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SECTION 6 DISCOVERY

November 2013

Ideally, discovery enables the parties to narrow the scope of the litigation, resolve a case informally, or prepare for trial by revealing the operative facts and evidence supporting each party's position. Limited time frames for resolving child protection suits make it critical for attorneys representing DFPS to be able to propound and respond to discovery efficiently and with an eye to the overall case strategy. This section is designed to give practitioners a working knowledge of the most common discovery issues encountered in child abuse and neglect litigation. While certain aspects of child protection litigation make some discovery methods more useful than others, the same rules apply as in any civil litigation.

Overview

The scope of discovery legitimately includes any matter that is not privileged and is relevant to a claim or defense or reasonably calculated to lead to the discovery of admissible evidence. When the best interest of a child is at issue, this principle is generally applied broadly. Discovery can include:

- The names and contact information of persons with knowledge of relevant facts, and a brief statement of the person's connection to the case;
- The names and contact information of trial witnesses;
- Detailed information about testifying expert witnesses and any consulting expert whose opinions a testifying expert has reviewed;
- A description and other information about documents and tangible things;
- Contents of any settlement agreements;
- Written or recorded witness statements; and
- The opposing party's legal contentions and the factual bases for each.[1]

Virtually every Suit Affecting the Parent Child Relationship (SAPCR) filed by DFPS will be subject to Level 2 discovery. When this discovery level applies:

- Discovery begins when suit is filed and ends 30 days before trial;[2]
- Interrogatories are limited to 25; and [3]
- Depositions are limited to 50 hours for each side.[4]

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[1] TEX. R. CIV. P. 192.3.
[2] TEX. R. CIV. P. 190.3 (b)(1)(A) (for cases filed under the FAMILY CODE).
[3] TEX. R. CIV. P. 190.3(b)(3) (limit on interrogatories does not include requests to identify or authenticate documents, but each subpart of an interrogatory is counted separately).
[4] TEX. R. CIV. P. 190.3(b)(2) (unless one side has more than two experts).

A propounding party can maximize the value of discovery by strategically designing each discovery request to build on responses from the previous requests. Similarly the process of marshalling relevant information to respond to discovery often benefits the responding party by facilitating an assessment of the strengths and weaknesses of a case.

The duty to supplement or amend discovery responses requires a further response to correct or complete a response within a reasonable time after a party becomes aware of the need for further response. A supplementary response made less than thirty (30) days before trial is presumed not to be reasonably prompt.[5]

In summary, the discovery rules provide:

- Except as specifically prohibited, the parties may enter into a Rule 11 agreement or the court may order modification to discovery procedures for good cause;[6]
- All discovery requests, notices, objections and responses (except interrogatory responses in most instances, see below) must be signed by the attorney of record or an unrepresented party;[7]
- The signature of an attorney or party on a response to a request for disclosure certifies that to the best of the signer's knowledge, information and belief, the disclosure is complete and correct at the time it is made;[8]
- The signature of an attorney or party on a discovery request, notice, response or objection is a certification that to the best of the signer's knowledge, information and belief, after reasonable inquiry, the document is consistent with the applicable rules of civil procedure (or a good faith extension of same), has a good faith factual basis, is not made for any improper purpose and is not unreasonable or unduly burdensome;[9] and
- Before bringing a motion to compel discovery, the moving party must certify that a good faith effort was made to resolve the dispute without court intervention.[10]

Generally, discovery requests and responses are not filed with the court, with the exception of:

- Discovery requests, deposition notices, and subpoenas served on nonparties;
- Discovery motions and responses to motions;
- Rule 11 agreements regarding discovery;
- Discovery the court orders to be filed;
- Discovery filed in support of or in opposition to a motion or similar court proceeding; and
- Discovery materials necessary for an appeal.[11]

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[5] TEX. R. CIV. P. 193.5(b).
[6] TEX. R. CIV. P. 191.1.
[7] TEX. R. CIV. P. 191.3(a).
[8] TEX. R. CIV. P. 191.3(b).
[9] TEX. R. CIV. P. 191.3(c).
[10] TEX. R. CIV. P. 191.2.
[11] TEX. R. CIV. P. 191.4(b),(c).

