NONPARTY DISCOVERY IN TEXAS: AN OVERVIEW FOR PRACTITIONERS

Presented and Co-Authored by:
Anna Rotman
Christopher D. Porter
Yetter Coleman LLP

Co-Authored by:
Rebecca L. Phelps
Yetter Coleman LLP

State Bar of Texas
38th Annual
Advanced Civil Trial 2015
San Antonio – July 15-17, 2015
Dallas – August 19-21, 2015
Houston – October 28-30, 2015

PARTNER

Harvard Law School
J.D., 2004
cum laude

Georgetown University
B.S, School of Foreign Service,
1998, *magna cum laude*

L´Institut D´Etudes
Politiques De Paris
1996-1997
honors diploma

Law Clerk to the
Hon. Marvin J. Garbis
U.S. District Court,
District of Maryland
2004-2005

Admitted to Practice
Texas, 2004

ANNA ROTMAN

arotman@yettercoleman.com | 713.632.8064

Anna represents both plaintiffs and defendants in state and federal court throughout the United States, priding herself on carefully listening to her clients' objectives — be they achieving a quick resolution or pushing through trial and appeal — and aligning the case strategy accordingly. Anna has counseled clients on their thorniest issues arising in North America, Latin America, Europe, and Asia. She has accumulated significant experience in commercial disputes and antitrust litigation and represents both large and small companies in global industries, with a particular focus on energy, technology and aviation. Her trial experience and fluency in Spanish and French uniquely position her as counsel for international companies of all sizes seeking representation in Texas.

Recognized as a "Texas Super Lawyer" and "Texas Rising Star" by *Thomson Reuters,* and as one of Houston's Top Lawyers by *H Magazine*, Anna earned her Bachelor of Science in Foreign Service, *magna cum laude*, from Georgetown University and an honors diploma from l'Institut des Études Politiques in Paris. She worked for several years in the technology industry before earning her JD, *cum laude*, from Harvard Law School, where she was articles editor of the *Harvard Journal of International Law*. Anna clerked for the Honorable Marvin J. Garbis on the Federal District Court for the District of Maryland before joining Yetter Coleman. She serves as Yetter Coleman's Co-Head of Hiring.

Representative Experience

- *Confidential Client* Successful defense of a Miller Act claim seeking allegedly unpaid fees, extended general conditions, and overhead arising from a federal construction project. We secured preferred forum which led to a quick and favorable settlement.
- *Confidential Client* Pre-litigation counseling to assess claims and determine path to resolution of software license compliance disputes.
- *Confidential Client* Successful defense of negligence claims arising from construction project. Plaintiff quickly and favorably settled after deposition.

Representative Experience, *cont'd*

- *American Airlines, Inc. v. Frequent Flyer Depot, et al*. Represented American in Tarrant County state court against several companies and individuals who have defrauded American's AAdvantage frequent flier program. Successfully obtained injunctive relief against several defendants and awarded summary judgment against multiple defendants. Briefed and argued successful defense of appeal of injunctive relief.
- *Sanchez v. City of Austin* Led five-person trial team in a successful First Amendment and due process challenge to the City of Austin's policy of banning arrestees at the Occupy Austin protest site from returning to any portion of City Hall property, for any purpose, for as much as a year.
- *American Airlines v. Sabre* Represented American in Tarrant County state court to protect its valuable and proprietary data from unauthorized redistribution in violation of defendants' contractual obligations. Successfully obtained summary judgment and favorable settlement.

Professional Honors and Affiliations

Professional Honors

- "Texas Super Lawyer" in Business Litigation, *Thomson Reuters*, 2013-14
- Texas Rising Star, *Texas Monthly Magazine*, 2010, 2012-13
- Houston Top Lawyers, *H Magazine*, 2013
- 2011 Kristi Couvillon Pro Bono Award, Texas Civil Rights Project

Affiliations

- Southern District of Texas Federal Bar Association, Board Secretary
- Harvard Law School Association of Houston, President
- Association of Women Lawyers, Foundation Trustee
- Texas Civil Rights Project Board of Councilors
- Texas Bar Foundation Fellow
- Member: State Bar of Texas, Houston Bar Association

Community Service

- Hermann Park Conservancy Advisory Board
- The Immunization Partnership Advisory Board
- United Way Young Leaders Initiative

Presentations & Publications

- "6 Tips for Leveraging Gender Stereotypes in Negotiations," The Texas Lawyer, April 6, 2015 (co-author)
- "Fifth Circuit Cracks Open the Courthouse Doors to Decide 'Arbitrability'," The Texas Lawyer, February 2, 2015 (co-author)
- "Ending the Tendency to Over-Preserve ESI," *The Texas Lawyer*, October 27, 2014 (co-author)
- "Update of Federal Courts and Federal Rules of Civil Procedure," The State Bar of Texas, 37th Annual Advanced Civil Trial Course (co-author), 2014
- "Preserving Privilege When In-House Counsel Wear Multiple Hats," *The Texas Lawyer*, July 14, 2014
- "Approaching Gender Differences in Negotiations," CLE presentation to the Association of Women Attorneys, Houston, May 28, 2014
- "Lucky 13: A Baker's Dozen of Tips for Stopping a Departed Employee from Using Protected Company Info," *The Texas Lawyer*, April 14, 2014
- "Cringe-worthy: 8 Tips to Prevent Embarrassing Emails," *The Texas Lawyer*, Feb 17, 2014
- "Competition Law", presentation to General Electric Oil & Gas, Feb. 5, 2014
- "Written Discovery: Strategies and Tactics," CLE presented to Hewlett-Packard legal department, Sept. 10, 2013
- "Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights," 17 Harvard Human Rights Journal 281

