civ. Prac. & Rem. Code §27.001(6).

The catch-22 in the *Elliott* instance is that since the Trial Court had not conducted a hearing on the motion to dismiss, it is unknown whether the motion was valid and whether there was any limited discovery that MagneGas could have obtained the motion to dismiss notwithstanding.

The Court may allow specified and limited discovery relevant to the motion on a showing of good cause, but otherwise “all discovery in the legal action is suspended until the Court has ruled on the motion to dismiss.” *Id.* §§ 27.003(c), .006(b). . .

The District Court’s order granting MagneGas’s Rule 202 petition was not the “specified and limited discovery *relevant to the [TCPA] motion [to dismiss]*” that the Act contemplates. *Id.* §27.006(b) (emphasis added). The District Court had no discretion to order a deposition based on MagneGas’s Rule 202 petition before ruling on Doe’s TCPA motion to dismiss, and consequently, we will conditionally grant Elliott’s petition for writ of mandamus.

The concurring opinion in *Elliott*, written by Justice Pemberton, states that The Court can – and should – resolve this discovery-related original proceeding without need to address the intricacies of the Texas Citizens Participation Act (TCPA). Since that would be ideal for my purposes, I think it is worth considering Justice Pemberton’s analysis.

The District Court ordered Elliott’s Rule 202 deposition without requiring a threshold showing of any kind regarding the merits of MagneGas’s potential claims and despite objections from Elliott and one of the anonymous speakers (Doe) that preserved the complaint. Elliott brings this First Amendment objection forward as his principal asserted ground for mandamus relief. This ground plainly has merit, and mandamus relief should conditionally issue for this reason alone. This Court needed to say no more at this juncture. [footnote deleted]

Justice Pemberton cites to and relies in large part for his conclusions on wording in *In re Does 1-10*, 242 S.W.3d 845 (Tex. App. – Texarkana 2007, orig. proceeding), which warrants a review of that opinion. But *In re Does 1-10* would be an important opinion to discuss and understand regardless.

b. ***In re Does 1-10***, 242 S.W.3d 845 (Tex. App. – Texarkana 2007, orig. proceeding). This case involved a hospital seeking recourse against a blogger, who the hospital believed was disparaging its business reputation and revealing information protected under HIPAA. Here is the important procedural history from the opinion:

the Hospital filed a petition against the Does—combined with an “ex parte request to non-party to disclose information” directed at SuddenLink, explicitly based on 47 U.S.C.A. §551(c) (West 2001 & Supp.2007), [Cable Communications Policy Act of 1984 (CCPA)] asking the Trial Court to direct [a ISP provider] SuddenLink to disclose the identities of the Does. On the day of filing (June 19, 2007), the Court granted the motion. On July 23, the Court issued a second “agreed” order, stating that the Hospital and SuddenLink had agreed to amend the prior order which provided for notice to the Does with opportunity for them to respond. If no response was made, SuddenLink was to disclose the information.

An interesting point raised in ***In re Does-1-10*** that is pertinent in about every anti-SLAPP case is the issue of standing. If the individual whose identity is being sought so that an action can be pursued against that individual, how does the individual have standing to object to a petition for a 202 petition, since the individual is not within the Court’s jurisdiction? ***In re Does-1-10*** does a pretty good job of answering this question:

the rules of discovery allow any person “from whom discovery is sought, and any other person affected by the discovery request” to move for a protective order. TEX. R. CIV. P. 192.6(a).. One of the reasons to ask for such relief is to protect the movant from “invasion of personal, constitutional, or property rights.” TEX. R. CIV. P. 192.6(b). A Court may then make any order in the interest of justice that denies or limits the requested discovery. TEX. R. CIV. P. 192.6(b)(1)(2). The request of Doe 1 that his name should not be released is based on a possible invasion of personal and constitutional rights. We believe the rules of procedure authorize a relator to move for such protection and hence grants standing to bring this action. See ***In re Shell E & P, Inc.***, 179 S.W.3d 125, 130 (Tex. App. – San Antonio 2005, orig. proceeding).