Discovery that is not filed with the court must be retained during trial and any appeal commenced within six months after the judgment is signed. [12]

TIP:
It is not uncommon for DFPS to provide a redacted copy of a CPS file to a party without a formal discovery request. This is authorized and can be an efficient way to share information. Attorneys do need to be aware that this type of exchange of information does not obviate the need to comply with a formal discovery request or with local rules or practices.

Confidentiality

Confidentiality provisions require redacting of DFPS documents in response to a discovery request to edit material that is not subject to release. In general, DFPS must withhold:

- All reports of alleged abuse or neglect and the identity of the reporter; [13]
- The files, reports, audio and videotapes, and documents generated pursuant to an investigation, with limited exceptions; [14] and
- Records obtained by DFPS from another source, if release to the requestor is prohibited by state or federal law. [15]

Identifying information regarding the following persons must also be redacted:

- Reporters of abuse and neglect;
- A child's biological family;
- Any previous adoptive family; and
- Other DFPS clients.

A release is also prohibited if it would interfere with an ongoing criminal investigation or prosecution. [16]

Exceptions to the general confidentiality requirements apply to the following persons:

- Parent/ Conservator/Guardian**:** Otherwise confidential case records are subject to release to the parent, conservator, or guardian of a child who was an actual or

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[12] TEX. R. CIV. P. 191.4(d).
[13] TEX. FAM. CODE §261.201(a)(1).
[14] TEX. FAM. CODE §261.201(a)(2).
[15] 40 TAC §700.204(b). This includes but is not limited to: medical records subject to the MEDICAL PRACTICES ACT, TEXAS CIVIL STATUTES, ART. 4413 4495b (unless release is authorized under §5.08); HIV information (unless release is authorized under Ch. 81 of HEALTH & SAFETY CODE); criminal history or arrest records obtained from law enforcement (unless release specifically authorized by state or federal law); adult or juvenile probation records, including juvenile arrest records (unless release specifically authorized by state or federal law); and polygraph exam reports (unless release specifically authorized by the POLYGRAPH EXAMINERS ACT, TEXAS CIVIL STATUTES, ART. 4413 (29cc), §19A.
[16] 40 TAC §700.203(f).

alleged victim of abuse or neglect, pursuant to a proper request and after redaction of information not subject to release; [17]

- Alleged Perpetrator: Otherwise confidential case records are subject to release to an alleged or designated perpetrator, whether or not the person is a parent of a victim, as long as the records are redacted. [18] Such a release is limited to records developed during the investigation and does not include records related to services provided to a child or family;
- Adoptive Parents: The adoptive or prospective adoptive parents of a child who was the subject of a child abuse investigation are entitled to all records regarding the child's history. The records must be edited to protect the identity of the biological parents (unless this information is already known or is readily available); [19] and
- Participant in Child Abuse Investigation: A person who does not qualify for access to child abuse records under the above exceptions, but who participated in some manner in a child abuse investigation, is entitled to access the case records directly pertaining to his or her involvement in the case. [20]

A court may order disclosure of otherwise confidential information either on motion by a party or on the court's own motion, following a noticed hearing, if the court finds the release essential to the administration of justice and not likely to endanger life or safety of the child, a reporter of abuse or neglect, a person involved in the investigation or a caretaker of the child. [21] In the context of an administrative law proceeding concerning a professional's license or certification or an educator's credential, an administrative law judge is also authorized to order disclosure of confidential information after a noticed hearing, if the requisite findings under TEXAS FAMILY CODE § 261.201 (b)(3) are made. [22] The identity of the reporter of abuse or neglect must be redacted prior to any release under this provision.

In addition, specific information regarding a child fatality under investigation by DFPS which would otherwise be confidential is subject to release. [23] The information to be provided varies depending on the circumstances, but in all cases redaction of certain information is required. [24]

Objections

A responding party objecting to written discovery must:

- Limit objections to those with a good faith factual and legal basis;
- Object on or before the deadline for a response; and

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[17] 40 TAC §700.203(b).
[18] 40 TAC §700.203(c).
[19] 40 TAC §700.203(d).
[20] 40 TAC §700.203(e).
[21] TEX. FAM. CODE §261.201(b),(c).
[22] TEX. FAM. CODE §261.201(b)-(1).
[23] TEX. FAM. CODE §261.203.
[24] TEX. FAM. CODE §261.203(e).

- Respond to the non-objectionable portion of a discovery request.[25]

The responding party may add a new objection when amending or supplementing a discovery response if the objection did not apply to the initial response.[26] The fact that new objections can be raised with an amended or supplemental response makes it unnecessary to anticipate future objections in a discovery response.

