

TEXAS DEPOSITIONS

Brock C. Akers

Volume 1

Trial Lawyer's Series®

CHAPTER ONE

OVERVIEW

Scope of Coverage

DISCUSSION

General Thoughts and Observations About Depositions

E-Discovery

Rules for Witnesses

Telephone Depositions

Cost Saving Ideas

— Ethical Considerations

— Oral Depositions

— Written Depositions

— Perpetuating Testimony

— Nonstenographic Tape Record

— Videotape Depositions

— Telephone Depositions

— Satellite Depositions—Video Teleconferencing and Video Conferencing

Making and Transcribing Depositions

— In General

— Court Reporters

— Before Starting the Deposition

— Making the Record

— Correcting the Record

CHECKLISTS

Texas Depositions—Checklist

— Scope of Coverage

— Arranging Depositions

— Taking Depositions

— Returning Depositions

— Using Depositions

Mandatory Disclosure—Checklist

— Scope of Coverage

Federal Depositions—Checklist

- Scope of Coverage
- Arranging Depositions
- Taking Depositions
- Returning Depositions
- Using Depositions

Deposition Notice—Checklist

Tips for a Successful Deposition—Checklist

Deposition Procedures—Checklist

Objections (Texas Rules)—Checklist

Privileges (Texas Rules)—Checklist

Objections (Federal Rules)—Checklist

Pretrial Depositions Relating to Oral and Written Depositions—Checklist

Telephone and Telephone-Video Depositions—Checklist

CHAPTER 2

STATUTES AND RULES

GENERAL DISCUSSION

The Meaning of Taking a Deposition Under the Rules

Texas Rules

Federal Rules

Under the Rules Stating Objections to Depositions

TEXAS RULES AND STATUTES PERTAINING TO DEPOSITIONS

Texas Rules of Civil Procedure (Discovery Practice and Procedure)

Rule 176 Subpoenas

Rule 190 Discovery Limitations

Rule 191 Modifying Discovery Procedures and Limitations; Conference Requirement; Signing Disclosures, Discovery Requests, Responses, and Objections; Filing Requirements

Rule 192 Permissible Discovery: Forms and Scope; Work Product; Protective Orders; Definitions

Rule 193 Written Discovery: Response; Objection; Assertion of Privilege; Supplementation and Amendment; Failure to Timely Respond; Presumption of Authenticity

Rule 194 Requests for Disclosure

Rule 195 Discovery Regarding Testifying Expert Witnesses

Rule 196 Requests for Production and Inspection to Parties; Requests and Motions for Entry Upon Property

Rule 197 Interrogatories to Parties

Rule 198 Requests for Admissions

Rule 199 Depositions Upon Oral Examination

Rule 200 Depositions Upon Written Questions

Rule 201 Depositions in Foreign Jurisdictions for Use in Texas Proceedings; Depositions in Texas for Use in Foreign Proceedings

Rule 202 Depositions Before Suit or to Investigate Claims

Rule 203 Signing, Certification, and Use of Oral and Written Depositions

Rule 204 Physical and Mental Examinations

Rule 205 Discovery from Nonparties

Rule 215 Abuse of Discovery; Sanctions

Texas Civil Practice and Remedies Code (regarding depositions)

Chapter 20. Depositions

Chapter 21. Interpreters

Chapter 22. Witnesses

Supreme Court Adopts Definitions of Unprofessional Conduct for Reporters

Texas Government Code

Charges and Expenses of Court Reporters,

§ 52.055 Expenses of District Court Reporters

§ 52.058 Expenses of District Court Reporters in Change of Venue Cases

§ 52.059 Charges for Depositions

Texas Health and Safety Code

Subchapter G. Disclosure of Health Care Information

§ 241.152 Written Authorization for Disclosure of Health Care Information

§ 241.153 Disclosure Without Written Authorization

FEDERAL RULES AND STATUTES PERTAINING TO DEPOSITIONS

Federal Rules of Civil Procedure (Discovery Practice and Procedure)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Rule 27. Depositions to Perpetuate Testimony

Rule 28. Persons Before Whom Depositions May Be Taken

Rule 29. Stipulations About Discovery Procedure

Rule 30. Depositions by Oral Examination

Rule 31. Depositions by Written Questions

Rule 32. Using Depositions in Court Proceedings

Rule 33. Interrogatories To Parties

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Rule 35. Physical and Mental Examinations of Persons

Rule 36. Requests for Admission

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Federal Statutes (28 U.S.C.)

