

Using Discovery in Physical and Sexual Abuse Cases



DISCOVERY TECHNIQUES IN HIGH CONFLICT CASES

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Purpose of Discovery



- To determine whether Petitioner can prove the allegations
- Long-term effects of child being adjudicated
- Determine whether to consent, stipulate or litigate
- Narrow the issues for trial
- Preparation for trial
- Develop a potential witness list
- Determine the pros and cons of the case
- Develop a strategy/theory for the case

Statutes that Dictate A/N/D Discovery



- **NC Rules of Civil Procedure Chapter 1A**
- **N.C.G.S. §7B-700 Regulation of Discovery and Protective Orders**
 - Pre October 1, 2009 and Post October 1, 2009
- **Nothing in 7B prevents attorneys from using other discovery techniques such as:**
 - Subpoenas
 - Depositions
 - Interrogatories, etc

The Complexities of Discovery in Abuse cases

- Must act with all urgency
- Physical and sexual abuse cases tend to have experts involved
- Medical jargon
- Choose your battles wisely
 - e.g. don't subpoena everything simply because you can
- Criminal implications to sex/physical abuse cases
- Resistance from DSS and experts to disclose information
- Willingness of clients to speak truthfully
- Complex evidentiary issues –
 - e.g. child testimony and evaluations

Expediting the Discovery Process



- **Statutory time frame**
 - Adjudication w/in 60 days from the filing of the petition
 - Know your judge – continuances may be granted for good cause
 - Failure for a party to comply with discovery can be good cause
- **Contact the party**
 - ask if they would respond to the discovery requests in a shorter period of time
- **Motion to Shorten Time to Respond**
 - File and serve the motion on all parties
 - Provide at least five days notice before calendaring the case

Various Methods of Discovery



- **Client interviews and collateral sources**
- **Motion for Production and Examination of DSS File**
- **Request for the Production of Documents**
- **Subpoeas and Subpoenas duces tecum**
- **Interrogatories**
- **Depositions**
- **Request for Admissions**
- **Motion to Shorten Time for Discovery**

Put your Client to work



- **Clients may:**
 - Access medical and mental health records of their child
 - Provide you with collateral information about the allegations in the petition
 - Inform you of potential witnesses
 - Provide historical information about their involvement with DSS
 - Sign releases for you to access information on their behalf
 - ✦ E.g. releases to access client's medical records, drug screens, etc.

Motion to Produce and Examine the DSS Records



- **The MOST important discovery tool**
- **Review Local Rules from your jurisdiction**
- **Execution of the Motion**
 - Bring the Motion to court with you at the nonsecure custody hearing
 - Serve all parties on the case, not just DSS
- **Time is of the essence**
 - Schedule an appointment with DSS within days of the Motion and Order To Produce and Examine being executed
 - Meet with your client (if possible) prior to reviewing the file
 - ✦ Your client is an essential part in the discovery process
 - ✦ Your clients can assist in narrowing the focus and providing background and history important to the case

Motion to Produce and Examine the DSS Record

(cont.)



- **Documents to look for in the DSS file:**
 - Social worker dictation
 - CPS Investigation notes
 - Initial DSS report
 - Prior DSS reports- substantiated and unsubstantiated reports
 - Police reports/ police interviews
 - Any CME/CFE evaluations performed on the child
 - Risk/Safety Assessments
 - Safety Plans
 - ✦ Review any violations or compliance with the assessments
 - Pictures
 - RIL documentation/notification letters

Request for the Production of Documents



- **Rule 34 of the NC Civil Rules of Procedure**
 - Can be used in lieu of Motion and Order to Examine and Produce the DSS file
 - Serve Petitioner with request for documents and serve all parties with said request
 - Must allow the party 30 days to respond
 - ✦ unless your Motion for Shortened time to respond is granted by Judge
 - Party must make the documents available to you at the location you designate – party does not have to copy the documents
 - Ask for same/similar documents that you receive in reviewing the DSS file

Subpoenas



- **Rule 45 of the NC Rules of Civil Procedure**
- **Service of Subpoenas**
 - via return receipt requested
 - via sheriff
 - Personal service – attorneys and parties cannot serve subpoenas
 - Service fees are waived in all juvenile cases if served by sheriff
 - Service via fax is NOT proper service
 - Provide all parties with a certificate of service of which persons, items you have subpoenaed.
- **Subpoena duces tecum**
 - Used to subpoena documents , videos, photos, etc.
 - Must allow a reasonable time for the party to comply with the request (good rule of thumb = 11 days)
 - Once in receipt of the items, you must notice all parties that you received the documents (Rule 45(d1))

Subpoenas

(cont.)



- **Who to subpoena**
 - Any potential witness that strengthen your client's case
 - Social workers involved in the case (if useful to you)
 - Don't depend on DSS to subpoena witnesses that benefit your client
- **Documents to Subpoena**
 - Police reports – investigative notes and interviews
 - Medical records, notes from social workers, physicians, and nurses
 - Videotapes, photos, documents
 - Expert reports
- **Sanctions for failure to comply (Rule 45e)**
 - If the subpoenaed person fails to be properly released from a subpoena the judge may use the sanctions in Rule 37(d)

Depositions on Oral Examination



- **Rule 30 of the NC Rules of Civil Procedure**
- **Defer to IDS policy regarding deposition fees and procedures**
- **Purpose**
 - Limit potential testimony and narrow contested issues
 - Can be used to impeach witnesses at trial
 - Sworn testimony
- **Procedure**
 - Provide place and time for deponent
 - Notice a party via Notice of deposition, via mail, fax
 - Notice a nonparty through a subpoena via sheriff or return receipt requested
 - Must allow at least 10 days notice to all parties about the deposition
 - Provide adequate notice of deposition to deponent and parties (10 days min)
- **Who can be deposed?**

Oral vs Written Depositions

- **Oral depositions**

- **Pros**

- Ability to ask follow-up questions
- Probe for information
- Element of surprise

- **Cons**

- Expensive and timely
- Issues with funding
- inconvenient

- **Written depositions**

- **Pros**

- Relatively inexpensive
- Don't require significant time to complete
- Can be sent to non-parties

- **Cons**

- No opportunity to follow-up
- Allows person to craft the best answer

Interrogatories



- **Rule 33 of the NC Rules of Civil Procedure**
- **Procedure**
 - May request any *party* to answer written questions
 - Answers are made under oath
 - Party has 30 days to answer
 - Regular service via mail or facsimile
- **Limitations :**
 - Limit of 50 questions without leave of court
 - Subparts of a question are counted as a question
 - Can not be used for non-parties, such as experts
- **Pros**
 - Statement made under oath, can be used to impeach
 - Inexpensive
- **Cons**
 - Doesn't allow the opportunity to ask follow-up questions
 - Limits on the # of questions that can be asked

Potential Pitfalls with Discovery Methods



- **Backlash effect from DSS, GAL and Judges**
- **Overly broad and extensive discovery requests may encourage judges to limit discovery**
- **Proverbial “burning bridges” with opposing counsel**
- **Judges passing discovery expenses on to the client**
- **DSS and GAL may serve you with discovery requests**