

Access to records can impact your case

Elisa Reiter and Daniel Pollack | June 7, 2022



Legislators and litigators alike hoped that revisions to the discovery rules would stop trial by ambush by mandating disclosures by each party to a case. Unfortunately, there are still many who either do not generate required disclosures or who simply disclose that they “rely on the claims set out in pleadings.” How can you access more records that might impact your case? A few items to consider:

Texas Department of Family and Protective Services (DFPS) caseworker records, including texts, are to be maintained as part of their record-

keeping, yet are rarely produced. Those texts can help cases involving parents who have been parties to Child Protective Services cases. It is possible to procure those texts, and related records, via a Deposition by Written Questions/Subpoena to the DFPS Records Custodian. The DFPS Records Management Handbook notes as follows:

“2000 Safekeeping of DFPS Records

Records Management Group 2016

The information in many DFPS records must be protected and maintained in a confidential manner throughout the retention period. A DFPS record can:

- contain a profoundly personal and private account of a person’s life;
- provide a historical account of financial transactions; and
- uphold vendor and employee accountability.

DFPS securely stores DFPS records to support decisions regarding client safety, facilitate internal business processes, and provide records to entitled requesters as mandated by state law. During the normal course of business DFPS determines the most efficient and cost effective way to store a DFPS record. The long-term storage of a record may require conversion from electronic to physical or physical to electronic.

DFPS may contract with a third-party vendor to store electronic or physical files, but DFPS always retains ownership of all paper and electronic files.”

Let’s assume your case involves allegations of abuse of an elderly individual by a spouse or an unrelated adult who claims that the elderly

person previously revoked all previous estate planning documents, and executed new documents. Is there any way to challenge or obtain copies of the new estate planning documents? Texas Estates Code Chapter 751.251 provides a means of reviewing a durable power of attorney:

“Subchapter F. Civil Remedies

Sec. 751.251. Judicial Relief F. (a) The following may bring an action requesting a court to construe, or determine the validity or enforceability of, a durable power of attorney, or to review an agent’s conduct under a durable power of attorney and grant appropriate relief:

- (1) the principal or the agent;
 - (2) a guardian, conservator, or other fiduciary acting for the principal;
 - (3) a person named as a beneficiary to receive property, a benefit, or a contractual right on the principal’s death;
 - (4) a governmental agency with regulatory authority to protect the principal’s welfare; and
 - (5) a person who demonstrates to the court sufficient interest in the principal’s welfare or estate.
- (b) A person who is asked to accept a durable power of attorney may bring an action requesting a court to construe, or determine the validity or enforceability of, the power of attorney.
- (c) On the principal’s motion, the court shall dismiss an action under Subsection (a) unless the court finds that the principal lacks capacity to revoke the agent’s authority or the durable power of attorney.

Added by Acts 2017, 85th Leg., R.S., Ch. 834 (H.B. 1974), Sec. 8, eff. September 1, 2017.”

The Michael Morton Act is codified at Code Crim. Pro Article 39.14, and creates an “open file policy” in regard to criminal cases. The statute mandates that prosecutors must disclose information in their file except for work product, or information about victims and children otherwise made confidential by law. In other words, this statute allows for access to all witness statements, not just a defendant’s statement. Cf. Tex. R. Evid. 615(a). Neither a court order or concession should be required to be able to access this information. Disclosure is required “as soon as practicable after receiving a timely request from the defendant.”

Discovery rules are intended to assure fair trials. Sometimes the right to a fair trial may mean searching for information from third parties, rather than from a reluctant and uncooperative opposing party. Depending on the circumstances, the right to confidentiality can bend when protection of children or the elderly are a key component of a case. These few aforementioned examples are intended as kick starters. Information may be procured in a cost-effective manner by trying to compel production from the opposing party, or simply by going around the opposition, by gathering information from others.

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