

DISCOVERY

I. Statutory Authority

- a. 48.293(1): Law enforcement reports available upon request to counsel for any party through the representative of the public.
- b. 48.293(2) records relating to child relevant to the subject matter shall be open to inspection by counsel of any party upon demand and upon presentation of releases when necessary at least 48 hours before the proceeding. The court may limit disclosure if it reasonably believes the disclosure would be harmful to the interests of the child.
- c. 48.293(3), 908.08: child's counsel or GAL are to be notified of any audiovisual recorded statements of the child.
- d. 48.293(4): Discovery procedures permitted under chap. 804 apply
 1. However, the time limits in chap. 804 do not lengthen the time limits of sec. 48.422. Therefore it is important to get a scheduling order at the beginning of the action or get a court order shortening the time of notice.
 2. Note that previous to Act 275 in 1995 the court of appeals in State v Tammy F, 196 Wis. 981 (Ct App. 1995) held that it was not a due process violation to deny civil discovery under chap 804.
- e. Chapter 804 generally
 1. written interrogatories
 2. oral or written depositions
 3. production of documents or permission to enter upon property
 4. physical and mental examinations
 5. requests for admissions
 6. limits by local rule, limits by prisoners (804.015), limits by protective orders

II. Juvenile records

- a. Courtney F v. Ramiro MC; (In re TPR to Caleb JF), 2004 WI App 36, 269 Wis. 2d709 Relevant records relating to the child are open to the GAL, counsel, court appointed special advocate upon demand with necessary

release and the court may make protective orders preventing disclosure of materials harmful to the child's interest.

- b. The court must first conduct an in camera examination to determine the relevance of juvenile records to the TPR proceeding.

III. Interrogatories and demands to produce

- a. Scope-may relate to any matters not privileged which are relevant to the subject matter including location of witnesses having knowledge of any discoverable matter. It is not ground 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.
- b. Length: sec. 804.08. check local rules to see if there are limits to the number of questions and sub-parts, otherwise unrestricted (except as related to actions by unrepresented prisoners. Sec. 804.01.)
- c. Service-upon the plaintiff, any time after suit is commenced. Upon other party with or after service of the summons and complaint. Copy of the interrogatories are to be served on all counsel of record. 801.14(1),(2).
- d. Copies not filed with the court unless otherwise ordered.
- e. Demand to produce. Sec. 804.09. an party may serve on any other party or someone acting on the party's behalf copy any designated documents including writings, drawings, graphs, charts, photographs, phono- records and other data compilations from which information can be obtained, translated or to inspect, copy, test
- f. Enforcement. Sec. 804.12 Motion to compel if answer is refused, evasive, incomplete. Can get reasonable expenses incurred in obtaining the order including attorney fees, unless refusal was substantially justified or otherwise unjust. Opposing counsel could get costs and fees if the motion to compel is denied. If a party still fails to comply then the matter could be deemed proved or evidence of the claim or defenses prohibited; pleadings could be stricken or there could be a contempt of court order plus costs and attorney fees.

IV. Depositions

- a. Scope-almost anything that is remotely relevant or could lead to the discovery of relevant information and is not meant to harass, annoy, embarrass, or oppress a deponent or party. Relevance is not a proper objection.
- b. Service of process - must give reasonable notice in writing to every other

party. Notice must state the time and place for the deposition and the name and address of person to be examined. The notice must be served upon every party's attorney and if not represented upon the party. Sec 804.05(3)(b) states where the deposition is to be held. Must be within 100 miles of where the party resides, is employed, transacts business in person or by court order. Usually counsel confer and stipulate to the time and place of the depositions.

- c. If the deposition is to be videotaped notice must be given per secs. 885.43-885.46.
- d. Telephone depositions are permissible per sec. 804.04 with sufficient notice.
- e. For cause shown in a motion, the court may enlarge or shorten the time for taking depositions. Sec. 804.05(2)(b).
- f. Per sec. 804.05(2)(d), a party deponent may be accompanied by a request for the production of documents under sec. 804.09. However, the party would have 30 days from service to comply with the demand to produce. Consider subpoena duces tecum with the notice of deposition.
- g. For a deposition of a non-party witness, issue a subpoena commanding the person to produce and permit the inspection and copying of documents or material and attach it to the notice of deposition. Sec. 804.05(2)(a). Provide notice of the deposition to all parties at least 10 days before the deposition. Sec. 805.07(2)(b). If only the materials are requested and not testimony, one usually cancels the deposition upon getting the requested material.
- h. Witness fees. Parties are not entitled to witness fees. Non party deponents cannot be compelled to testify unless paid for one day's attendance and travel. Sec. 805.07(1), 885.06(1). The amount is per sec. 814.67. (\$16 per day and \$.20 per mile) Witnesses on behalf of the state are not entitled to any fee in advance. A witness on behalf of the state is one who is expected to provide relevant testimony or evidence for the state whether hostile or not.
- i. Court reporter fees. See sec. 814.69
- j. Motions to quash subpoena. Motion must be promptly made before the time set for compliance if the subpoena is unreasonable or oppressive or requires advanced fees/costs. Sec. 805.07(3).
- k. Protective orders. Sec. 804.01(3), 804.05(5). File motion to terminate or limit a deposition if it is being conducted in bad faith or to unreasonably annoy, embarrass or oppress the deponent or party.
- l. Deposition on written questions. Sec. 804.06.
- m. Duty to supplement. Sec. 804.01(5).
- n. Objections at time of the deposition 804.05(4).

