Disclosure and Discovery in Dependency and Neglect Cases

A New Rule Brings Statewide Consistency

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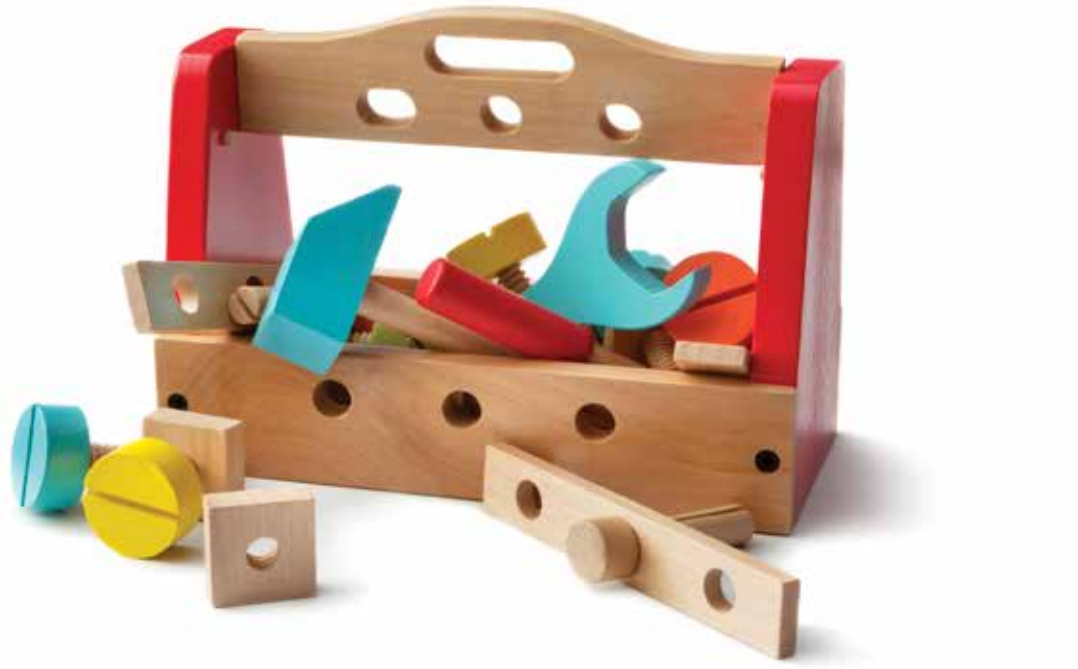

This article discusses a new disclosure and discovery rule for child welfare cases. The rule is intended to better protect the interests of the parties in these cases and standardize disclosure and discovery procedures throughout the state.

This year, the Colorado Supreme Court adopted Colorado Rule of Juvenile Procedure (Rule) 4.6, a new rule for disclosures and discovery in child welfare cases.[1] Rule 4.6 became effective on July 1, 2024. The Colorado Rules of Juvenile Procedure did not previously contain a rule for disclosure or discovery. Importantly, while Rule 1 states that child welfare proceedings not governed by the Colorado Rules of Juvenile Procedure must be conducted according to the Colorado Rules of Civil Procedure (CRCP), the civil disclosure and discovery rule (CRCP 26) does not apply to child welfare cases unless otherwise ordered by the court.[2] This catch-22 left child welfare cases without a clear way forward regarding disclosure and discovery and led to inconsistent implementation of standards across the state. This article explains the provisions of Rule 4.6.

Unique Aspects of Dependency and Neglect Cases

Child welfare cases, referred to as dependency and neglect cases, are unique because they involve civil law and constitutional rights, and "requir[e] an intricate balance of the important and interrelated rights and interests of parents, legal guardians and/or legal custodians; children and youth; and the government."[3] Accordingly, while some parts of the new rule are similar to its civil law equivalent, "dependency and neglect cases require a particularized approach to discovery, which is reflected in [Rule 4.6]."[4]