§ 1821 Per Diem and Mileage Generally; Subsistence

§ 1826 Recalcitrant Witnesses

§ 1920 Taxation of Costs

CHAPTER 3

DIGEST

Scope of Coverage

TOPICS

Adjournment or Completion of Depositions

Agreements

Attorney as Witness

Audio (Tape Recorder) Depositions

Certifying Questions

Confidentiality

Contempt

Corporate Depositions
Corrections to Deposition
Cost of Depositions
Court Reporters
Customary Practices

Defending Depositions
Deposition Procedures
Deposition as Substitute for Other Discovery Requests
Deposition as Summary Judgment Evidence
Deposition Summaries
Deposition to Perpetuate Testimony
Deposition on Written Questions (Written Deposition)
Discovery Plans

Ethical Consideration
Exhibits to Depositions
Expenses of Attending Depositions
Expert's Deposition
Failure to Attend Depositions
Filing of Depositions
Foreign Depositions

Interpreters

Jurisdiction Over the Deposition

Making the Record
Modifying Deposition Procedures
Motion to Compel Answers

Nonstenographic Recordings
Notice of Depositions
Number of Depositions

Objections
Out-of-State Depositions

Parties Joined After the Deposition
Persons to Be Deposed
Persons to Be Present at Deposition
Place or Location of Depositions
Private Conference With Witnesses
Privileged Information
Production of Documents
Protective Orders
Public Access to Court Records
Purpose of a Deposition

Questions and Answers

Sanctions
Scheduling Depositions

Scope of Discovery
Signature of Witness
Stipulations
Subpoena
Supplemental Depositions
Supplementing Deposition Responses

Taking a Deposition Under the Rules
Telephone Depositions
Time Limitations on Depositions
Time of Taking Deposition
Types of Depositions

Unresponsive Answers
Use of Depositions at Trial
Use of Depositions on File

Video Depositions

Weekend Depositions
Witnesses

SUPPLEMENTAL REFERENCES

Texas Lawyer's Creed—A Mandate for Professionalism
Texas Disciplinary Rules of Professional Conduct

CHAPTER 4

FORMS AND MOTIONS

Introduction

STATE COURT FORMS

NOTICES OF DEPOSITION

- 1 **Notice of Oral Deposition—Party (Multiple Witnesses)**
Application: Multiple Parties; Multiple Witnesses (Parties); Notice *Duces Tecum*
- 2 **Notice of Oral Deposition—(Nonparty)**
Application: Multiple witnesses; *Subpoena Duces Tecum* Notice
- 2A **Notice of Corporate Deposition—When Corporation is a Party**
Application: Official Corporate Answers; Notice *Duces Tecum*
- 3 **Notice of Oral Deposition—(Nonparty)**
Application: Single Witness; *Subpoena Duces Tecum* Notice
- 3A **Notice of Intention to Take Oral Deposition**
Application: Expert Witness; *Subpoena Duces Tecum* Notice
- 4 **Notice of Oral Deposition—Videotape**
Application: Single Witness; Videotape
- 4A **Motion and Order or Stipulation for Telephone Depositions**

- 5 **Notice of Oral Deposition of an Organization (Nonparty)**
Application: Nonparty Corporation, Association, etc. to Designate Witness
- 6 **Notice of Deposition by Written Questions (Written Deposition)**
Application: Custodian of Hospital Records—Short Form
- 7 **Cross-Questions to Custodian of Records of Hospital**
Application: Proving Up Hospital Records as Business Records
- 8 **Notice of Deposition by Written Questions**
Application: Custodian of Hospital Records—Long Form
- 9 **Notice of Deposition by Written Questions**
Application: Treating Physician—Short Form; *Subpoena Duces Tecum*
- 10 **Notice of Deposition by Written Questions (Written Deposition)**
Application: Treating Physician—Long Form; Prove up Diagnosis, Prognosis, Medical Bill, etc.
- 10A **Notice of Written Questions (Written Deposition)**
Application: Custodian of Medical Records
- 10B **Notice of Deposition by Written Questions (Written Deposition)**
Application: Custodian of Personnel Records