There is in ***In re Does 1-10*** an extended discussion of the Cable Communications Policy Act of 1984 (CCPA) and whether it applies to only governmental agencies or to private individuals. The discussion, while interesting, is beyond the scope of this paper. The important take away is that regardless of the application of the statute, discovery must proceed under state procedural rules:

in most cases involving Internet lawsuits based on libel or breach of contract, the scenario is that suit is brought against a Doe Defendant, and the Plaintiff at some point early in the proceeding seeks to discover his or her identity. That relief is sought, not through some all-controlling federal

statutory exception—but instead through the discovery tools of that forum, as applied in balancing the right to litigate libel with the constitutional protection of free anonymous speech.

What is particularly interesting about the *In re Does 1-10* opinion is that it finds that the Trial Court abused its discretion by not utilizing the Texas Discovery Rules to reach its result. It then goes on to discuss how a Texas Court might use the Texas Discovery Rules to provide relief to a business entity seeking the identity of an anonymous individual who it believes is disparaging the entity's business reputation. *In re Does 1-10*, 242 S.W.3d at 819. It is this part of the *In re Does 1-10* opinion that Justice Pemberton refers to in his concurrence in *In re Elliott*. The Texarkana Court sets forth the following as a preferred test:

“[B]efore a defamation can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”

The problem and dilemma in a Rule 202 context is that the Texarkana Court is effectively suggesting what it held is an abuse of discretion. It is creating a procedure where none exists. Rule 202 does not contain the above requirement. Indeed, there is case law to the effect that a Rule 202 petition does not have to set out a claim. *In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, orig. proceeding). Furthermore, Texas Supreme Court has held that a demonstration of a prima facie case (demonstration of “viability”) is not required to obtain discovery relevant to a pled claim in Texas. *Ford v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009) (“but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery.”) So, in the end, there may need to be a legislative fix, since the Texas Supreme Court has not provided additional guidance in this area.

c. It is important to note that it is not sufficient merely to claim that the legal action (i.e. a Rule 202 proceeding) implicates First Amendment privileges, including anonymity. The individual asserting the First Amendment privilege must file a motion to dismiss. Absent the filing of a motion to dismiss, a Rule 202 order has been held not to be an abuse of discretion. *International Association of Drilling Contractors v. Orion Drilling Company, LLC*, 512 S.W.3d 483 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2016); *Puig v. Hejtmancik*, 2017 WL 5472781 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2017).

## N. APPEAL

A party to a Rule 202 petition against whom suit is anticipated may seek review of an allegedly improper Rule 202 order via mandamus. *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011); (orig. proceeding); *In re Jordan*, 249 S.W.3d 416, 420 (Tex. 2008); *In re Emergency Consultants, Inc.*, 292 S.W. 3d 78, 80 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, orig. proceeding [mand. denied]; *In re Hewlett-Packard*, 212 S.W.3d 356, 360 (Tex. App. – Austin 2006, orig. proceeding). A party to a Rule 202 proceeding has no adequate remedy by appeal if the Trial Court abused its discretion by ordering discovery

that would compromise procedural or substantive rights. *In re Chernov*, 399 S.W.3d 234, 235 (Tex. App. – San Antonio 2012, orig. proceeding). As in other original proceedings, a Trial Court’s order granting a verified petition to take depositions before suit is reviewed under an abuse of discretion standard. *Patton Boggs LLP v. Moseley*, 394 S.W. 3d 56, 568-69 (Tex. App. – Dallas 2011, orig. proceeding). Additionally, a ruling regarding a request to investigate a potential claim is appealable as a final judgment, which a ruling on a deposition to aid an anticipated claim is not because it is ancillary to an anticipated claim. *In re Jorden*, 249 S.W.3d 416, 419 (Tex. 2008) (Pre-suit deposition orders are final and appealable if sought from someone against whom suit is *not* anticipated.)