Dependency and neglect cases are governed by CRS Title 19, commonly referred to as the Children's Code. Two purposes of the Children's Code are to "preserve and strengthen family ties whenever possible," and "for the courts to proceed with all possible speed to a legal determination that will serve the best interests of the child."[5] Because of the issues at stake, including safety and permanency for the child and the constitutional rights of parents, timelines in dependency and neglect cases are expedited to ensure that cases do not languish. For example, when a child is removed from their home on an emergency basis and placed in the custody of county department of human services, the district court must hold a hearing within 72 hours to determine if the child should be returned to their parent(s) or guardian(s) or remain out of their home.[6] As another example, the determination of whether a child is dependent or neglected must occur within 90 days of the service of the petition on a parent,[7] or within 60 days if the child involved is under 6 years old when the petition is filed.[8] The deadlines for disclosure and limits on discovery in the new rule reflect the urgency of dependency and neglect cases.

Automatic Disclosures

Rule 4.6(e) governs automatic disclosures. In hearings regarding the emergency removal of a child from their home and in hearings conducted after emergency orders suspending, reducing, or restricting family time, parties must automatically disclose all exhibits they intend to introduce and all witnesses they intend to call in their case in chief no later than the commencement of the hearing.[9] Additionally, no later than the first appearance after these expedited hearings, the parties are automatically required to disclose (1) information regarding whether the child or parents have Native American heritage (required by the Indian Child Welfare Act, 25 USC §§ 1901 et seq.); (2) information relevant to jurisdictional determinations under the Uniform Child-Custody Jurisdiction and Enforcement Act, CRS §§ 14-13-101 et seq.; and (3) information regarding parentage, custody, guardianship, child support, or protection order cases, and any other court case relevant to the court's jurisdiction.[10] In addition, parents must disclose contact information for the child's relatives pursuant to CRS § 19-3-403(3.6)(a).[11]

Disclosures on Written Request

Rule 4.6(f) permits the parties to seek additional enumerated disclosures upon written request. The list of specified items subject to disclosure under this subsection is broad and is intended to encompass the often rapidly changing facts of a case. This allows counsel to properly advise their client based on the most up-to-date information available, preventing delays in the case. The respondent, child, or youth may request from the petitioner (county department of human services): safety and risk assessments, relevant information from the Colorado Department of Human Services' statewide system, family time assessments, police reports, and several other categories of information in the possession or custody of the county department of human services.[12] The petitioner, child, or youth may request from the respondent: a copy of the child's (or youth's) birth certificate, social security card, and information related to Medicaid or health insurance coverage.[13] When such requests are made, disclosure must be provided within 21 days, unless otherwise agreed to by the parties or ordered by the court.[14] Despite the breadth of the information available for request, not all the enumerated items in subsection (f) need to be requested in every case. Instead, "[a]ttorneys should consider the individual needs and circumstances of each case when deciding the scope and type of discovery to pursue."[15]

Disclosures for Contested Trials or Hearings

The course of a dependency case presents the potential for myriad litigated trials and hearings, such as emergency hearings, adjudicatory trials, return home hearings, and termination of parental rights hearings. Parties to litigated trials or hearings in dependency cases (except for those governed by Rule 4.6(e)) must disclose: (1) the names and contact information for potential witnesses and a summary of their anticipated

testimony, (2) a résumé or curriculum vitae for each potential expert, (3) written reports from potential experts or a summary of anticipated testimony if no report was written, and (4) a list and copy of all exhibits intended to be offered at the trial or hearing.[16] These disclosures must be provided no later than seven days before the trial or hearing, unless otherwise agreed to by the parties or ordered by the court.[17]

Discovery

Similar to CRCP 26, Rule 4.6 permits discovery to be obtained and provided regarding any matter that is relevant, not privileged, and proportional to the needs of the case.[18] However, in dependency and neglect cases, "[g]uardians ad litem and children under 12 are not required to produce discovery unless ordered by the court for good cause shown."[19]