DEPOSITIONS TO PERPETUATE TESTIMONY

- 10C **Petition to Perpetuate Testimony**
Application: Petition to Take Deposition Before Suit is Instituted

MOTIONS AND ORDERS

- 11 **Motion For Audio Recording in Lieu of Stenographic Recording of Deposition**
Application: Use of Tape Recorder (Audio) in Lieu of Court Reporter
- 12 **Order Authorizing Audio Recording in Lieu of Stenographic Recording of Deposition**
Application: Use with Motion for Audio Recording (Form 11)
- 13 **Motion and Order or Stipulation for Telephone Depositions**
- 14 **Motion to Shorten Time for Taking Video Deposition**
Application: Take Video Deposition with Less than Five Days' Notice
- 15 **Notice of Oral Deposition—Videotape (Nonparty)**
Application: Attachment to Motion to Shorten Time for Taking Video Deposition; Single Witness; *Subpoena Duces Tecum*
- 16 **Order Shortening Time for Deposition Notice**
Application: Use with Motion to Shorten Time for Taking Deposition
- 17 **Motion for Protective Order—Expert Fees**
Application: Require Party Requesting Deposition to Pay Expert Fees
- 18 **Motion for Protective Order—Witness Ill**
Application: Postpone Deposition Because Witness Ill
- 19 **Motion for Protective Order (Alternative)**

Application: General Format

20 **Order Granting Relief in Response to Motion for Protective Order**

Application: Order Granting Relief in Response to Motion for Protective Order

21 **Motion to Quash Subpoena**

Application: Prevent Taking of Nonparty's Deposition

21A **Defendant's Motion to Quash Notice of Deposition**

22 **Motion to Quash Subpoena or in the Alternative for Protection**

23 **Order Quashing Subpoena**

Application: Prevent Taking of Nonparty's Deposition

23A **Motion to Suppress Deposition**

23B **Order on Motion to Suppress Deposition**

REFUSAL OF WITNESS TO ANSWER QUESTIONS—ORAL OR WRITTEN

24 **Motion to Compel Witness to Answer Deposition Questions**

25 **Court Reporter's Letter Certifying Unanswered Deposition Questions**

Application: Exhibit Attached to Motion

26 **Order Compelling Answers to Certified Questions**

Application: Use with Motion to Compel Witness to Answer Deposition Questions

REFUSAL OF WITNESS TO APPEAR FOR DEPOSITION

27 **Motion to Order Appearance**

Application: Less Severe Means to Compel Attendance than Motion for Contempt

28 **Order to Appear for Deposition**

29 **Motion for Contempt—Witness Fails to Appear at Deposition**

Application: Compel Attendance of Witness at Deposition by Attachment by Sheriff

30 **Judgment of Contempt—Failure of Witness to Appear for Deposition. Also, Witness Fails to Attend Contempt Hearing Though Duly Notified**

Application: Secure Contempt Order and Have Sheriff

Attach Witness to Bring to Deposition

STIPULATIONS

31 **Stipulations for Taking Depositions Under State Rules**

MISCELLANEOUS FORMS

32 **Letter to Client Regarding Deposition**

33 **Letter to Client Regarding Deposition—(Alternative)**

34 **Letter to Opposing Counsel Confirming Deposition Arrangements**

35 **Deposition Cover Page—Telephone Deposition**

- 36 **Deposition Summary—Very General**
(page reference only; topical headings)
- 37 **Deposition Summary—Very General**
(page reference only; topical headings)
- 38 **Deposition Summary—Extremely Abbreviated**
(page and line references)
- 39 **Deposition Summary—Extremely Abbreviated**
(page and line references)
- 40 **Waiver of Twenty-Day Notice for Written Questions**
- 41 **Objections to Deposition**
- 42 **Deposition Scheduling Form**
- 43 **Deposition Scheduling Form—Alternative**
Application: Person Scheduling the Deposition is Unfamiliar with the Case File
- 44 **Information for Court Reporter**