PARTNER

University of Michigan
School of Law
cum laude
J.D., 2008

University of Texas
at El Paso
B.A. Business Administration,
2001
Alpha Lambda Delta
Honor Society
Scholar Athlete of
the Year Award,
2000-2001
Captain, Football Team
Most Valuable Player,
2000 Humanitarian Bowl

Law Clerk to the Hon.
Philip R. Martinez,
U.S. District Court for the
Western District of Texas,
2008-2009

Admitted to Practice
Texas, 2009

CHRISTOPHER D. PORTER

cporter@yettercoleman.com | 713.632.8073

Chris is a trial lawyer with substantive jury-trial experience, including direct and cross examinations of key witnesses. He has handled all aspects of pre-trial matters, including dispositive motions, fact and expert depositions, witness preparation, and written discovery.

Chris's practice focuses on business litigation, representing plaintiffs and defendants of all sizes in federal and state courts. He works to fully understand his clients' problems to provide the highest level of legal advice for their particular circumstances. By developing a close working relationship with his clients and maintaining an open and ongoing dialogue, Chris develops strategies to efficiently resolve their issues. Whether his clients reach an early amicable solution, or they take their case through trial, Chris works to help them reach the right decision at every stage of representation.

Chris graduated with honors from the University of Michigan Law School. After graduation, he completed a one-year federal district court clerkship with the Honorable Philip R. Martinez in the Western District of Texas. Chris earned his B.A. in Business Administration with a concentration in finance from The University of Texas at El Paso. While at UTEP, Chris was elected Senator of the Student Government Association and also served as a Captain of UTEP's football team. As a running back for the UTEP Miners, Chris won the Scholar Athlete of the Year award for the 2000-2001 seasons and was named the Most Valuable Player at the 2000 Humanitarian Bowl. After graduating from UTEP, Chris worked as an underwriter for Chubb Insurance in both Philadelphia and Houston.

Chris was recognized as a 2014 and 2015 "Texas Rising Star" by Thomson Reuters' *Super Lawyers*.

Representative Experience

- *Brandon A. Backe, et al. v. City of Galveston, Texas, et al.* Successfully prosecuted as co-lead counsel a high-profile, federal civil rights jury trial on behalf of an ex-MLB player and other victims of alleged police brutality, including examination at trial of 17 witnesses, court argument, and related legal briefing.
- *Confidential Client* Successfully negotiated pre-litigation settlement between client and company claiming damages for construction management services.
- *Confidential Client* Successful defense of a Miller Act claim seeking allegedly unpaid fees, extended general conditions, and overhead arising from a federal construction project. We secured preferred forum which led to a quick and favorable settlement.
- *American Airlines, Inc. v. Sabre* Helped to successfully represent American Airlines in a billion-dollar antitrust suit against Sabre, one of the nation's largest airline ticket distributors, involving new technology to sell corporate air travel. After three weeks of a state court jury trial, American and Sabre settled the lawsuit, with American receiving a confidential monetary payment from Sabre and the parties agreeing to a multi-year renewal of their distribution agreement.
- *CenterPoint v. AEGIS, et. al.* Helped obtain a jury verdict for insurers' failure to pay for pipeline directional drill accident under builders' risk policies. The result was recognized as one of the "Top Texas Verdicts of 2011" by *VerdictSearch.*
- *Doctors Hospital and GE HFS v. Beazley Insurance Co.* Helped to successfully represent GE HFS in trial in connection with claims arising from insurer's breach of contract to insure and repair property damage. The verdict was ranked among the top 100 national and top 25 Texas verdicts of 2010.
- *Confidential Client.* Represented a Fortune 500 company in defending its subsidiary against a 60-plaintiff discrimination suit.

Professional Honors and Affiliations

- "Texas Rising Star," by Thomson Reuters' *Super Lawyers, 2014-15*
- Houston Top Lawyers, *H Magazine*, 2015
- Discovery Youth Foundation, Advisory Board Member
- Writers in the Schools, Board Member

ASSOCIATE

Stanford Law School
J.D., 2014
Pro Bono Distinction
Editor, Stanford Journal of Law, Business and Finance, 2012-2013

United States Naval Academy
B.S., 2007
Graduated with Merit
USNA 2006 Women's History Award for Independent Research

Admitted
California, 2014
Washington, D.C., *pending*

REBECCA L. PHELPS

rphelps@yettercoleman.com | 713.632.8016

Becky focuses her practice on complex commercial litigation.

