DISCOVERY:

Using the Civil and Criminal Rules of Discovery in DSS Cases

Maitri "Mike" Klinkosum
Assistant Capital Defender
Office of the Capital Defender-Forsyth Regional Office
Winston-Salem, North Carolina
8 West Third Street
P.O. Box 20308
Winston-Salem, NC 27120-0308
Telephone: (336) 761-2503
Fax: (336) 761-2515

Introduction

The necessity of finding and analyzing discovery by defense counsel is of utmost importance in any case. The rules of discovery vary remarkably from criminal to civil cases. However, because the representation of parents against the Department of Social Services often encompasses civil and criminal issues, the parent-attorney should be well versed in both the civil and criminal rules and rights of discovery.

Civil litigants in North Carolina are afforded liberal discovery, broad procedures designed to ferret out information, and a culture that promotes complete disclosure of all the evidence possessed by both sides. These procedures can be utilized by the parent-attorney to provide effective representation to a parent accused of abusing and/or neglecting his or her children. The civil rules of discovery provide wide latitude in the pursuit of information. However, in cases involving the Department of Social Services, the parent-attorney will often be confronted with a claim of "privileged information" by the Department. When such a claim is made, the parent-attorney should then attempt to use some of the constitutionally mandated procedures under the criminal rules of discovery as a means to obtain the necessary information with which to defend the client.

The diligent pursuit of information and the evaluation of that information, which serves to both bolster the parent's defense and impeach the Department's case, should be the central mission for every attorney charged with representing a parent. The effective advocate should try to be aware of every fact that helps his client, as well as every fact that hurts his client. Aggressive discovery practice may increase the possibility of a dismissal of the case or may help in reaching some mutually acceptable settlement.

Statutory Discovery Under the Juvenile Code

It is an understatement to say that statutory discovery in abuse/neglect cases is very minimal. Statutory discovery rules in DSS cases are set forth at N.C.Gen.Stat. 7B-700 and the rules state as follows:

(a) Upon written motion of a party and a finding of good cause, the court may at any time order that discovery be denied, restricted, or deferred.

(b) The Court may permit a party seeking relief under subsection (a) of this section to submit supporting affidavits or statement to the court for in camera inspection. If, thereafter, the court enters an order granting relief under subsection (a) of this section, the material submitted in camera must be available to the Court of Appeals in the event of an appeal.

Since the statutory language does not set forth any procedures or devices for obtaining discovery in DSS cases, the parent-attorney must look to the discovery tools under the rules of Civil Procedure.

Discovery Using the Rules of Civil Procedure

The Rules of Civil Procedure, located at N.C.Gen.Stat. § 1A-1, et al, generally govern abuse/neglect proceedings. ***In Re Bullabough***, 89 N.C.App. 171, 365 S.E.2d 642 (1988). ***Thrift v. Buncombe County DSS***, 137 N.C.App. 559, 528 S.E.2d 394 (2003).

While any practitioner seeking to use discovery devices under the Rules of Civil Procedure should thoroughly read and understand all the rules of discovery, the basic scope and general provisions of discovery are set forth under N.C.Gen.Stat. § 1A-1, Rule 26(b):

> In General – Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

Under the North Carolina Rules of Civil Procedure, there are several discovery tools which may be utilized, however there are three discovery devices that are routinely utilized by civil practitioners: Interrogatories (N.C.Gen.Stat. § 1A-1, Rule 33), Requests

for Production of Documents (N.C.Gen.Stat. § 1A-1, Rule 34) and Depositions (N.C.Gen.Stat. § 1A-1, Rule 32).

Interrogatories
N.C.Gen.Stat. § 1A-1, Rule 33

Interrogatories are sets of written questions concerning the subject matter of the case which are formulated by one party and served upon the opposing party. Any party may serve upon any other party written interrogatories to be answered by the party who was served. Interrogatories are often used to learn the basic facts about a case including, the witnesses, expert witnesses, subject matter, etc.

A party may not serve more than 50 interrogatories to any other party. If the serving party feels that more than 50 interrogatories are required, that party must obtain either the permission of the Court to serve more than 50 interrogatories or the consent of the other party.

Subparts of an interrogatory are counted as separate interrogatories for purposes of calculating the 50 question limit. In other words, if Party X serves an interrogatory numbered 1 on Party Y and interrogatory 1 contains subparts A through F, Party X has served Party Y with 7 interrogatories and may only serve another 43 questions.

The serving party must leave sufficient space for a response after every interrogatory. The answering party must either (1) state the answer to the interrogatory in the space provided, using additional pages if necessary, or (2) restate the interrogatory on a separate page and answer the question on the same page.