Common objections include:

- Not relevant or reasonably calculated to lead to the discovery of admissible evidence;[27]
- Discovery is obtainable from another source that is less burdensome;[28] and
- Improper procedure (*e.g.*, exceeds allowable number of interrogatories, inadequate notice of subpoena duces tecum).

Privileges

In the context of child abuse litigation, evidence cannot be excluded on the basis of privilege, except in the case of attorney client communications.[29]

To assert a privilege a party must:

- State that responsive information has been withheld;
- Identify the request it relates to; and
- State the privilege that is asserted.[30]

Commonly invoked privileges in child abuse litigation include those related to:

- Mental health records;
- Drug and alcohol abuse records;[31]
- Attorney-client;[32] and
- Work product.[33]

The identity, mental impressions, and opinions of a consulting expert are privileged, unless the consulting expert's opinions or impressions are provided to a testifying expert.[34]

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[25] TEX. R. CIV. P. 193.2.
[26] TEX. R. CIV. P. 193.2 (d).
[27] TEX. R. CIV. P. 192.3 (a); Tex. R. Evid. 401.
[28] TEX. R. CIV. P. 192.4 (a).
[29] TEX. FAM. CODE §261.202; *Bordman v. State*, 56 S.W. 3d 63 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (confession regarding sexual assault of children admissible under TEX. FAM. CODE §261.202, which creates an exception to clergy communication privilege).
[30] TEX. R. CIV. P. 193.3(a).
[31] 42 C.F.R. §2.1(a). 2.2 (a).
[32] TEX. R. EVID. 503(b).
[33] TEX. R. CIV. P. 192.5(b).
[34] TEX. R. CIV. P. 192.3 (e).

Relevant exceptions to the privilege attached to mental health records include: (1) where a parent signs a waiver or release permitting CPS to access these records; (2) for court-ordered psychological examination, if the judge finds the patient was informed that communications would not be privileged and (3) in any proceeding regarding abuse or neglect of a resident of an institution as defined by Health and Safety Code §242.002.[35]

TIP:
Ask the court to inform the parties in court that communications made in the course of a court-ordered psychological examination will not be privileged.

One method of accessing mental health and substance abuse and alcohol treatment records is to obtain written releases from the parents. Note that many mental health providers (including most state facilities in Texas) require their own release for records and will not accept a general release signed by a parent. Another option some DFPS litigators use is to routinely is to make a motion for a court order authorizing DFPS to obtain records from specific providers, which can then be attached to a subpoena.[36] While courts frequently direct parents to sign releases to allow access to these records, if a parent is unavailable, or if the provider deems the release too old to be effective by the time it is used, attaching a court order to a request for records will save time.

TIP:
A party who inadvertently produces privileged material does not waive the privilege if, within 10 days or a shorter time ordered by the court after discovery of the error, the producing party amends the response, identifies the material produced and the privilege asserted. This "snap-back" provision requires the requesting party to return the specified material and any copies.[37]

Subpoenas - Rule 176

Subpoenas are a common tool used to obtain testimony from parties and nonparties, either for discovery or for trial. Careful compliance with all technical prerequisites is essential to avoid an objection or a flaw that precludes enforcement.[38]

A subpoena:

- May be issued by the clerk of court, an attorney, or an officer authorized to take depositions;[39]

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[35] TEX. R. EVID. 510 (d)(2),(4)(6).
[36] See Practice Guide, SECTION 13 TOOLS, Evidence, Motion and Order to Authorize Disclosure of Records and Confidential Communication. This is a noticed motion, in contrast with a request for an Order in Aid of Investigation, which is filed as an ex parte motion.
[37] TEX. R. CIV. P. 193.3(d).
[38] TEX. R. CIV. P. 176.1; 176.2.
[39] TEX. R. CIV. P. 176.4.

