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New Juvenile Discovery Rules: Mandatory, Comprehensive, and Streamlined.

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Mandatory, Comprehensive, and Streamlined

By Joshua B. Kay

The recently promulgated amendments and additions to the civil discovery rules include several changes affecting child protection and juvenile delinquency proceedings.[1] The updates should make discovery in juvenile court matters more efficient by clarifying what is discoverable and requiring more timely exchange of information.

Automatic discovery and timelines for all juvenile matters

Perhaps most important, the new rules do away with the requirement that parties file discovery demands. As of January 1, 2020, discovery will be automatic in juvenile cases: "The following materials are discoverable as of right in all proceedings *and shall be produced no less than 21 days before trial, even without a discovery request*."[2] (Emphasis added.)

The old rule required that discovery demands be filed no later than 21 days before trial, and there was no provision indicating when discovery had to be produced, leaving practitioners to set arbitrary deadlines. These deadlines for production could be unreasonably short or leave too little time to prepare for trial. Under the new rule, as noted above, discoverable materials must be produced at least 21 days before trial, putting all parties on notice and giving everyone involved more time to incorporate discovered materials into their trial preparation.

What is discoverable in all matters?

The new rule also describes what materials are discoverable, managing to both broaden and make more specific the kinds of information that must be produced. Once the rule becomes effective, "all written or recorded statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency" are discoverable, rather than just "nonconfidential" statements, as the old rule states.[3] The new rule notes that discoverable materials are not limited to those enumerated, and the list now includes allegations of maltreatment included in a Child Protective Services (CPS) complaint as well as CPS investigation reports, as long as the identity of the person who reported the case to CPS is protected.[4]

Also specified as discoverable are the results of psychiatric and psychological evaluations, which are frequently court-ordered in child protection proceedings and sometimes become the subject of discovery disputes.[5] Taken together, the new rule's automatic discovery requirement, deadline for production, and range of discoverable materials should help streamline court proceedings and level the playing field in child protection and juvenile delinquency cases, which inherently involve differences in investigative and negotiating power between the state Department of Health and Human Services and the other parties.

The new rule also requires the production of any written, video, or recorded statements of a witness that a party may call at trial, the curriculum vitae and report of any expert, and any criminal record that may be used for impeachment purposes at trial.[6] In addition, the rule clarifies the language allowing sanctions for non-compliance.[7]

Specific requirements for delinquency matters

Another major change is the addition of new discovery and disclosure requirements particular to delinquency matters. Previously, there were no requirements specific to delinquency cases.[8] The new rule incorporates the discovery requirements in MCR 3.922(A) and adds several provisions.[9] For example, parties must disclose known criminal convictions of any witnesses they may call at trial.[10] The prosecuting attorney must produce any known exculpatory information or evidence.[11] Parties must also produce any written or recorded statements of "a defendant, co-defendant, or accomplice pertaining to the case even if that person is not a prospective witness at trial" as well as "any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."[12]

That said, there is no automatic right to discovery of "information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination" in delinquency cases.[13] However, if a juvenile makes a showing that there is a "reasonable probability" that privileged records "are likely to contain material information necessary to the defense, the court shall conduct an in camera inspection of the records."[14] The rule goes on to

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describe subsequent procedures depending on what the court finds and whether the privilege holder waives the privilege.[15] In any case, the court must preserve the records in question for possible appellate review.[16] Furthermore, the rule provides that counsel must maintain custody of privileged records, and the records may be used only for the purpose approved by the court.[17] Finally, if some portions of material are discoverable and others are not, the nondiscoverable portions may be excised, provided that the disclosing party informs the other party that non-discoverable information has been excised and withheld.[18] The other party may demand "a hearing in camera to determine whether the reasons for excision are justifiable."[19]

Discovery for disposition and review hearings

The new rules do not only address discovery before trial. In delinquency matters, several types of material must be provided to the respondent, respondent's counsel, and the prosecuting attorney at least seven days before "dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings[.]"[20] These materials include assessments and evaluations to be considered by the court, police reports, witness statements, probation officer reports, predisposition reports, documents related to recommendations in those reports, documents regarding restitution, and similar documents.[21]

In child protection proceedings, the new rules require that all reports in the agency's case file—including case service plans, substance abuse and psychological evaluations, therapy reports, drug screening results, parenting time logs, and the like—be provided to the court and parties at least seven days before disposition, dispositional review hearings, and permanency planning hearings.[22] Historically, timely exchange of these materials has not been consistent, a problem the new rules should remedy.

Discovery for termination of parental rights hearings

Finally, the old child protection rules regarding termination of parental rights hearings were silent about discovery.[23] Yet termination of parental rights hearings are generally quite similar to trials, and there may be considerable additional documentation that accrued since the case began but was not revealed to or shared by the parties. The new rules apply the discovery requirements contained in MCR 3.922(A) to termination proceedings.[24] It is worth noting that termination of parental rights at initial disposition was already covered by MCR 3.922(A), because the evidence for termination is generally taken at the same time as the evidence for adjudication in these cases. The new rules apply to cases in which termination is based on different circumstances than adjudication or a failure to rectify the conditions that led to adjudication.[25]

Conclusion

Collectively, the new juvenile discovery rules are designed to reduce guesswork and discovery disputes and ensure a more even playing field for the parties. Most importantly, counsel and clients will have more complete information and more time to review materials, which should improve counsel's ability to incorporate discovered documents and other materials into their advocacy. Considering the gravity of the rights at stake and the severity of possible sanctions in child protection and juvenile delinquency cases, these changes are critically needed and should be welcomed by all those involved. ■

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ENDNOTES

1. Administrative Order No. 2018-19 (2019), available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-19_2019-06-19_FormattedOrder_AmendtOfDiscoveryRules.pdf#search=%22administrative%20order%202018-19%22> [https://perma.cc/HDR5-6GPW] (site accessed October 4, 2019). The court rules cited in this article are either new or revised as reflected in this order from the Michigan Supreme Court.
2. MCR 3.922(A)(1). Discovery demands are still permitted and may be helpful, particularly if counsel desires production of unusual or highly specific materials. However, demands are no longer required.
3. MCR 3.922(A)(1)(b). As with other citations to the rule, please compare the old and new versions.
4. *Id.* This identity protection is required by MCL 722.625.
5. MCR 3.922(A)(1)(f).
6. MCR 3.922(A)(1)(i), (j), (k).
7. MCR 3.922(A)(4).
8. See generally MCR 3.922 in effect before January 1, 2020.
9. MCR 3.922(B)(1).
10. MCR 3.922(B)(1)(a).
11. MCR 3.922(B)(1)(b).
12. MCR 3.922(B)(1)(c) and (d).
13. MCR 3.922(B)(2).
14. MCR 3.922(B)(3).
15. MCR 3.922(B)(3)(a)–(c).
16. MCR 3.922(B)(3)(d).
17. MCR 3.922(B)(3)(e).
18. MCR 3.922(B)(3)(f).
19. *Id.*
20. MCR 3.922(B)(4).
21. *Id.*
22. MCR 3.973(E)(5); 3.975(E); 3.976(D)(4).
23. See generally MCR 3.977 in effect before January 1, 2020.
24. MCR 3.977(F)(2); 3.977(H)(2).
25. *Id.* MCR 3.977(H)(2) is titled "Termination of Parental Rights; Other."