Each interrogatory must be answered separately and fully in writing under oath. Because interrogatories are answered under oath, they may be used as both substantive evidence and as impeachment tools at trial and can be used to impeach a witnesses credibility should a witnesses testimony be inconsistent with answers to interrogatories.

Because interrogatories are answered under oath, the answers must be signed by the person making them.

The party who has been served with interrogatories has 30 days, after service, to answer them. Extensions of time may be allowed by the serving party or by the Court. The Court may also shorten the time for a response from the served party.

If the answering party has an objection to any interrogatory, the objection and the reason for the objection must be stated, in writing, in the space provided for the answer to the interrogatory.

Any objections are to be signed by the attorney making them.

Requests for Production of Documents
N.C.Gen.Stat. § 1A-1, Rule 34

Along with interrogatories, a party may serve a Request for Production of Documents. Rule 34 also allows a party to request the production of "things" and to be able to enter upon property. As discovery in most DSS cases only involve the need for documents, that issue will be discussed in this section.

A Request for Production of Documents is drafted and served much like a set of interrogatories. The party making the request can ask the opposing party to copy the requested documents and or make the documents available for inspection. The scope of what may be requested is governed by N.C.Gen.Stat. § 1A-1, Rule 26(b).

"Documents" include:

- Writings
- Drawings
- Graphs
- Charts
- Photographs
- Phonorecords
- Other data or compilations from which information can be obtained, translated by the respondent through detection devices into reasonably usable form.

The request must contain the following:

- The items to be inspected either by individual item or category.
- A description of each item and category with reasonable particularity.
- The time, place, and manner of the inspection or copying.

Like sets of interrogatories, the serving party must leave sufficient space for a response after every request and the answering party must state the response in the space provided or restate the request to be followed by the response. Additionally, the party served with the requests has 30 days in which to file a written response. This period of time may be extended or shortened by the Court.

Any objection to a request, as well as the reason for the objection, must be stated in the area for the response. This is true even if the objection is to part of a request. The objecting party must still specify which portion of the request is objectionable and the reasons for the objection.

Depositions Upon Oral Examination
N.C.Gen.Stat. § 1A-1, Rule 30

Depositions are usually taken after both interrogatory answers and responses to requests for production of documents have been given. The reason for the timing of this sequence of events lies in the fact that answers to interrogatories and requests for production of documents will typically guide the attorney in the planning and taking of a witness' deposition.

Because depositions require the services of a court reporter and can be lengthy, they are often expensive. In order to utilize this discovery device in cases involving DSS, cases in which most attorneys are appointed because of the indigency of the clients, it will likely be necessary to obtain funds from the Court to hire a court reporter for purposes of depositions.

However, the value of depositions cannot be understated. They are a wonderful tool for determining the witness' knowledge about a case, the witness' credibility, and for boxing a witness into a certain rendition or recollection of the facts of a case. Depositions may be taken of either party and/or non-party witnesses.

The value of depositions is also found in the fact that a deposition is "testimony" for purposes of court proceedings. Under Rule 32(a)(1), a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deposed witness.

The deposition may also be used as substantive evidence (Rule 32(a)(2)).

In order to take a witness' deposition the deposing party must serve the witness with a Notice of the deposition <u>to every other party in the action</u>. The notice must state the time and place for the taking of the deposition and the name and address of each person to be deposed. If the name of the person is not known, a general description sufficient to identify him/her or the particular class or group to which he/she belongs is required.

The party taking the deposition must send the notice to all other parties 10 days prior to taking the deposition if all of the parties reside in the State and 15 days prior if any parties reside outside of the State.

A resident of this State can only be required to submit to a deposition in the county where he/she resides, is employed, or transacts his business in person. Nonresidents may be required to submit to a deposition only in the county where he/she resides or within 50 miles of the place of service. These requirements are subject to modification by the court (Rule 30(b)(1)).

Failure to Comply with Discovery
N.C.Gen.Stat. § 1A-1, Rule 37

Rule 37 provides the remedies available when a party served with a discovery device fails to respond appropriately. The party serving discovery may move for an order compelling an answer, a designation, or inspection in compliance with the original request. If the failure to comply occurs in a deposition, the party asking the question that was not answered must complete the entire deposition and then move the court for an order compelling discovery.

Evasive or incomplete answers are treated as failures to answer.