- May be served by a sheriff, constable, or any person age 18 or older who is not a party to the action;[40]
- May be served on a party's attorney of record; and[41]
- May not require a witness to appear in a county more than 150 miles from where the witness resides or is served.[42]

The best practice is to serve subpoenas early enough to avoid the anxiety of a last minute effort to serve a subpoena. The party serving a subpoena must tender the witness fees at time of service but as a state agency DFPS is entitled to a special rate of $1.00 a day plus reimbursement for specific expenses.[43] Proof of service must be made by filing either the witness's signed memorandum showing acceptance of the subpoena or a statement showing the date, time and manner of service signed by the person who served notice.[44]

A person served with a subpoena can request a protective order if the subpoena seeks information that is privileged or otherwise objectionable.[45] DFPS has adopted detailed policy governing procedures for handling subpoenas served on individual staff or the agency.[46]

If confidential DFPS records are sought in litigation in which DFPS is not a party, it may be necessary to file a motion to quash or a motion for protective order or for an in camera inspection. If there is a dispute as to a claim of privilege, the person asserting the privilege has the burden to prove the claim of privilege.[47]

Requests for Disclosure - Rule 194

Requests for disclosure are often most effective at the outset of a case. Requests for disclosure can be used to obtain information about potential parties, paternity, persons with knowledge of the facts, identity of expert witnesses, legal theories, and witness statements. Operative restrictions applicable to requests for disclosure include:

- No work product privilege applies to responses;[48]
- Requests can only be made to a party;[49]
- Requests must be filed 30 days before the applicable deadline for discovery;[50] and

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[40] TEX. R. CIV. P. 176.5(a).
[41] TEX. R. CIV. P. 176.5.
[42] TEX. R. CIV. P. 176.3.
[43] TEX. CIV. PRAC. & REM. CODE §22.003.
[44] TEX. R. CIV. P 176.5 (b).
[45] TEX. R. CIV. P. 176.6 (e).
[46] DFPS Subpoena Policy and Procedures, OP-4105, January 2, 2012, available at: http://www.dfps.state.tx.us/handbooks/Operating_Policy/OP-4105_Subpoena.asp
[47] TEX. R. CIV. P. 193.4 (a).
[48] TEX. R. CIV. P. 194.5.
[49] TEX. R. CIV. P. 194.1.
[50] TEX. R. CIV. P. 194.1.

- Responses are due 30 days after the request is served, unless a request is served before the defendant's answer is due; then the response is due 50 days after a request is served.[51]

A request for disclosure can used to obtain significant information including:

- Names of parties;
- Names and contact information of potential parties;
- Names of persons with knowledge of facts and a brief statement of each person's connection with the case;
- Legal theories and factual basis of a party's claims and defenses;
- Specific information about testifying experts;
- Any discoverable settlement agreements; and
- Any discoverable witness statements.[52]

If responsive documents are voluminous, the responding party may designate a time and place to produce the documents for inspection instead of producing copies with a response.[53] No objections or work product assertion is permitted.[54] If a disclosure regarding legal theories and the factual bases for each is amended or supplemented, the original response is not admissible and cannot be used for impeachment.[55]

Requests for Admission - Rule 198

Requests for admission are often most useful to obtain factual information for further discovery or to impeach a party at trial. Furthermore, in a case in which you believe that you will have to defend against a motion for summary judgment, requests for admission can be used as evidence to attach to your response. In Level 2 discovery, thereis no limit on the number of requests for admission permitted..[56] Requests for admissions can be useful in a CPS case to ascertain information regarding:

- Parentage;
- A parent's awareness of conditions or facts;
- The identity of relatives or possible placements; or
- Substance abuse history and treatments.

Because the Rules of Civil Procedure do not limit the attorney to one set of request for admissions, the attorney can use requests later in the case to get the parent(s) to admit to specific relevant facts such as:

- Missed visitations (by date);
- Failure to attend appointments for services (by provider and date);

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[51] TEX. R. CIV. P. 194.3.
[52] TEX. R. CIV. P. 194.2.
[53] TEX. R. CIV. P. 194.4.
[54] TEX. R. CIV. P. 194.5.
[55] TEX. R. CIV. P. 194.6.
[56] TEX. R. CIV. P. 190.3.

- Housing locations;
- Employment history;
- Paramour or dating relationships; and
- Verification of drug test results (by date).