She graduated from Stanford Law School with Pro Bono Distinction for her extensive public service while attending law school. At Stanford, Becky was an editor for the Stanford Journal of Law, Business and Finance, and the Director of Communications for the Stanford Law Veterans Organization.

A Surface Warfare Officer in the United States Navy, Becky served for five years of active duty before transitioning into the Navy Reserve in 2012. She graduated from the United States Naval Academy, with Merit, and received the 2006 USNA Women's History Award for her independent research on the role of southern women in the Civil War.

Becky held clerkships with the U.S. Attorney Office, Northern District of California; the Santa Clara County District Attorney's Office; the Securities and Exchange Commission in New York; and, the Office of California Attorney General.

Professional Honors and Affiliations

- Awards: Navy and Marine Corps Commendation Medal, 2009; Navy and Marine Corps Achievement Medal, 2007, 2009, 2011; Global War of Terrorism Expeditionary Medal, 2007; Navy Sea Service Deployment Ribbon, 2007
- Member: National Committee for Ladies America; Associate Vice President, Harvard Business School Club, Washington, D.C., 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

At one point or another, civil litigators will have to navigate nonparty discovery. For example, a client will be served with a subpoena requesting discovery for a dispute in which it has no involvement. The client will want to protect its own interests and minimize its exposure to unnecessary cost and intrusion. Or a client in litigation will need nonparty discovery to make its case. In this instance, the practitioner must determine the most efficient way to obtain this information. To answer questions about nonparty discovery, practitioners should first turn to Texas Rule of Civil Procedure 205.

The 1999 change to the Texas Rules of Civil Procedure created Rule 205 to govern discovery from nonparties. The Comment to the 1999 change states: "Under this rule, a party may subpoena production of documents and tangible things from nonparties without need for a motion or oral or written depositions." Because most requests for nonparty discovery in civil litigation pertain to depositions or document requests, a court order is not necessary. Indeed, a court order is only required in particular instances, which will be discussed later.

This article is meant to guide attorneys as they help their clients navigate the nonparty discovery process.

II. NONPARTY SUBPOENAS

The starting point for obtaining discovery from nonparties in Texas is the issuance of a subpoena. As noted, Texas Rule of Civil Procedure 205 sets forth the guidelines for seeking discovery from nonparties. Practitioners should note, however, that they cannot rely solely upon Rule 205, but will instead need to look to other rules when seeking nonparty discovery. For example, Rule 205 does not cover the actual issuance of subpoenas to nonparties. For this, parties must turn to Texas Rule of Civil Procedure 176, which covers the issuance of subpoenas in Texas, including those to nonparties.

A. Issuance of Subpoena

Pursuant to Rule 176.2, a party may issue a subpoena to command a person to "attend and give testimony at a deposition, hearing, or trial," or to "produce and permit inspection and copying of designated documents or tangible things" in that person's custody, possession, or control. The rule prohibits a party from subpoenaing a nonparty "to appear or produce documents or other things in a county that is more than 150 miles from where the [nonparty] resides or is served." TEX. R. CIV. P. 176.3(a). Attorneys authorized to practice in Texas have the authority to issue subpoenas, TEX. R. CIV. P. 176.4(b), and they must serve the subpoenas by delivering copies "to the witnesses and tendering to that person any fees required by law." TEX. R. CIV. P. 176.5(a).

When a party serves a nonparty with a subpoena, the party must also file the subpoena with the court. TEX. R. CIV. P. 191.4(b)(1). Discovery requests and deposition notices served on nonparties must be filed as well. *Id.* Practitioners will sometimes overlook this requirement because subpoenas, discovery requests, and deposition notices served on parties *do not* need to be filed with the court. TEX. R. CIV. P. 191.4(a)(1). It is thus important to be aware this distinction.

B. Defective Service

When service of a subpoena is procedurally defective, a nonparty or any other party challenging the subpoena may

move to quash service, which is a limited tool that asks the court to invalidate the selected method of service of process. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985) (per curiam) (motion to quash is the appropriate device to object to procedural error in service). Common grounds for filing a motion to quash are improper issuance and improper service.

The only result achieved by a successful motion to quash service is that the requesting party must re-serve the subpoena. Due to the limited relief, a motion to quash for defective service does nothing to protect a nonparty's substantive rights.

C. Subpoena for Documents

Since the 1999 change to the Rules, a party can subpoena nonparties for documents without requesting a deposition. TEX. R. CIV. P. 205.3. This is more convenient—for both parties and nonparties—because it eliminates the time and expense of depositions while still allowing parties to obtain information. Before serving a nonparty with a subpoena for documents, there are certain steps that parties must follow. Specifically, a party must first serve a notice to produce documents or tangible things—on both the nonparty and all parties to the litigation—"at least 10 days before the subpoena compelling production is served." TEX. R. CIV. P. 205.2. The party must serve this notice "a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period." TEX. R. CIV. P. 205.3(a).