FEDERAL COURT FORMS

REPORTS

- 45 **Report of the Parties' Planning Meeting (Federal Court)**
Application: Filed with the Court within Fourteen Days of the Rule 26(f) Meeting

NOTICES OF DEPOSITIONS

- 45A **Notice of Oral Deposition—(Party)**
Application: Single Witness; *Duces Tecum* Notice
- 46 **Notice of Oral Deposition—(Nonparty)**
Application: Single Witness; *Subpoena Duces Tecum* Notice
- 47 **Notice of Oral Deposition—Organization (Nonparty)**
Application: Rule 30(b)(6) Deposition of Organization to Designate Witness; Single Witness;
Subpoena Duces Tecum
- 48 **Notice of Oral Deposition—(Party)—Videotape**
Application: Single Witness; *Duces Tecum* Notice; Videotaped
- 49 **Notice of Written Deposition**
Application: Federal Notice Form to be Used with Written Questions from State Court Forms

MOTIONS AND ORDERS

- 50 **Motion to Take Telephone Depositions Pursuant to Federal Rule of Civil Procedure 30(b)(7)**
- 51 **Order Granting Motion to Take Telephone Depositions**
- 52 **Motion for Protective Order**
- 53 **Order Granting Relief Under Federal Rule of Civil Procedure 26(c)**

STIPULATIONS

54 **Stipulations for Taking Depositions Under the Federal Rules**

55 **Stipulations for Taking Telephone Depositions**

FOREIGN DEPOSITIONS

56 **Fed. R. Civ. P. 28(b); Notice of Foreign Oral Deposition**

57 **Fed. R. Civ. P. 28(b); Petition for Commission to Take Written Deposition in Foreign Country**

58 **Fed. R. Civ. P. 28(b); Order for Commission to Take Foreign Written Deposition**

59 **Commission to Take Foreign Written Deposition**

Application: Attachment to Order for Commission to Take Foreign Written Deposition

60 **Fed. R. Civ. P. 28(b); Petition for Commission to Take Oral Deposition in Foreign Country**

61 **Order to Issue Commission for Foreign Oral Deposition**

62 **Commission to Take Foreign Oral Deposition**

Application: Attachment to Order for Commission to Take Foreign Oral Deposition

63 **Fed. R. Civ. P. 28(b); Petition for Letter Rogatory for Foreign Deposition**

64 **Order to Issue Letter Rogatory for Foreign Deposition**

65 **Letter Rogatory**

66 **Letter of Request**

CHAPTER 5

PRACTICE AIDS

MEDICAL AIDS

Medicine-Related Internet Sites

Code for Physicians and Attorneys of Texas

Medical Abbreviations

Medical Terminology: Prefixes, Stems, and Suffixes

Introduction to Medical Illustrations

— Pelvis, Lumbar Vertebrae, and Nerve Roots

— Lumbar Vertebra

— Vertebral Ligaments

— Vertebral Column

— Dermatomes

— Hand and Wrist

— Foot

— Bones of the Knee—Anterior

— Bones of the Knee—Posterior

— Ligaments of the Knee—Anterior

— Ligaments of the Knee—Posterior

— Muscles—Anterior

— Muscles—Posterior

- Muscles—Neck
 - Muscles—Arm & Shoulder
 - Muscles—Abdomen
 - Venous System
 - Arterial System
 - Nerves
- Orthopedic Tests
The Neurological Examination

GENERAL AIDS

- Perpetual Calendar
- Table of Days
- Leap Years
- Life Expectancy Tables
- Land Acreage, Distances, and Measurements
- Weights and Measures
- Metric Conversion
- Accident Reconstruction
- The Internet: Information Available

CHAPTER 6

WITNESSES

Scope of Coverage

PREPARING FOR THE DEPOSITION

- Preparing the Client/Witness for Deposition
- Client/Witness Deposition Preparation—Checklist
- Expert Witnesses—Fees and Expenses
- Expert Witness Deposition Preparation—Checklist