Requests for admission:

- May request an admission regarding statements of opinion or fact, application of law to fact, or the genuineness of any documents; and
- Must be served at least 30 days before the end of the discovery period.[57]

A response to Requests for Admission:

- Must specifically admit or deny the request, or explain in detail why it is not possible to admit or deny, unless an objection is stated or a privilege asserted;[58]
- Is due within 30 days of service (or 50 days if the request is served before the answer is due);[59] and
- Conclusively establishes any admission, subject to the court's authority to permit withdrawal or amendment for good cause if the opposing party will not be unduly prejudiced and the presentation of the merits of the case will benefit.[60]

Failure to respond timely will result in admissions being deemed admitted.[61]

While the Rules of Civil Procedure no longer require a motion to deem requests for admissions admitted, it is good practice (unless specifically prohibited by your court) to file any request for admissions that are admitted or any sets of request for admissions that are not answered with the District Clerk so that the judge may take judicial notice of the admission in a bench trial or so instruct the jury that the specific fact has been admitted.

Interrogatories - Rule 197

Under a Level 2 discovery plan, parties are allowed a maximum of 25 interrogatories or a total of 25 discrete subparts. Interrogatories are useful in seeking specific information regarding details of specific events, occurrences, or legal contentions. The responding party must respond to the interrogatories within 30 days unless the interrogatories are propounded before a respondent's answer is due, in which case the respondent has 50 days to respond.[62] The responding party (as opposed to the attorney) must sign and verify answers to interrogatories, except:

- Answers based on information from other persons, which the response indicates; and

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[57] TEX. R. CIV. P. 198.1.
[58] TEX. R. CIV. P. 198.2(b).
[59] TEX. R. CIV. P. 198.2(a).
[60] TEX. R. CIV. P. 198.3.
[61] TEX. R. CIV. P. 198.2(c).
[62] TEX. R. CIV. P. 197.2(a)

- Interrogatories regarding persons with knowledge of relevant facts, trial witnesses, and legal contentions.[63]

TIP:
If a party responds to a request for the identity of persons expected to testify at trial with a list of all persons with knowledge of relevant facts, ask the court to require the opposing party to identify those persons actually intended to serve as trial witnesses.

Requests for Production of Documents - Rule 196

Production requests can be useful in seeking information relating to income verification, documents that support a party's contentions, and criminal convictions. A request for production of documents must:

- Sufficiently describe the item or category of items requested;
- Be served at least 30 days before the end of the discovery period; and
- Specify a reasonable time and place for the response.[64]

If the request seeks medical or mental health records from a non-party, the request must be served on a nonparty in compliance with Rule 21a, with limited exceptions.[65]

The responding party:

- May produce copies in lieu of originals (unless the issue of authenticity is raised);
- May retain originals and permit access for inspection and copying; and
- Must produce documents as they are maintained in the usual course of business or organized to correspond to categories in the request.[66]

Depositions - Rules 199-200

Notice of deposition is sufficient for a party or a witness employed by or otherwise under the control of a party, but a nonparty witness must be subpoenaed to appear for a deposition.[67]

A notice of a deposition:

- Must be served within a reasonable time before the deposition;[68]
- May set the place for the deposition either in the county where the witness lives or works;

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[63] TEX. R. CIV. P. 197.2(d).
[64] TEX. R. CIV. P. 196.1.
[65] TEX. R. CIV. P. 196.1(c).
[66] TEX. R. CIV. P. 196.39(c).
[67] TEX. R. CIV. P. 199.3.
[68] TEX. R. CIV. P. 199.2(a).

- May require a witness who is a party, or a person designated by a party under Rule 199.2(b)(1), to appear in the county where the suit is filed; and
- May require a witness to appear in the county where the witness is served or within 150 miles of that location, if the witness is not a Texas resident or is transient; and
- May set the deposition at any convenient location directed by the court. [69]

On receipt of a deposition notice, agency attorneys should always notify the individual named immediately because notice served on a party's attorney is valid service. [70]
Any objection to the time and place of the deposition must be made by filing a motion for protective order or a motion to quash. If filed by the third business day after service of notice, this objection effectively delays the oral deposition until an order on the motion has been entered. [71]

When a deposition notice names an organization, the notice of deposition must describe with reasonable particularity the matters on which the examination is requested. In response the entity must designate one or more persons who will testify and identify what matters each person will testify to, within a reasonable time before the deposition. [72]

Only the following objections to questions are permitted during a deposition:
- Objection, leading; and
- Objection, form. [73]

Any other objections to the deposition testimony can be made at trial.

Objections to form include that the question:
- Assumes facts not in evidence;
- Misquotes deponent;
- Is argumentative;
- Calls for speculation;
- Is vague, confusing or ambiguous;
- Is compound;
- Has been asked and answered; and
- Is too general.