Practitioners should note that "reasonable time" is not defined in the Rules. It will depend upon the scope of the request and the time the requesting party provides to the nonparty to respond. To the extent the nonparty finds that the response time is unreasonable, it should move to quash the subpoena or for a protective order, procedures which will be discussed later in this article.

The notice that parties serve on nonparties must contain the name of the nonparty from whom production is being sought, a reasonable time and place for production or inspection, and the items the party is seeking. TEX. R. CIV. P. 205.3(b). If a party is requesting the testing and sampling of a tangible good, the notice must describe the testing and sampling with "sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling." TEX. R. CIV. P. 205.3(3). In its response, the nonparty has the option to deliver possession of the item to the requesting party, rather than test the object on its own. *See In re University of Tex. Health Ctr.*, 198 S.W.3d 392, 397 (Tex. App.—Texarkana 2006, orig. proceeding) ("The rules expressly provide for production of a tangible item for testing, and one contemplated method by which that production may be accomplished is by physically delivering possession of the item to the requesting party or that party's agent.").

D. Production of Documents and Costs

In complex commercial cases, parties will typically have a protective order in place to protect documents that are produced during the course of litigation. The protective order will likely have different levels of protection for documents, which can include confidential, highly confidential, and attorneys' eyes only. Before producing documents in response to a subpoena, a nonparty should consider requesting a copy of the protective order to ensure that its documents will be adequately protected. If

the nonparty is satisfied with the protective order, then it should secure an agreement from the parties that its documents are entitled to protection under the order. To accomplish this, the nonparty should enter into a Rule 11 agreement with the parties. Alternatively, the protective order itself may allow nonparties to sign on to gain its protections.

Texas Rule of Civil Procedure 205.1(b) only requires a nonparty to produce the requested documents to the party who issued the subpoena, and not to all other parties to the litigation. The party who issued the subpoena must provide copies of the documents to any other party in the litigation who requests the documents at the requesting party's expense. TEX. R. CIV. P. 205.3(e).

Nonparties may also ask who will pay the costs they incur to produce the documents. Because nonparties typically have no dog in the fight, they naturally feel as though they should not have to bear the production costs. Texas Rule of Civil Procedure 205.3(f) addresses this issue by requiring that the party requesting the production "must reimburse the nonparty's reasonable costs of production." In determining what constitutes "reasonable costs," courts have interpreted the term to simply mean the exact cost of retrieving, processing, and transporting the documents produced. *See BASF Fina Petrochemicals Ltd. P'ship v. H.B. Zachry Co*., 168 S.W.3d 867, 873 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) ("We may not interpret a rule, even in the name of equitable principles, beyond its specific language."). Practitioners should note that in cases involving medical records, Texas Health & Safety Code Ann. § 241.154(b) to (e) governs the maximum fees for production of medical records by nonparties. *See In re Metro Roi, Inc*., 208 S.W.3d 400, 405-07 (Tex. App.—El Paso 2006, no pet.) (when a party sought production of medical records from a nonparty medical care provider, the provider was entitled to charge a fee in the amount provided by the Texas Hospital Licensing Law which was higher than the normal reasonable costs for production).

In addition to recovering their actual costs for production, nonparties often ask if they can recover their attorneys' fees associated with producing documents. Texas courts have held that reasonable cost of production does not include attorneys' fees. *See H.B. Zachry Co*., 168 S.W.3d at 873 ("Texas courts have consistently maintained that, in the absence of any authority explicitly authorizing an award of attorneys' fees, such an award is not recoverable, either against an opposing party or as a 'cost of production.'") (citation omitted). When a nonparty seeks legal advice regarding the production of its documents, it does so to protect its own interest. And because such legal advice is not technically required to facilitate compliance with a subpoena or produce requested documents, courts have not considered the associated legal fees to constitute a cost of production. *Id*. at 874.

Courts have also discussed attorneys' fees relating to the cost of production in terms of policy goals. The goal of Rule 205.3(f) is to protect non-parties from incurring burdensome and unnecessary expenses in responding to the discovery requests of litigants. However, courts must also consider the broader goal of providing litigants with the ability to resolve their dispute by presenting all evidence, from whatever source, relevant to the dispute. *H.B. Zachry Co*., 168 S.W.3d at 874. Since the Texas Supreme Court included provisions for attorney' fees pertaining to discovery elsewhere in the Rules of Civil Procedure, courts have interpreted the

absence of such a provision in Rule 205.3(f) as the Texas Supreme Court's intention to exclude attorney's fees for nonparty cost of production. *H.B. Zachry Co*., 168 S.W.3d at 874.

