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Texas Justice Provides an Evidence Solution



By [Neil Kathol](#)

Have you ever been in a situation where you have reliable information that an organization has infringed your intellectual property rights, but you do not have actual “evidence” in-hand? This article discusses a procedure under the District Court Rules of Texas which addresses this issue in cases where a Texas court has jurisdiction over the matter.

In most jurisdictions unless you have what constitutes court-acceptable evidence of infringement, the proposed defendant (“Target”) can “non-suit you” - have your claim struck on the basis there is no evidence to support the allegations. In these motions the Target usually has no obligation to give its evidence on the facts and legal claims you would like to prosecute. If you are aware of facts and evidence from another lawsuit, you are generally prohibited from using such facts and evidence in a new lawsuit until you seek a court order.

You are understandably daunted by having your claim thrown out with costs against you.

The Texas procedure can be summarized as an entitlement to perform questioning of a witness of the potential defendant before deciding whether to commence the suit or not. In Texas the court may, in the correct circumstances, grant you an order giving you the right to take a “deposition” (also known as a “questioning”) before filing any legal claim against the Target in Texas.

To obtain this order, you must both swear a petition and make an application to the court on notice to the Target. The Target may argue against it, but the courts in Texas have shown that they are willing to grant this type of order as a matter of general principle.

In Texas, the court takes the view that if there are facts suggesting a legal claim exists the interests of justice are served if, in the most convenient manner possible, a given “Target” is brought before court reporters to give sworn evidence on activities and facts related to the potential lawsuit. The court will direct an organization to assign witnesses to attend, direct those witnesses to provide relevant written materials in advance and cooperate in respect of informing themselves.

It is also notable that if the deposition evidences facts which might ground a separate action in another jurisdiction, such as Alberta, then there may be steps that can be taken to bring an action in Alberta.

It is also notable that in issuing demand letters in situations where you are lacking strong evidence respecting the claim behind the demand, it is wise to exercise caution. You could be contradicting yourself if you clearly indicated you had evidence of the wrongdoing and then later say you need a deposition to obtain such evidence. This contradiction can be used against you in any "verified petition initiative" brought later.

Contact [Neil Kathol](#) in our [Intellectual Property and Technology Group](#) for further information about this procedure. We, or our Texas colleagues would be pleased to answer any questions.

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