The only objection to testimony is that is it nonresponsive. [74]

Lawyers are not allowed to coach a witness and no private conferences are allowed except to determine whether a privilege should be asserted. [75]

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[69] TEX. R. CIV. P. 199.2(b)(2).
[70] TEX. R. CIV. P. 199.3.
[71] TEX. R. CIV. P. 199.4.
[72] TEX. R. CIV. P. 199.2(b)(1)
[73] TEX. R. CIV. P. 199.5(e).
[74] TEX. R. CIV. P. 199.5(e).
[75] TEX. R. CIV. P. 199.5(d), (f).

An attorney may instruct a witness not to answer a question only:

- If necessary to preserve a privilege;
- To comply with a court order;
- To protect a witness from an abusive question or one for which any answer would be misleading; or
- To suspend the deposition to obtain a court ruling on a contention that the deposition is being conducted in violation of applicable rules.[76]

A deposition on written questions can be an effective alternative to an oral deposition, particularly where a witness has knowledge of salient facts that can be readily documented.[77] This can be used for a party or nonparty.[78] As with any deposition, a nonparty must be subpoenaed.[79] A notice of deposition with the direct questions to be asked must be served on the witness and all parties and the deposition officer at least 20 days before the deposition is taken.[80] Objections must be made within 10 days after service of the notice. This discovery tool can be used for an out of state witness, using a deposition officer authorized in the state where the deposition is to be taken.[81] This option may facilitate admission of drug testing results from an out of state facility, if the written questions elicit adequate information.[82]

Requests for Physical and Mental Examinations- Rule 204

In a DFPS suit (among others), on motion by a party or the court's own initiative, the court may appoint:

- One or more psychologists or psychiatrists to examine a child or another other party to the suit; and/or
- A qualified expert to test and determine paternity.[83]

Discovery from Nonparties- Rule 205

Discovery is only available from a nonparty by means of:

- A court order under Rules 196.7 (request for entry on land), 202 (depositions before suit) or 204 (physical and mental examinations); or
- With service of a subpoena to compel an oral deposition or deposition on written questions, request for production of documents or tangible things served with a

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[76] TEX. R. CIV. P. 199.5(f), (g).
[77] TEX. R. CIV. P. 201.1.
[78] TEX. R. CIV. P. 205.1; 205.2.
[79] TEX. R. CIV. P. 200.2.
[80] TEX. R. CIV. P. 200.3.
[81] TEX. R. CIV. P. 201.1.
[82] This might include the witness's knowledge of procedures for obtaining and tracking specimens, the testing protocol, equipment used, supervision and training of employees who perform testing, record keeping and reliability of test results.
[83] TEX. R. CIV. P. 204.4.

notice of deposition, or request for production of documents or tangible things served under Rule 205.1.[84]

A deposition subpoena for a nonparty must be served on the nonparty and all parties.[85] A request for production of documents or tangible things without deposition must be served on a nonparty no later than 30 days before end of the discovery period.[86] If a request to a nonparty seeks production of medical or mental health records of another nonparty, the requesting party must serve the person whose records are at issue unless limited exceptions apply. The nonparty's reasonable costs of production must be reimbursed by the requesting party.[87]

Experts – Rule 195

Special rules govern the exchange of information about expert witnesses in the discovery process. Information about experts is only available through:

- Requests for disclosure;
- Depositions; and
- Court-ordered reports.[88]

Unless otherwise ordered by the court, the deadline for designation of experts is the later of:

- 30 days after receipt of the request;
- 90 days before the end of discovery period, as to testifying experts for a party seeking affirmative relief (*e.g.* DFPS); and
- 60 days before end of discovery period for other experts.[89]

The scope of discovery involving testifying experts (or consulting experts whose work has been reviewed by a testifying expert) includes:

- Name and contact information;
- Subject matter of testimony and facts known by the expert that form the basis of the expert's opinion, regardless of how or when the information was acquired;
- Expert's mental impressions and opinions made in connection with the case and methods used to derive such opinions;
- Any bias of the witness; and
- All documents, tangible things, models or data compilations reviewed by or prepared by or for the expert in anticipation of testimony.[90]

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[84] TEX. R. CIV. P. 205.1.
[85] TEX. R. CIV. P. 205.2.
[86] TEX. R. CIV. P. 205.3(a).
[87] TEX. R. CIV. P. 205.3(f).
[88] TEX. R. CIV. P. 195.1; 195.4; 195.5.
[89] TEX. R. CIV. P. 195.2.
[90] TEX. R. CIV. P. 192.3(e).