E. Preservation of Documents

Civil litigators are well aware that a party has "a duty to preserve relevant evidence once litigation arises, and a duty to exercise reasonable care to preserve relevant evidence if it actually or reasonably should anticipate litigation." *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 226 (Tex. App.—Amarillo 2003), *on reh'g in part* (May 19, 2003). There is a question, however, as to whether nonparties who have not yet received a subpoena have the same obligation. Texas courts have not squarely addressed this situation. But because Texas has not established spoliation of evidence as an independent tort against nonparties, there does not appear to be a remedy against third parties who destroyed documents prior to receiving a subpoena. *See McIntyre v. Wilson*, 50 S.W.3d 674, 686 (Tex. App.—Dallas 2001, pet. denied) ("Under the particular circumstances presented in this case, we conclude McIntyre has not provided any compelling reason for this Court to recognize a new tort of spoliation by third parties.").

Nevertheless, a nonparty must preserve relevant documents once it receives a subpoena for documents because the subpoena compels compliance. *See* TEX. R. CIV. P. 176.6. Practitioners should therefore be aware of the importance of issuing subpoenas to nonparties in a timely manner because notice of litigation does not create a duty for nonparty to preserve material documents.

F. Snapback Provision

Nonparties are afforded the same recourse and relief for accidental disclosures as parties. Nonparties may use the snapback provision under Rule 193.3(d) to correct accidental disclosures of privileged documents. Rule 193.3(d) states in part:

> "[a] party who produces material or information without intending to waive a claim of privilege does not waive that claim . . . if—within ten days or shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted."

Despite the rule's plain language reference to the term "party," courts have interpreted Rule 193.3(d) to include production by nonparties. In *In re Certain Underwriters at Lloyd's London*, 294 S.W.3d 891, 903 (Tex. App.—Beaumont 2009, no pet.), the court stated, "[i]t is clear that a person may be a party who produces information related to a lawsuit without necessarily also being a party to the suit, as nonparties can be subpoenaed to require their cooperation in a civil suit. By employing the term "party who produces," we do not perceive any intent by the drafters of Rule 193.3(d) to constrict the Rule's application solely to those that are named as parties in a suit." *Id*. (citation omitted)

G. Deposition

Along with seeking documents from nonparties during the course of litigation, parties will oftentimes subpoena nonparties for depositions. Texas Rule of Civil Procedure 205.2 outlines the necessary steps

a party must take to obtain these depositions. When seeking a deposition from a nonparty, whether oral or written, a party must first serve notice of the deposition before or at the same time it serves the subpoena compelling the deposition. *Id.* (Note that this differs from a request for documents only, which requires that the notice be sent 10 days before the subpoena compelling production of the documents is served.) A party may also subpoena a nonparty to produce documents or tangible things at the time of the deposition. Traditionally, this was known as a subpoena duces tecum. And although Rule 176 no longer uses this phrase, many practitioners still issue subpoenas with this title. *See* § 8:6. Subpoena (formerly subpoena duces tecum) compared, 2 Tex. Prac. Guide Disc. § 8:6 (2015 ed.).

A deposition on written question is another procedural vehicle to obtain information from third parties. For example, a party may seek to obtain medical records from a nonparty. In that instance, the party may choose to serve a deposition on written questions. TEX. R. CIV. P. 205.1(b). A party can serve the notice for depositions on written questions, like oral depositions, at the same time it serves the subpoena. TEX. R. CIV. P. 205.2. Note, however, that the notice for a deposition on written questions "must be served on the witness and all parties at least 20 days before the deposition is taken." TEX. R. CIV. P. 200.1. And since a party may serve a subpoena along with the notice for depositions, the earliest a party can subpoena a nonparty for a deposition on written questions is 20 days before the deposition is to take place.

Depositions on written question are useful for proving up documents and satisfying the business records exception to hearsay. It is true that a nonparty's production of documents authenticates the documents "for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7." TEX. R. CIV. P. 176.6(c). But this does not address a hearsay objection. Practitioners should thus serve a deposition on written questions along with their document requests to satisfy the business records exception to hearsay. TEX. R. EVID. 803(6). A party may also satisfy this exception by obtaining a business records affidavit from the nonparty. *Id.*; *see also* TEX. R. EVID. 903(10). That said, a deposition on written questions may prove more effective because a nonparty is compelled to comply with the subpoena and respond to the requests, but has no obligation to fill out a business records affidavit.

III. RESPONDING TO NONPARTY SUBPOENAS

When responding to subpoenas, nonparties should attempt to directly resolve any objections or concerns by conferencing with the requesting party. When there is an open line of communication court intervention may be avoided. These conferences will also provide the nonparty with insight into whether it is a potential target defendant.

Nonparties should also consider contacting the non-requesting party, particularly if the subpoena seeks information about the non-requesting party. In that instance, the non-requesting party may choose to challenge the discovery request itself. Additionally, the non-requesting party may provide the nonparty with additional information about the case.

Overall, early communication with the parties may help streamline the discovery process for nonparties and help them

understand where they fit in the landscape of the dispute.