If the party failing to answer discovery persists in the refusal to answer, after the court has ordered the party to give an answer, the court may enter the following sanctions:

- An order that matters regarding which the order was made be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order;
- An order refusing to allow the non-complying party to support or oppose designated claims or defenses, or prohibiting them from introducing designated matters of evidence;
- An order striking pleadings, or parts of pleadings, or staying the proceedings until the order is obeyed, or dismissing the action, or rendering a judgment by default against the non-complying party;
- An order holding the non-complying party in contempt of court for failure to obey any order, except an order to submit to a physical or mental examination;

Alternative Discovery Methods

Often, DSS will make a claim of privilege or confidentiality under N.C.Gen.Stat. § 7B-2901. While such a claim will make the process of defending a parent all the more difficult, it should not necessarily end the attempts to obtain discovery.

Public Policy vs. Constitutional Rights

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due

Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. ***Owenby v. Young***, 357 N.C. 142, 579 S.E.2d 264 (2003).

This writer would argue that, while the State may have some valid interest in making the documents and materials surrounding an abuse/neglect case confidential, such an interest is only a public policy consideration, which must yield in light of the fact that a parent's right to the care, custody, and control of his/her children is a constitutionally protected fundamental right.

Further, as the right of a parent is a constitutionally mandated right, the courts have determined that the right to counsel applies in proceedings in which that right is placed in jeopardy. It would stand to reason that if a parent has the right to counsel, that parent would obviously have the right to effective assistance of counsel under the 6th Amendment to the United States Constitution. Therefore, in order to be an effective advocate, the parent-attorney would necessarily need as much information as possible in order to effectively represent the parent.

The courts, including the US Supreme Court, have rendered opinions in which public policy interests, codified by statute, were determined to stand in a secondary position to the rights afforded an individual under the United States Constitution.

The seminal case on this point is ***Davis v. Alaska***, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 297 (1973), wherein the U.S. Supreme Court found that Alaska's reliance on a state statute which barred the questioning of a witness about a prior juvenile record violated the Confrontation Clause, despite Alaska's legitimate interest in protecting the identity of juvenile offenders. In ***Davis,*** and later in ***Pennsylvania v. Ritchie***, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), the U.S. Supreme Court held that while the State may have a strong interest in protecting certain types of information, such an interest does not prevent disclosure in all circumstances.

The same can be said of the State's interest in guarding the information held by the Department of Social Services. While such concerns are relevant public policy considerations, they do not rise to such an overwhelming level as to justify the infringement on the rights to parent under the 14th Amendment.

Therefore, in cases where the Department of Social Services is seeking to hinder or bar discovery under 7B-700, in addition to arguing that the 14th Amendment trumps the public-policy considerations of the Department, the parent-attorney might consider using the cases of ***Pennsylvania v. Ritchie***, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) and ***State v. McGill***, 141 N.C.App. 98, 539 S.E.2d 351 (2000) to obtain *in camera* review of the records if the court will not allow full disclosure directly to the defense.

Although ***Ritchie*** and ***McGill*** deal with records maintained by child welfare agencies as they relate to criminal cases, in the broader sense, those cases hold that a defendant may obtain an *in camera* review of confidential records in order that material

evidence in those records be disclosed to the defense. Such a procedure may persuade the court that the requirement of due process and the need to protect confidentiality are balanced.

Further, ***Ritchie*** and ***McGill*** require the court to seal any documents turned over for *in camera* inspection in the court file for appellate review. Once the matter is sent to the appellate courts, those courts then open the sealed files and review the documents to determine if any should have been turned over to the defense.

Again, while these cases deal with criminal actions, it can be argued that the same principles apply in abuse/neglect cases. Parents faced with charges of abuse/neglect by DSS are confronted with a direct assault on their constitutionally protected right to parent their children. Accordingly, because their 14th Amendment rights are involved they have the right to counsel and, arguably, the effective assistance of counsel. If counsel for a parent is unable to prepare the matter for adjudication and to ultimately defend the client against the charges, then his/her assistance is ineffective.

By depriving an attorney of the materials needed to prepare a case, the State is, in effect, sponsoring ineffective assistance of counsel and placing an otherwise competent attorney in the position of being ineffective. ***U.S. v. Cronic***, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Finally, if the court conducts an *in camera* hearing, request the opportunity to participate in the review of the records. If needed, further stipulate to a protective order preventing the disclosure of the contents of the records unless permitted by the court. This will ensure that the defense is able to review the records.

While the courts will likely do an adequate job of review, they are often not acquainted with the finer points of a parent's case and, as such, the parent-attorney should be present to review the records, as he or she is the only person who can completely view the records with an eye towards using them in defending against the charges.