- o. Submission to deponent for signing. If requested by deponent or party for changes with the reason given for making the changes. Sec 804.05(6).
- p. Use of depositions in court. Sec. 804.07. Can be used to impeach a party so far as otherwise admissible.

V. Questioning opposing or adverse witnesses: tips

- a. Leading v. open ended questions
- b. Ask what reviewed to prepare for the deposition
- c. Ask whether there is any reason that they cannot give accurate, truthful answers at the outset.
- d. Offer water, soft drink, coffee, breaks.
- e. Advise that they can change an answer any time during the deposition and afford them the opportunity to change an answer at the conclusion of the deposition.
- f. Review the rules of the road: no nodding or shaking of the head, give verbal answers.
- g. Do not let the opposing attorney tell the witness what to say or object other than “as to form.”
- h. Prepare as much as possible with previous discovery, and investigation
- i. Loop and weave answers together.
- j. Narrow the potential answers.

VI. Preparation of your client or your lay witness: tips

- a. Relax, orange juice/power bar.
- b. Testimony is under oath and recorded, copy to all sides and judge.
- c. Portions can be read aloud as if testifying live
- d. Purpose is to gather facts, view and size up witnesses, test credibility, and find contradictions.
- e. Who will be there
- f. Dress appropriately
- g. Attitude-polite and business like
- h. Don't be influenced by opposing attorney's friendliness or animosity.

- i. Don't react to provocations.
- j. Take breaks if needed.
- k. Do not look at your lawyer for answers to the questions.
- l. Be sure to listen to the question asked, be sure you understand the question before answering, and answer in as short an answer as possible.
- m. Answer the question asked without elaboration to avoid cuing the other side to something they might not have thought to ask. Do Not Volunteer.
- n. Hesitate before answering question to permit your lawyer to object, to control the pace of questioning, to think up an appropriate answer to the question, and to avoid being waltzed down the proverbial garden path.
- o. If the questioning lawyer speeds up, witness should slow down.
- p. Listen to objections of counsel carefully. "Object as to form"
- q. Listen to your own lawyer as to whether the question must be answered or not.
- r. The witness must answer the question regardless of relevance except if the question is meant to embarrass, harass, and annoy or if the question has been asked and answered repeatedly.
- s. If there is a dispute about answering a question it can be marked and addressed later by the court or counsel can try to get a telephone ruling by the court during the deposition.
- t. If the question can be answered with yes or no, do so and wait for the next question.
- u. Do not think out loud.
- v. Pauses are fine.
- w. Ask questions if unsure of the question
- x. Okay to say: Can you repeat the question; I do not know; I do not understand; I do not remember; I am nervous and cannot recall now but will let you know; that is all I can think of now; I will check and get back to you.
- y. Avoid getting boxed in; qualify answers
- z. Avoid evasive answers; tell the truth.
- aa. Do not be an advocate or sell your case.
- bb. Do not get angry, defensive.

- cc. Do not hide bad facts that will be later admitted; “walk your chickens”
- dd. Avoid “never” or “always” or making generalizations or over-statements.
- ee. No whining
- ff. Be consistent; review facts, do the math, but do not over-prepare, memorize and thereby sound rehearsed.
- gg. Pay attention to the other depositions
- hh. Know the other attorney’s style—intimidation, honey v. vinegar, rapid fire v. Columbo.
- ii. Try to be clinical in answers where appropriate; don’t exaggerate or minimize.
- jj. Beware that materials reviewed may have to be relinquished.
- kk. Leading v. open ended questioning
- ll. Beware of traps in multiple part leading questions; break down compound questions
- mm. Use graphic language when appropriate but no swearing or disrespect.

VII. Questioning expert witnesses

- a. Subpoena duces tecum or require the production of the file, CV, and correspondence from opposing party and counsel in the notice of deposition.
- b. Must pay them witness fees for their time. May have to pay for preparation time.
- c. Review their file before questioning; mark the entire or portions of their file as an exhibit.
- d. Review counsel’s correspondence with the witness. (Work product? — only if the witness is not going to testify. Hardship?)
- e. Poison pen letters
- f. Deposition to preserve testimony

VIII. Requests for admission. Sec. 804.11; 804.12(4).

- a. Useful in limiting issues related to statement or opinions of fact or the application of law to fact.
- b. Can be served at any time after service of the complaint upon that party.
- c. The matter is deemed admitted if not answered within 30 days after service

of the request or shorter or longer as the court may allow.

- d. If objection is made, the reason for the objection must be stated.
- e. If the answering party cannot truthfully admit or deny, the party shall specify so much of it as is true and qualify or deny the remainder.
- f. Answering party cannot give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry.
- g. Requesting party can move to determine the sufficiency of the answer or objection. Court may determine that the final disposition of the request be made at a pretrial hearing or motion hearing and award the expenses incurred in relation to the motion.
- h. If a matter is admitted or deemed admitted it is conclusively established however the court may permit a withdrawal of an admission or amendment when the presentation of the merits of the action will be served and the party who obtained the admission fails to satisfy the court that the withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.