A. Objections to Place and Time of Deposition

When a party issues a subpoena for an oral deposition to a nonparty, the subpoena must specify a time and place for compliance. TEX. R. CIV. P. 176.1(e). The nonparty may lodge an objection to the time or place by filing a motion to quash or protective order within three business days of being served with the deposition notice. TEX. R. CIV. P. 199.4. This will automatically stay the oral deposition until the court resolves the motion. *Id.* Recall that a party can serve notice of a deposition prior to serving the actual subpoena. TEX. R. CIV. P. 205.2. Practitioners must take care to calculate the three-day period to file an objection on behalf of nonparty clients from service of the notice, and *not* from service of the subpoena. Otherwise, they risk waiving their objection. Note that if a party files a motion for a protective order due to time and place, it must then propose an alternate time and place for the deposition. TEX. R. CIV. P. 192.6(a). Unless a nonparty is prepared to offer a new time and place for the deposition, a motion to quash is the better route to stay the deposition.

Practitioners should note that the non-requesting party may object to the time and place of a subpoena as well. Rule 199.4 states in part that "[a] party or a witness may object." There are several reasons why a non-requesting party might object to the subpoena. For example, a party may notice the deposition of a nonparty after discovery has closed. In that instance, the non-requesting party will object to time and place because the request is made out of time. Rule 199.4 affords it that opportunity.

B. Objections to Written Discovery

Nonparties also have the right to object to requests for written discovery. The Texas rules define written discovery as "requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission." TEX. R. CIV. P. 192.7(a). Written discovery essentially encompasses everything except for depositions and requests for mental examinations.

Unlike a motion to quash which may be filed by any person *challenging* the subpoena, written objections must be made by the person subject to the subpoena. *See* TEX. R. CIV. P. 176.6(d). Common objections to written discovery include that the requests are overbroad, irrelevant, vague, ambiguous, harassing, burdensome, or that the subpoena is being brought in bad faith. Practitioners should note that court's frown upon boilerplate objections. As such, like parties objecting to discovery requests, nonparties should specifically state "the legal or factual basis for the objection and the extent to which the [nonparty] is refusing to comply with the request." TEX. R. CIV. P. 193.2(a).

When a nonparty has specific objections to written discovery, it must file its objections before the time specified for compliance. TEX. R. CIV. P. 176.6(d). Thus, attorneys for nonparties must be mindful of the due date for the requested materials listed in the subpoena. *See Young v. Ray*, 916 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding). Additionally, a nonparty does not have to comply with the portion of a subpoena to which it has objected. TEX. R. CIV. P. 176.6(d). Once the nonparty objects, the only manner in which a party can force the nonparty to comply is to move for a court order. *Id.* The party

issuing the subpoena may move for such an order any time after the objection is made. *Id.*

C. Protective Orders

In addition to serving objections to written discovery, nonparties have the right to move for protection from the discovery a party is seeking. TEX. R. CIV. P. 176.6(e); *see also* TEX. R. CIV. P. 192.6(a), (b). The purpose of a protective order is "[t]o protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights." TEX. R. CIV. P. 192.6(b). Nonparties must move for a protective order "within the time permitted for response to the discovery request." TEX. R. CIV. P. 176.6(e). Nonparties should not, however, "move for protection when an objection to written discovery or an assertion of privilege is appropriate." TEX. R. CIV. P. 192.6(a). That said, "a motion does not waive the objection or assertion of privilege." *Id.*

When seeking protective orders, nonparties may ask a court to order that:

> (1) the requested discovery not be sought in whole or in part;
>
> (2) the extent or subject matter of discovery be limited;
>
> (3) the discovery not be undertaken at the time or place specified;
>
> (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
>
> (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76(a).

TEX. R. CIV. P. 192.6(b).

Protective orders may be requested not only by the entity from whom the discovery is sought, but also by a party affected by the discovery request. TEX. R. CIV. P. 192.6(a). For example, if a party requests discovery from a nonparty that impacts another party to the litigation, the impacted party may move for a protective order. That said, if the nonparty does not seek a protective order from the trial court, a party does not later have standing to seek protection through mandamus relief on behalf of the nonparty. *See In re ASI Aviation, LLC*, 2014 WL 104487, *1 (Tex. App.—Waco 2014, no. pet.) (denying a party's request for mandamus relief from discovery on behalf of a nonparty because the nonparty could have sought such relief in the trial court).

When moving for protective orders, nonparties must state their reasons with particularity and not simply provide boilerplate statements. *See In re Liberty Mut. Ins. Co.*, No. 14-09-00086-CV, 2009 WL 441897, *5 (Tex. App.—Houston [14th Dist.] Feb. 24, 2009, no pet.) (holding that a trial court abused its discretion by granting a protective order where petitioner produced no specific evidence that the third-party discovery requests were unduly burdensome or unnecessarily harassing). "The party seeking to avoid discovery must show a particular, specific, and demonstrable injury by facts sufficient to justify a protective order, and the trial court may not grant a protective order limiting discovery unless the party seeking such protection has met this burden." *Id.* *See also In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) ("The party resisting discovery is not free to make conclusory statements that the requested discovery is unduly burdensome or unnecessarily harassing, but, instead, must produce some evidence supporting its request for a protective order."); *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987) (requiring "a particular, articulated and

demonstrable injury, as opposed to conclusory allegations").

