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May 7, 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 215.1

Dear Justice Phillips:

Enclosed is a proposed change to Rule 215.1 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:

OCH:PGB Supreme Court.Rule 215.1.May 2004

Attachment

The Honorable Thomas R. Phillips Chief Justice, Supreme Court Page 2

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

# REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

### Rule 215.1. Motion for Sanctions or Order Compelling Discovery

A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

(a) Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

#### (b) Motion.

- (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or
- (2) If a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:
- (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or
- (B) to answer a question propounded or submitted upon oral examination or upon written questions; or

# (3) if a party fails:

- (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or
  - (B) to answer an interrogatory submitted under Rule 197; or
- (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or

(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.

- (c) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
- (d) Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expense unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

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(e) Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

### II. Proposed Rule:

#### Rule 215.1. Motion for Sanctions or Order Compelling Discovery

A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

(a) Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

#### (b) Motion.

- (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or
- (2) If a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:
- (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or
- (B) to answer a question propounded or submitted upon oral examination or upon written questions; or
- (3) if a party fails: objects or asserts a privilege or fails to respond to any permissible form of discovery or fails to permit discovery in accordance with these rules;
- (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or
  - (B) to answer an interrogatory submitted under Rule 197; or

- (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or
- (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196:

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, a response, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.

- (c) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
- (d) Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expense unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(e) Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

III. Brief statement of reasons for requested changes and advantages to be served by them:

Rule 215.1 currently makes no provision for a motion for sanctions or order compelling discovery if a party fails to respond to a request for disclosure pursuant to Rule 194. The proposed rule also simplifies Rule 215.1(b)(3) and makes it more consistent with Rule 193.