If a testifying expert witness is retained or otherwise within the control of the responding party, a party can obtain the following information through a request for disclosure,:

- Name and contact information;
- The subject matter, general substance of the expert's mental impressions and opinions, and a brief summary of the basis for such;
- All documents, evidence, reports, and materials which have been provided to, reviewed or prepared by the expert; and
- The expert's current resume and bibliography.[91]

If a testifying expert is not retained or employed by the responding party, in lieu the substance of the experts impressions and opinions and a summary of the basis for such, the responding party must provide documents reflecting this information.[92]

In contrast, information about a consulting expert, who is employed to aid in trial preparation but is not intended to testify and whose opinions have not been reviewed by a testifying expert, is protected by the work product privilege.[93] This includes a consulting expert's identity, mental impressions and opinions, unless these opinions or impressions are provided to a testifying expert.

As a party seeking affirmative relief, DFPS must make a designated expert witness available for deposition as follows:

- If no report is provided, the party must made the expert available for deposition "reasonably promptly" after the expert is designated; or
- If the expert's report is provided when the expert is designated, the expert need not be made available for deposition until "reasonably promptly" after all other experts have been designated.[94]

The court may also order that an expert's opinions, data, observations and the like be reduced to written or other tangible form.[95] The same duty to amend or supplement discovery applies to discovery regarding expert witnesses.

Enforcement

As part of any action to compel discovery, the moving party must include a certificate demonstrating that the parties made a reasonable effort to resolve the dispute without

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[91] TEX. R. CIV. P. 194.2(f) *In re M.H.*, 319 S.W. 3d 137 (Tex. App.— Waco 2010)(pediatrician from University of Texas medical school designated to provide expert consultation regarding abuse and neglect for Child Protective Services [Forensic Assessment Center Network] is a retained expert for purposes of the discovery rules).
[92] TEX. R. CIV. P. 194.2(f).
[93] TEX. R. CIV. P. 192.3(e).
[94] TEX. R. CIV. P. 195.3.
[95] TEX. R. CIV. P. 195.5.

court intervention. If informal resolution is not possible, a party may seek a court order to compel compliance, as well as sanctions.

Failure to timely respond, amend, or supplement discovery may preclude admission of the evidence not produced unless the court finds there was good cause for the failure or no unfair prejudice results from admitting the evidence except the testimony of a party, cannot be excluded as a discovery sanction.[97] Moreover, if a discovery sanction will be contrary to the best interest of a child that is a factor for the trial court to consider. [98]

Sanctions for abuse of the discovery process include orders denying discovery, imposing costs, finding facts established, limiting claims or defenses, striking pleadings or dismissing an action and/or, a contempt order for failure to comply with any order except orders to submit to a physical or mental examination.[99]

TIP:
Make sure that all discovery is answered timely and fully and ensure that all discovery is supplemented at least 30 days before trial.

The proponent of the discovery does not have to file a motion to compel if the answers to discovery are late or not forthcoming at all. In fact, the proponent can wait until trial and then ask the Court to grant sanctions for failure to answer.

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[96] TEX. R. CIV. P. 191.2.

[97] TEX. R. CIV. P. 193.6 *In re M.H.*, 319 S.W. 3d 137 (Tex. App.— Waco 2010) (where doctor's testimony regarding "pediatric condition falsification" did not change between the 14 day hearing and trial, no unfair surprise or prejudice warranted exclusion of testimony); *In re E.A.G.*,373 S.W. 3d 129 (Tex. App.— San Antonio 2012)(pet. denied) (Fact that expert witness had been parents' counselor negated finding of surprise resulting from her testimony, where DFPS timely disclosed expert but failed to produce expert's c.v. and report until day of trial).

[98] *Spurck v. DFPS*, 396 S.W. 3d 205 (Tex. App. — Austin 2013, no pet) (failure to disclose witness in timely manner does not preclude testimony in absence of evidence of unfair surprise or prejudice, particularly where best interest of child takes precedence over technical rules); *Taylor v. Taylor*, 254 S.W. 3d 527 (Tex. App. — Houston [1st Dist.] 2008, no pet.).

[99] TEX. R. CIV. P. 215.2 (b).