Practitioners should note that a nonparty may move for a protective order "either in the court in which the action is pending or in a district court in the county where the subpoena was served." TEX. R. CIV. P. 176.6(e). Thus, the nonparty will need to make a strategic decision regarding where it wants its motion for protective order to be heard: in the county where it was served, which will typically be its home county, or in the county where the case is pending.

IV. NONPARTY DISCOVERY REQUIRING COURT ORDER

There are additional forms of discovery parties may seek from nonparties that require a court order as opposed to a subpoena. Texas Rule of Civil Procedure 205.1 provides that parties may compel discovery from nonparties only through a court order under Rule 196.7 (Request or Motion for Entry Upon Property), Rule 202 (Depositions Before Suit or to Investigate Claims), and Rule 204 (Physical and Mental Examinations).

A. Motion for Entry Upon Property

Under Rule 196.7(a), a party may gain entry on a nonparty's property to "inspect, measure, survey, photograph, test, or sample" the property. In order to obtain such an order, the requesting party must file a motion and notice of hearing on all parties, as well as the nonparty owner, no later than thirty days before the end of the applicable discovery period. *Id.* If the identity and address of the nonparty cannot be obtained through reasonable diligence, the court must permit service by means reasonably calculated to give the nonparty notice of the motion and hearing. TEX. R. CIV. P. 196.7(a)(2).

As with subpoenas for the production of tangible things, the court order must state the time, place, manner, conditions, and scope of inspection. TEX. R. CIV. P. 196.7(b). The order must specifically describe the desired means, manner, and procedure for testing or sampling, and must state the person by whom the inspection, testing, sampling is to be made. *Id.*

If the responding person is a nonparty, the nonparty must serve a written response on the requesting party within thirty days of service of the request. TEX. R. CIV. P. 196.7(c)(1). The response must state objections, assert privileges, and state, as appropriate, that (1) entry will be permitted as requested, (2) entry will take place at a specified time and place, if objecting to time and place requested, or (3) entry cannot be permitted for reasons stated in response. TEX. R. CIV. P. 196.7(c)(2)(A), (B), (C).

Entry onto the property of a party or nonparty involves "unique burdens and risks, among other things, confusion and disruption of the defendant's business and employees." *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 928 (Tex. App.—Dallas 2014, orig. proceeding). For these reasons, Rule 196.7(d) states that an order for entry on a nonparty's property may issue only for *good cause* shown and only if the land, property, or object thereon as to which discovery is sought is *relevant* to the subject matter of the action.

After a diligent search, we have found no Texas cases that directly address what constitutes "good cause" for a discovery order allowing entry onto the property of a nonparty. However, good cause for other discovery orders is generally shown where the discovery sought is relevant and material and the substantial equivalent of the material cannot be obtained through other means. *See In re SWEPI L.P.*, 103 S.W.3d 578, 584

(Tex. App.—San Antonio 2003, orig. proceeding). Discovery is considered relevant and material when the information sought will aid the movant in preparation or defense of a case. *Id.*

Mere relevance in the general sense is not sufficient to justify a request for entry upon the property of another. *See In re Goodyear Tire & Rubber Co.*, 437 S.W.3d at 928. Instead, "the trial court should conduct a greater inquiry into the necessity for the inspection, testing, or sampling." *Id.* (quotation omitted). When determining whether the requested entry upon property is sufficiently relevant to justify the burden on the property owner, a court must balance the way in which the proposed entry will aid the search for the truth against the burdens and dangers created by the inspection. *Id.*

Practitioners should note that Rule 196.7 does not allow the requesting party to enter the land of another for the purpose of creating new evidence for demonstrative purposes. For example, in *In re Goodyear Tire & Rubber Co.,* the court did not allow plaintiffs to enter property to make a new recording of the manufacturing process at the heart of the dispute. *Id.* at 929. The court disallowed the proposed recording because it would not document the exact process used in making the actual tire at issue in the case, nor would it document the condition of the plant at the time the tire was manufactured. *Id.*

B. Medical or Mental Health Records of Other Nonparties

Medical and mental health records are often sought in medical malpractice cases and practitioners should be aware that nonparty health records can be fair game in a dispute unrelated to them. Under Rule 205.3(c), a party may compel the production of a nonparty's medical or mental records from another nonparty. Personal and clinical records do not have to be in a nonparty's possession to be described as nonparty records. The records only need to be personal and clinical records regarding the nonparty. *See In re Diversicare Gen. Partner*, 41 S.W.3d 788, 794 (Tex. App.—Corpus Christi 2001, orig. proceeding), *overruled on other grounds, In re Arriola*, 159 S.W.3d 670 (Tex. App.—Corpus Christi 2004, orig. proceeding).

When requesting the medical or mental health records of nonparties, a party must serve the nonparty whose records are sought with notice by a reasonable time or at least thirty days before the end of the discovery period and the notice must be served at least ten days before the subpoena is served. TEX. R. CIV. P. 205.3(c). However, this notice requirement does not apply to circumstances under Rule 196.1(c)(2), where:

> 1. The nonparty signs a release of the records that is effective as to the requesting party;
>
> 2. The identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or
>
> 3. The court, upon a showing of good cause by the party seeking the records, orders that service is not required.

