Discovery: How to Get What You Need from Economical to $$$$$

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I. Introduction

This paper is intended to assist the family law practitioner in propounding and answering discovery in most general types of family law cases. The paper will address the basic principles and permissible scope of discovery, as well as discuss the unique issues of dealing with the discovery of electronic evidence in today's technologically savvy world. The paper will not address depositions as the article is primarily focused on written or other tangible types of evidence. Finally, the article will attempt to address the ethical considerations involved when both seeking and responding to discovery requests. The appendices provided at the end of the paper will offer some helpful case cites as well as list additional useful articles on this topic.

II. The Discovery Rules–A Brief Primer

While most of us think we have a good grasp on the basics of discovery, I think it is always helpful to review the rules themselves as a place to start.

A. Rule 192–Scope of Discovery

Certainly the entire purpose of discovery is to determine the facts of a case so as to avoid "trial by ambush," and to promote the possibility that cases will be determined upon the true facts of the case. The purpose of discovery was quite succinctly stated in the landmark case of ***Jampole v. Touchy***, 673 S.W.2d 569, 573 (Tex.1984).

> "[w]e note that the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."

It was this type of thinking that eventually led to what we 'old-timers' still refer to as the "new discovery rules" as amended and effective in 1999.

The scope of permissible discovery is now outlined generally in Rule 192. Parties may generally obtain discovery regarding "any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery." Tex. R. Civ. P. 192.3(a).

The Supreme Court comment to this rule states in pertinent part:

"While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context."

Thus, to the practitioner, it seems like on the one hand the intent of the discovery rules is to promote as much fact-finding as possible, where on the other hand it seems to limit that potential. The good news for the family law practitioner, at least in original cases involving children, is that the general consensus of most courts is that almost anything can be considered relevant when it comes to determining the best interest of the children, at least to the extent the discovery of certain evidence may lead to the discovery of admissible evidence.

Rule 192 further sets forth the permissible types of discovery available to parties in a case which are the following:

a. requests for disclosure;
b. requests for production and inspection of documents and tangible things;
c. requests and motions for entry upon and examination of real property;
d. interrogatories to a party;
e. requests for admission;
f. oral or written depositions; and
g. motions for mental or physical examinations.

Each of these types of discovery will be addressed briefly below.

Likewise, the discovery sought must be relevant or likely to lead to the discovery of admissible evidence. Thus, just because something may not be admissible in trial does not make it irrelevant, nor does it make it non-discoverable. Rule 192.3(a) specifically states that it is not grounds for an objection that the information sought will be inadmissible at trial if the information appears reasonably calculated to lead to the discovery of admissible evidence. However, the Texas Supreme Court has increasingly focused on the subject matter of the litigation holding that discovery requests transcending the theories and claims set forth in the pleadings are well outside the bounds of proper discovery. ***See Texaco v. Sanderson***, 898 S.W.2d 813, 815 (Tex. 1995); ***Dillard Dept. Stores, Inc. v. Hall***, 909 S.W.2d 491, 492 (Tex. 1995); ***K Mart v. Sanderson***, 937 S.W.2d 429, 431 (Tex. 1996). While the above-cited cases do not involve family law litigation, they may form the basis for limiting discovery in the appropriate situation.

Further, just like beauty, relevancy is in the eye of the beholder. However, it is important to remember that the most important 'beholder' is the individual in the black robe who is ruling on the objections. So Rule #1 is–"Know your judge." If you know the types of evidence that the judge hearing the case thinks is important, or what they do or don't allow into evidence (e.g. child's hearsay testimony) then you may have a better idea of what the judge will order produced/revealed in the event of a discovery dispute.

The rules and comments further contemplate that discovery requests should have reasonable limitations as to time, place and subject matter. As relates to family law, this could be as long as the length of the marriage in a given case, or much shorter, depending upon the circumstances. The most frequent areas of abuse that I have personally seen are in (1) modifications, where some lawyers attempt to discover evidence well prior to the previous order that could not possibly have any bearing on the modification sought; and (2) lengthy marriages where attorneys attempt to seek bank account or other information from 20 years ago that is not necessary for dividing assets at time of divorce. This applies to relevance regarding the subject matter as well. The key is trying to define that perfect balance between being broad enough to obtain as much relevant information as possible without exceeding the bounds of what is really necessary and within the scope of discovery.

B. Requests for Disclosure

TRCP 194 is the discovery rule that outlines permissible inquiries within a Request for Disclosure. This is the easiest and most common form of discovery, or as I call it, the "No-brainer" discovery request. Rule 194 sets out specifically what may be asked in a Rule 194 RFD, and is not objectionable. Period. With very few exceptions, Requests for Disclosure should be propounded in almost every family law case as early in the case as possible. Just as in all other discovery responses, answers to disclosure are due 30 days after they are served upon a party, and all supplementation must be provided by 30 days prior to trial in cases under the Texas Family Code. [*See* TRCP 190.3 (1)(A)].

C. Interrogatories

The rules regarding the propounding of and responses to interrogatories are found primarily in TRCP 197. In cases operating under a Level 2 Discovery Control Plan, the number of interrogatories is limited to 25.

Answers to interrogatories may only be used against the responding party, and prior answers that have been amended or supplemented are not admissible and may not be used for impeachment purposes.

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