CONDUCTING THE DEPOSITION

- Standard Introductory Comments—Checklist
- Standard Preliminary Questions for the Witness—Checklist
- Basic Checklist for Expert's Deposition
- Universal Checklist for Cross-Examining Opposing Expert

ADMISSIBILITY OF EXPERT'S SCIENTIFIC TESTIMONY:

A NOTE ON *DAUBERT V. MERRELL DOW PHARMACEUTICALS*

CHAPTER 7

VIDEO DEPOSITIONS

Scope of Coverage

APPLICABLE RULES

PROCEDURE, TECHNIQUE, AND TECHNICAL MATTERS

- Preparing the Witness
- Preparing the Camera Operator (Video Technician)
- Preparing the Attorney/Interrogator

PRESENTING THE VIDEOTAPE DEPOSITION AT TRIAL

- Handling Objections
- Equipment for Presenting Video Deposition

VIDEOTAPED DEPOSITIONS BY COURT ORDER

CASE LAW

ADVANTAGES AND DISADVANTAGES OF VIDEOTAPE

- Advantages
- Disadvantages

TAKING VIDEO DEPOSITIONS—CHECKLISTS

- Operator
- Witness
- Court Reporter (Federal Court Depositions)
- Attorneys

VIDEO, SATELLITE, AND INTERNET DEPOSITIONS

VIDEOPHONE DEPOSITIONS

CHAPTER 8

FOREIGN JURISDICTIONS

Scope of Coverage

FOREIGN DEPOSITIONS

- Federal Practice
- Taking Depositions in Japan
- Practical Considerations
- Case Law—The Hague Evidence Convention

FEDERAL STATUTES & TREATIES

- The Hague Convention
- 28 U.S.C. § 1781 Transmittal of letter rogatory or request
- 28 U.S.C. § 1782 Assistance to foreign and international tribunals and to litigants before such tribunals
- 28 U.S.C. § 1783 Subpoena of person in foreign country
- 28 U.S.C. § 1784 Contempt

TEXAS PRACTICE

- Texas Rules of Civil Procedure 201. Depositions in Foreign Jurisdictions for Use in Texas Proceedings;
Depositions in Texas for Use in Foreign Proceedings
- Texas Civil Practice & Remedies Code § 20.001. Persons Who May Take a Deposition
- Texas Civil Practice & Remedies Code § 20.002. Testimony Required by Foreign Jurisdiction

TEXAS DEPOSITIONS

Brock C. Akers

Volume 1A

Trial Lawyer's Series®

CHAPTER 1A

AUTOMOBILES/RAILROADS

1A.1 AUTOMOBILES

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Opposing Driver
- Police Officer
- Accident Reconstruction Expert
- Ambulance Attendant
- Plaintiff
- Drinking Driver
- Truck Driver

1A.2 RAILROADS

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Train Crew Member
- Legal Citations

You are referred also to *Texas Automobiles* of the Trial Lawyer's Series® for complete information in the preparation and trial of such cases. It is available from Knowles Publishing, Fort Worth, Texas.

CHAPTER 2A

DEFAMATION/LIBEL/SLANDER

Scope of Coverage

Potential Witnesses

Potential Documents

Plaintiff

Defendant

Legal Citations

CHAPTER 3A

DOMESTIC RELATIONS

3A.1 DIVORCE/ANNULMENT

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Spouse
- Character Witnesses

3A.2 CHILD CUSTODY/VISITATION/SUPPORT

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Former Spouse
- Character Witnesses
- Psychologist/Psychiatrist

3A.3 PATERNITY

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Mother
- Accused Father

3A.4 CONTEMPT

- Scope of Coverage
- Potential Witnesses
- Potential Documents
- Clerk or Deputy Clerk of the Court
- Spouse of Former Spouse
- Movant
- Legal Citations

CHAPTER 4A

DRAM SHOP

Scope of Coverage

Potential Defendants

Potential Witnesses

Potential Documents

Companions

Defendant

Eyewitness

Intoxicated Tortfeasor (AB)