C. Deposition Before Suit or to Investigate Claims

A nonparty may be subpoenaed for deposition before a suit has even arisen. Nonparty discovery incorporates Rule 202.1, which states that "[a] person may petition the court for an order authorizing the taking

of a deposition on oral examination or written questions either:

> (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or
>
> (b) to investigate a potential claim or suit.

Rule 202.2(a), (b)(1), (b)(2), and (c) lists the requirements for a petition requesting deposition before suit, providing that the petition must:

> (1) be verified
>
> (2) be filed in a proper court of any county where venue of the anticipated suit may lie or where the witness resides if no suit is yet anticipated; and
>
> (3) be in the name of the petitioner.

The petition must also state whether the petitioner anticipates litigation in which the petitioner may be a party or the petitioner expects to investigate a possible claim by or against the petitioner. TEX. R. CIV. P. 202.2(d). If a suit is anticipated, the petition must also state that the names, addresses, and phone numbers of the parties the petitioner anticipates will be adverse to it. TEX. R. CIV. P. 202.2(f)(1). If this contact information is unavailable after diligent inquiry, the petition must include descriptions of such persons. TEX. R. CIV. P. 202.2(f)(2).

Whether or not suit is anticipated, the petition must state the names, phone numbers, and addresses of the persons to be deposed, the expected substance of the testimony, and the petitioner's reasons for seeking such testimony. TEX. R. CIV. P. 202.2(g). Finally, the petition must include a court order authorizing the petitioner to take the depositions of the persons named in the petition. TEX. R. CIV. P. 202.2(h).

At least fifteen days before the hearing, the petitioner must serve the petition and notice of the hearing upon all witnesses, as well as upon persons with expected adverse interests to the petitioner. TEX. R. CIV. P. 202.3(a).

If the petition includes unnamed described persons whom the petitioner expects to have adverse interests to the petitioner, the petitioner may serve them by publication of the petition and notice of the hearing. TEX. R. CIV. P. 202.3(b)(1). The publication must run in the newspaper of broadest circulation in the county where the petition is filed. *Id.* If there is no newspaper, the notice must be filed in the newspaper of broadest circulation in the nearest county where a newspaper is published. *Id.* The notice must run more than fourteen days before the hearing date and must run once each week for two consecutive weeks *Id.* The notice must include the time and place of the hearing. *Id.*

D. Physical and Mental Examinations

Under a narrow set of circumstances a party may move for an order compelling a nonparty to submit to a physical or mental examination or to produce for such examination a person in the nonparty's custody, conservatorship, or legal control. TEX. R. CIV. P. 204.1(a)(2). The moving party must make the motion no later than thirty days before the end of any applicable discovery period. TEX. R. CIV. P. 204.1(a). The motion must be served on the person to be examined and all parties. TEX. R. CIV. P. 204.1(b).

The rules have established a high bar for compelling nonparties to submit to examinations. The court can issue an order for exam only when good cause is shown and only when either (1) the mental or physical condition is in controversy, *or* (2) except as provided in Rule 204.4 (cases arising under Titles II or V of Family Code), when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial. TEX. R. CIV. P. 204.1(c). However, the designation of a psychologist as a testifying expert does not negate the requirement of good cause. *See In re Transwestern Publ'g Co*., 96 S.W.3d 501, 506 (Tex. App.—Fort Worth 2002, orig. proceeding) (good cause not assumed merely because psychologist has been appointed to testify as expert on person's mental condition).

Good cause requires the court to balance the nonparty's right of privacy against the movant's right to a fair trial. *See In re Click*, 442 S.W.3d 487, 491 (Tex. App.—Corpus Christi 2014, orig. proceeding). To show good cause, the movant must establish that:

> (1) the examination is relevant to issues that are genuinely in controversy in the case and the examination would produce, or would likely lead to, relevant evidence;
>
> (2) a reasonable nexus exists between the condition in controversy and the examination sought; and
>
> (3) it is not possible to obtain the desired information through means that are less intrusive than a compelled examination.

Id. at 491.

The requirements for good cause apply not only to examinations, but to the production of physical samples as well. *Id*.

For a condition to be "in controversy," it must be central to the movant's claim or defense. *See In re Ten Hagen Excavating, Inc*., 435 S.W.3d 859, 867-68 (Tex. App.—Dallas 2014, orig. proceeding) ("[I]n-controversy requirement is not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case…") (quotations omitted). For example, a condition would be in controversy in a negligence action where a plaintiff claims personal injury caused by the defendant's negligence, or where a defendant asserts his physical condition as a defense to a claim. *See id.*

V. CONCLUSION

Rule 205 provides a procedural roadmap for parties seeking discovery from nonparties and the nonparties who are served with their requests. By gaining an understanding of this rule—as well as the other rules it touches—practitioners can ably serve their clients during the third-party discovery process.