As under the civil discovery rule, there are several tools available for discovery under Rule 4.6. These are oral depositions, depositions by written examination, requests for admission, interrogatories, and requests for production.[20] These discovery tools have relatively tight deadlines to meet the expedited timelines in dependency and neglect hearings. For example, requests for admissions, interrogatories, and requests for production must be propounded at least 35 days before a contested hearing, and responses are generally due 21 days after service.[21] Oral depositions and depositions by written examination must likewise be completed at least 21 days before a contested hearing.[22] Although the tools available are similar, the limits on discovery under Rule 4.6 differ from CRCP 26. Under the civil rules, a "party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed."[23] In dependency and neglect cases, "[t]hroughout a case, a party may take depositions of up to 4 persons," including all experts.[24] Additionally, while the deposition of an expert under CRCP 26 can last six hours, under Rule 4.6, "[e]ach deposition must be limited to two hours."[25] Further, while CRCP 26 allows service of 30 written interrogatories on an adverse party, parties are limited to 20 under Rule 4.6.[26] Last, Rule 4.6(i)(4) specifically provides that "[i]t is presumed that depositions of children or youth are not in their best interests and require a court order supported by good cause shown."

In short, to balance the goals of the Children's Code noted above, disclosure and discovery in child welfare cases is generally more limited and on a shorter timeline than in civil cases. Critically, however, in those instances where that balance falls short, the trial court retains the discretion to limit or expand discovery for good cause.[27] In doing so, the court may consider various factors, such as the purposes of the Children's Code, case complexity, the importance of the issue at stake, and whether the burden or delay associated with the proposed discovery outweighs its likely benefits.[28] The court also has the power to issue protective orders regarding the scope or method of disclosures and discovery for good cause shown.[29]

Conclusion

Prior to 2024, the Colorado Rules of Juvenile Procedure lacked a disclosure and discovery rule, which often led to inconsistent standards across the state in dependency and neglect cases. The creation of Rule 4.6 filled that need and will more fully protect the rights of the parties and ensure the uniform application of disclosure and discovery rules across the state. CL



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NOTES

1. Rule 4.6 was adopted as a stand-alone rule. The remainder of the Rules of Juvenile Procedure are also under review for potential amendment.
2. CRCP 26(a).
3. Colo. R. Juv. P. 4.6(a)(1). The parties to a dependency case generally involve at least the parent(s) or guardian(s), and the child(ren) or youth named in the petition. Parents have the right to be represented by counsel and can retain private counsel or will be appointed counsel if found to be indigent. Children under 12 are represented by guardians ad litem who are appointed to represent and advocate for their best interests. CRS § 19-3-203(1), (5). Youth aged 12 and older are also provided counsel (counsel for youth) who are charged with representing the youth's expressed objectives. CRS § 19-3-203(2), (6). Other parties or participants are also possible, including special respondents and intervenors.
4. Colo. R. Juv. P. 4.6(a)(2).
5. CRS § 19-1-102(1)(b)–(c).
6. CRS § 19-3-403(3.5). *See also* CRS §§ 19-3-405(4) and -217(3).
7. CRS § 19-3-505(3).
8. *Id.*
9. Colo. R. Juv. P. 4.6(e)(1).
10. Colo. R. Juv. P. 4.6(e)(2).
11. Colo. R. Juv. P. 4.6(e)(3).
12. Colo. R. Juv. P. 4.6(f)(1)(A)–(J).
13. Colo. R. Juv. P. 4.6(f)(2).
14. Colo. R. Juv. P. 4.6(f).
15. Colo. R. Juv. P. 4.6, cmt. 8.
16. Colo. R. Juv. P. 4.6(g)(1)–(4).
17. Colo. R. Juv. P. 4.6(g).
18. Colo. R. Juv. P. 4.6(i)(1)(A).
19. Colo. R. Juv. P. 4.6(i)(1)(B).
20. Colo. R. Juv. P. 4.6(i)(4)–(8).
21. Colo. R. Juv. P. 4.6(i)(3)(B), (i)(6)–(8).
22. Colo. R. Juv. P. 4.6(i)(3)(B).
23. CRCP 26(b)(2)(A).
24. Colo. R. Juv. P. 4.6(i)(4).
25. *Compare* CRCP 26(b)(4)(A) *with* Colo. R. Juv. P. 4.6(i)(4).
26. *Compare* CRCP 26(b)(2)(B) *with* Colo. R. Juv. P. 4.6(i)(7).
27. Colo. R. Juv. P. 4.6(i)(10).
28. *Id.*
29. Colo. R. Juv. P. 4.6(i)(9).