

**TBA Virtual FastTrack – Memphis  
August 7, 2020**

***Key Rules Collecting and Presenting Evidence in Family Law Cases.***  
Judge Carma McGee

**1. Key Rules for Collecting Evidence in Family Law Cases- How do you get it?**

Rule 26 – TN Rules of Civil Procedure

Rule 26.02

**(1) 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 **electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form**, and the identity and location of persons 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.**

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden and cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. The court shall specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03.

(emphasis added)

### Don't forget ESI in Discovery!

ESI is any type of information that is created, used, and stored in digital form, and requires a computer or other device for access.

Electronically Stored Information can come in a wide range of forms. Some common types of ESI include:

- E-mails, texts, chats, and instant messages
- Video, audio, and image files
- Word processing and spreadsheet files
- Website activity and history
- Information posted on a [social networking websites](#)
- Voice mails and video mail
- Computer programming information

### Tools:

- Temporary Mutual Injunction
- Preservation Letter
- Subpoenas
- Requests for Documents/Interrogatories
- Requests for Admission
- Depositions
- Subpoenas
- Injunctions

### Temporary Mutual Injunction

- TCA 36-4-106(d)(4) An injunction restraining and enjoining both parties from hiding, destroying or spoiling, in whole or in part, any evidence electronically stored or on computer hard drives or other memory storage devices.

### Requests for Production of Documents

#### **TNRCP 34.01**

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, phono-records, and other data and data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the respondent into a reasonably usable form), or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule

26.02 and which are in the possession, custody or control of the party upon whom the request is served;...(emphasis added)

See comments re definition of “documents”

### **TNRCP 34.02**

Unless the parties otherwise agree, or the court otherwise orders:

**(2)** A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

**(3)** If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

**(4)** a party need not produce the same electronically stored information in more than one form.

**Amendment effective October 1, 2019:** Objections must be **specific** and you must state whether you are withholding documents based upon the objection.

### **Interrogatories**

#### **TRCP 33.01**

Any party may serve upon any other party written interrogatories to be answer by the party served....who shall furnish such information as is available to the party. Interrogatories may, without leave of the court be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered **separately and fully** in writing under oath, unless an objection is made to it or to a portion thereof, in which event the reasons and grounds for objection shall be stated with specificity in lieu of an answer for that portion to which an objection is made. An objection must clearly indicate whether responsive information is being withheld on basis of that objection. The answers are to be signed by the person making them, and the objections by the attorney making them.  
(emphasis added)

**Amendment effective October 1, 2019** requiring specific objections.

**Rule 33.03:** option to produce business records in lieu of answering.

**Note:** Be sure to check local rules on limits on the number of interrogatories or requests for production and also on whether they should be filed.

### **Subpoenas**

#### **Rule 45**

45.02 for the production of things, protection from undue burden or expense

45.07 – must provide 21 days to respond by non-party

45.08 – how documents subpoenaed must be produced – as kept in the ordinary course of business. If ESI, reasonable form and not undue burden or costs. Privilege log.

### **Requests for Admissions**

#### **TNRCP 36**

May request admissions related to facts, application of law to the facts, or opinions about either and genuineness of any documents.

30 days to answer, but no sooner than 45 after service

Cannot claim lack of knowledge unless reasonable inquiry.

### **Depositions**

#### **TNRP 30**

Remember the use of depositions. See below.

### **Criminal Issues to Consider**

1. The Electronic Communications Privacy Act 18 U.S.C 2510 et seq
  - a. Unlawful to intentionally intercept any wire, oral, or electronic communication or to use or disclosure any such that has been intentionally intercepted.
  - b. Provides for civil damages and attorney fees
  - c. May not be used as evidence
2. Stored Communications Act 18 USC 2701
  - a. If you intentionally access without authorization or
  - b. Intentionally exceeds authorization
  - c. Criminal and civil sanctions
  - d. Does not provide that it is not discoverable
3. TN Wiretapping and Electronic Surveillance Act.

### **Examples to consider:**

- archived uber history
- archived facebook
- venmo
- paypal
- Remittly, cashapps
- Emails
- Business records
- Data backups (Quicken etc)
- Iphone backups

## **2. Key Rules for Presenting Evidence in a Family law case - How do you use it?**

### **Four things to ask yourself:**

1. *Is it relevant?* (TRE 401) Does It have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be.

2. *Is it unfairly prejudicial?* (TRE 403) Is the probative value of substantially outweighed by the danger of unfair prejudice.
3. *Is it authentic?* (TRE 901) Is it what it purports to be.
4. *Is it hearsay?* (TRE 801-806) Is it an out of court statement offered for the truth of the matter? If so, does an exception apply.

### **TRE 901**

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness with Knowledge.* Testimony that a matter is what it is claimed to be.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Examples-emails, social media, websites

(9) *Process or System (Computer Documents).* Evidence describing process or system used to produce a result and showing that the process or system produces an accurate result.

-Advisory Commission Comment- "Subsection (b)(9) treats authentication of computer documents. All that a lawyer needs to do is introduce evidence satisfying the court that computer system produces accurate information;

Examples: computer generated transcripts of email/text-message, etc., social media archive, etc.

### **TRE 801**

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(Emphasis added)

### **TRE 803**

Hearsay Exceptions

(1.2) Party opponent admission

(3) Then existing mental, emotional or physical condition (intent, plan, motive, design, mental feeling, bodily health) Not to prove a fact remembered.

(6) Regularly Conduct Activity – Affidavit made at or near the time, from information transmitted by a person with knowledge with a business duty to record, regular course of business to record. See also TRE 902(11)

(8) Public Records

(14) Records of Documents Affecting an Interest in Property

### **TNRCP 32 – Use of Deposition at Trial**

- 1- Used by any party to contradict or impeach a testifying witness
- 2- Deposition of a party may be used for ANY purpose by adverse party
- 3- Used by any party for ANY purpose if witness unavailable per TRE 804(a)

**Rule 33.02** Use of Interrogatories at Trial: answers may be used to the extent permitted by the Rules of Evidence.

### **3. What can you do if evidence disappears?**

Options to consider

- Rule 34A Spoiliation
- Rule 37 Sanctions
- Attorney fees
- Adverse inference
- Default judgment
- Prohibition against the introduction of evidence
- Contempt

### **TNRCP 37.06 Electronically Stored Information**

**(1)** If a party fails to provide electronically stored information and a motion to compel discovery is filed, a judge should first determine whether the material sought is subject to production under the applicable standard of discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as: the ease of accessing the requested information; the total cost of production compared to the amount in controversy; the materiality of the information to the requesting party; the availability of the information from other sources; the complexity of the case and the importance of the issues addressed; the need to protect privilege, proprietary, or confidential information, including trade secrets; whether the information or software needed to access the requested information is proprietary or constitutes confidential business information; the breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of

additional such information is warranted; the relative ability of each party to control costs and its incentive to do so; the resources of each party compared to the total cost of production; whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information; whether the electronically stored information is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

**(2)** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system. (emphasis added)