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April 28, 2004

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court  
Supreme Court Building  
P. O. Box 12248  
Capitol Station  
Austin, Texas 78711

RE: Proposed Change to Rule 205

Dear Justice Phillips:

Enclosed is a proposed change to Rule 205 which has been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of this proposed rule change to Justice Hecht and to Charles Babcock, Chairman of the Supreme Court Advisory Committee.

Sincerely,

ATLAS & HALL, L.L.P.

By:

  
O. C. Hamilton, Jr.

OCH:PGB  
Supreme Court.Rule 205.4.23.2004

Attachment

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court  
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cc w/enclosures:

The Honorable Nathan Hecht  
Justice, Supreme Court of Texas  
Supreme Court Building  
P. O. Box 12248, Capitol Station  
Austin, Texas 78711

Charles Babcock  
901 Main Street Suite 6000  
Dallas, Texas 75202-3748

**STATE BAR OF TEXAS  
COMMITTEE ON COURT RULES**

**TEXAS RULES OF CIVIL PROCEDURE**

**REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE**

I. Exact wording existing Rule:

**RULE 205. Discovery from Nonparties**

**Notes and Comments**

Comments to 1999 change: Under this rule, a party may subpoena production of documents and tangible things from nonparties without need for a motion or oral or written deposition.

**205.1 Forms of Discovery; Subpoena Requirement**

A party may compel discovery from a nonparty – that is, a person who is not a party or subject to a party’s control – only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

- (a) an oral deposition;
- (b) a deposition on written questions;
- (c) 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; and
- (d) a request for production of documents and tangible things under this rule.

Added Aug. 5, 1998 and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

**205.2 Notice**

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

Added Aug. 5, 1998, and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

### **205.3. Production of Documents and Tangible Things Without Deposition**

(a) *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.

(b) *Contents of Notice.* The notice must state:

- (1) the name of the person from whom production or inspection is sought to be compelled;
- (2) a reasonable time and place for the production or inspection; and
- (3) the items to be produced or inspected, either by individual item or by category, describing each item or by category, describing each item and category with reasonable particularity and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

(c) *Request for Production of Medical or Mental Health Records of Other Nonparties.* If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) *Response.* The nonparty must respond to the notice and subpoena in accordance with Rule 176.6.

(e) *Custody, Inspection and Copying.* The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.

(f) *Cost of Production.* A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.

Added Aug. 5, 1998 and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

II. Proposed change of existing rule:

## **Rule 205. Discovery from Nonparties**

### **Notes and Comments**

Comments to 1999 change: Under this rule, a party may subpoena production of documents and tangible things from nonparties without need for a motion or oral or written deposition.

#### **205.1 Forms of Discovery; Subpoena Requirement**

A party may compel discovery from a nonparty – that is, a person who is not a party or subject to a party’s control – only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

(a) an oral deposition;

(b) a deposition on written questions;

(c) 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; ~~and or~~

(d) a request for production of documents and tangible things under this rule.

Added Aug. 5, 1998 and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

#### **205.2 Notice**

A party seeking discovery by subpoena from a nonparty must serve on ~~the nonparty and~~ all parties a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

Added Aug. 5, 1998, and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

#### **205.3. Production of Documents and Tangible Things Without Deposition**

(a) *Notice; Subpoena.* A party may compel production of documents and tangible things from a nonparty without a deposition 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 205.3(b) and a subpoena compelling production or inspection of documents or tangible things.

(b) *Contents of Notice and Subpoena.* ~~The notice must state:~~

- (1) The notice must state the name of the person from whom production or inspection is sought to be compelled;
- (2) The notice must state a reasonable time and place for the production or inspection; and
- (3) The subpoena must designate the items to be produced or inspected, either by individual item or by category, describing each item or by category, describing each item and category with reasonable particularity and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.
- (4) The notice must state the items designated in the subpoena to be produced or inspected or must incorporate by reference an attached copy of the subpoena.

(c) *Request for Production of Medical or Mental Health Records of Other Nonparties.* If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) *Response.* The nonparty must respond to the ~~notice and~~ subpoena in accordance with Rule 176.6.

(e) *Custody, Inspection and Copying.* The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.

(f) *Cost of Production.* A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.

Added Aug. 5, 1998 and Nov. 9, 1998, and amended Dec. 31, 1998, eff. Jan. 1, 1999.

III. Brief statement of reasons for change of existing rule and advantages to be served by them:

The reference in Rule 205.3 to the notice requirements of Rule 205.2 is confusing and perhaps incorrect since Rule 205.2 incorporates the regular notice requirements of the applicable form of discovery. The Committee is of the opinion that the notice required in subpoenaing documents and other tangible things without a deposition should be governed by the notice requirements of Rule 205.3(b) and not Rule 205.2. Also, being consistent with Rule 199.2(b)(5), one should be able to attach a copy of the subpoena to the notice rather than having to duplicate listing the items both in the notice and in the subpoena. The Committee also believes that the notice should go only to parties. Often, when the notice is sent to the nonparty, the nonparty responds to the notice and produces the documents before a party has an opportunity to object. Thus, only the subpoena should be served on the nonparty.