Jailer

Plaintiff

Paramedic

Police Officer

Legal Citations

Texas Statutes

CHAPTER 5A

ECONOMISTS' DEPOSITIONS

A Primer on Economic Testimony in Litigation

Strategic Considerations of Economic Testimony

Economist

Opposing Economist

Legal Citations

Bond Yields and Interest Rates

Working Life Table for Men

Life and Worklife Expectancies for Men by Race

Worklife Expectancies for Men by Schooling Completed

Working Life Table for Women

Life and Worklife Expectancies for Women by Race

Worklife Expectancies for Women by Schooling Completed

CHAPTER 6A

FIRE INSURANCE

Scope of Coverage

Potential Witnesses

Potential Documents

Insured

Fire Insurance Company Representative

Arson Expert

Firefighter

Legal Citations

CHAPTER 7A

INJURIES AND DAMAGES

Scope of Coverage

Potential Witnesses

Potential Documents

Injured Party

Medical Doctor/Osteopath

Chiropractor

Employment Expert

Fellow Employee

Spouse

Before-and-After Witness

Employer/Supervisor of Injured Party

Biomechanical Engineer

Neurologist (Quadriplegic Injury)

Rehabilitation Consultant

Vocational and Career Counselor (Assessment of Competitive Disadvantage Resulting from Amputation)

Vocational Evaluator (Orthopedic Injury Case)

Vocational Rehabilitation Consultant (Spinal Cord Injury Case)

Payroll/Personnel Clerk

Decedent's Friend/Relative

Legal Citations

CHAPTER 8A

NEGLIGENT HIRING

Scope of Coverage

Potential Witnesses

Potential Documents

Employer

Employee

Legal Citations

CHAPTER 9A

PREMISES LIABILITY

Scope of Coverage

Potential Witnesses

Potential Documents

Owner or Lessee

Plaintiff

Human Factors Engineer

Biomechanical Engineer

Owner of Dog (Animals)

Bartender (Dram Shop)

Intoxicated Tortfeasor (*AB*) (Dram Shop)

Witness to Construction Hazard (Highway Defect)

Architect/Architectural Engineer (Parking Areas)

Security Manager

Legal Citations

CHAPTER 10A

PROBATE

Scope of Coverage

Potential Witnesses

Potential Documents

Attorney Drafting Will

Friend of Decedent

Handwriting Expert (Forensic Document Examiner)

Legal Citations

CHAPTER 11A

PRODUCTS LIABILITY

Scope of Coverage

Potential Witnesses

Potential Documents

Plaintiff

Manufacturer's Representative

Design Engineer

Design Engineer—Expanded Checklist

Human Factors Psychologist—Warnings Expert

Legal Citations

CHAPTER 12A

PROFESSIONAL LIABILITY

12A.1 MEDICAL MALPRACTICE

Scope of Coverage

Potential Witnesses

Potential Documents

Depositions in Medical Negligence Cases

Defendant Doctor

Hospital Records Custodian

Hospital

Hospital Code Standards

12A.2 LEGAL MALPRACTICE

Scope of Coverage

Potential Witnesses

Potential Documents

Defendant Attorney (General)

Defendant Trial Attorney (Attorneys)

Expert Witness (Attorneys)

12A.3 ACCOUNTANT MALPRACTICE

Scope of Coverage

Potential Defendants

Potential Witnesses

Potential Documents

Plaintiff

Defendant (Accountant)

Expert Witness (Accountant)

Legal Citations

CHAPTER 13A

RICO

Scope of Coverage

Potential Witnesses

Potential Documents

Components of RICO Action

RICO

Classic Schemes and Artifices to Defraud

Legal Citations

RICO Statute

CHAPTER 14A

UNFAIR BUSINESS ACTS OR PRACTICES

Scope of Coverage

Potential Witnesses

Potential Documents

Unfair Business Practices

Legal Citations

CHAPTER 15A

UNLAWFUL DETENTION

Scope of Coverage

Potential Witnesses

Potential Documents

Plaintiff

Defendant

Police

Legal Citations

Texas Statutes

WORKERS' COMPENSATION

Scope of Coverage

Potential Witnesses

Potential Documents

Plaintiff

Legal Citations

