

CIVIL DISCOVERY

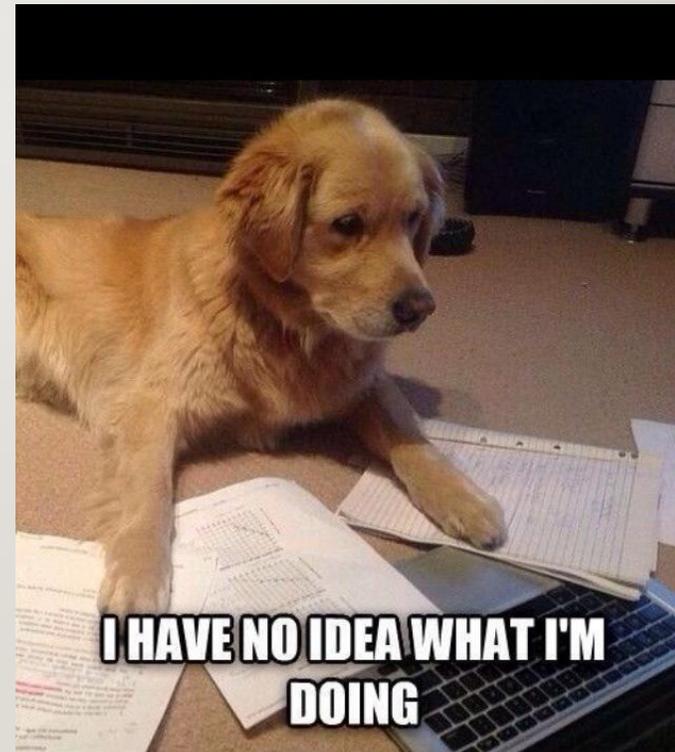
YES – WE HAVE TO BE (MOSTLY) CIVIL, WHEN CIVILLY DISCOVERING THAT WHICH IS DISCOVERABLE THROUGH CIVIL DISCOVERY.

Atty Jessica Moeller
Wisconsin State Public Defender
Milwaukee Juvenile/Mental Health
414-266-1107
moellerj@opd.wi.gov

LET'S START WITH SOME STATUTORY GUIDANCE

- Chapter 48 Discovery rules - §48.293
- Rules of Civil Procedure - §804
 - See §48.293(4)

- Onward with our perusal through Chapter 804.



CHAPTER 804 – WHAT ARE MY CHOICES

- Depositions - oral or written
- Requests for admissions
- Requests for production
- Interrogatories
- Examinations – mental or physical
- Inspection

“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 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.”

Wis Stat. § 804.01(2)(a)

DEPOSITIONS!!!

- If possibly try to get your deposition times scheduled right away with the petitioner and their potential witness.
 - You at least know from the beginning in a non-private TPR that you will want to depose the case manager(s).
- Hire a Court reporter
 - Intranet.opd > Forms/Doc/Clearinghouse
 - Transcript
 - Request form
 - Policy



DEPOSITIONS

- You really can depose anyone in the case
 - You can compel them to testify with a subpoena under §805.07
 - If it's a party you are deposing – notice is all that is required but that is essentially as strong as a subpoena.
 - Get them 'reasonable' notice – in writing! (§804.05(2))
 - A general description so the witness has an idea of what is going on.
 - Be sure to identify the documents you want - §804.09
- What if they live too far?
 - Could potentially be required to attend anywhere the petition is filed.

BE PREPARED...TO BE NICE



"I ask the witness to quit taking advantage of the fact that his deposition is not being videotaped."

- These are fact finding missions
- Be very limited if you like to use cross-examination style – save that for the trial!
- Make sure to get your notice of depo ready and include a subpoena duces tecum so they bring all their stuff with.
- If your deponent is reviewing notes during the deposition get those!

THEY CAN AND WILL DEPOSE YOUR CLIENT TOO

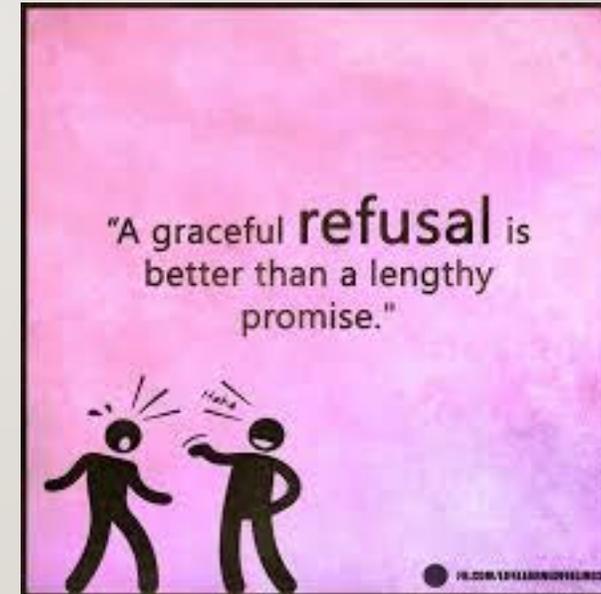
- You can choose to ask questions of your own client to clear something up
- Be sure to object just as you would at trial
 - They will not be handled the same but you are preserving your record and your objection should they try to introduce this at trial
- **PREPARE YOUR CLIENT!!!**
 - Have an idea of what types of questions will be asked
 - Remind them they can take breaks and should
 - While you cannot give your client answers you certainly can prepare them for the questions
 - Yes or no is best.
 - No excuses!

DURING THE DEPOSITION

- So – if they answer poorly – do you fix it there or not?
 - Sometimes its best to leave it for trial
 - Unless there is a chance you client is unable to testify then you can utilize the transcript under a hearsay exception
 - Or – you want to fix it then and there to make it clear to the state why they should be working with you towards a more favorable settlement.
- Remember to take a break before the deposition is finished
 - Gives you a chance to quickly find out with your client if there is anything you need to fix

WHAT ABOUT REFUSING TO ANSWER?

- You may have to call up the judge for a ruling
 - Not exactly practical
 - Answer may be taken subject to ruling
- Plead the 5th
- Realistically once the cat is out of the bag....
 - Can you adjourn the rest of the deposition?
- What if you forget to object?
 - §804.07(2) – to the rescue! (admissibility issues)
 - Buuuut.... §804.07(3)(c)2 might kick you back
 - Content and form



WEIGH THE OPTIONS

DEPOSITIONS

- Go ahead and ask the questions you just don't know the answer to
- Assess your witness
- Preserves testimony in case they, well, die
- Contradict/Impeach/Refresh

WRITTEN DISCOVERY

- They can take their time to form their answer
- Still cannot observe them
- May get some good admissions if you carefully craft your questions

PRACTICING DEPOSITIONS



INTERROGATORIES

§ 804.08



INTERROGATORIES

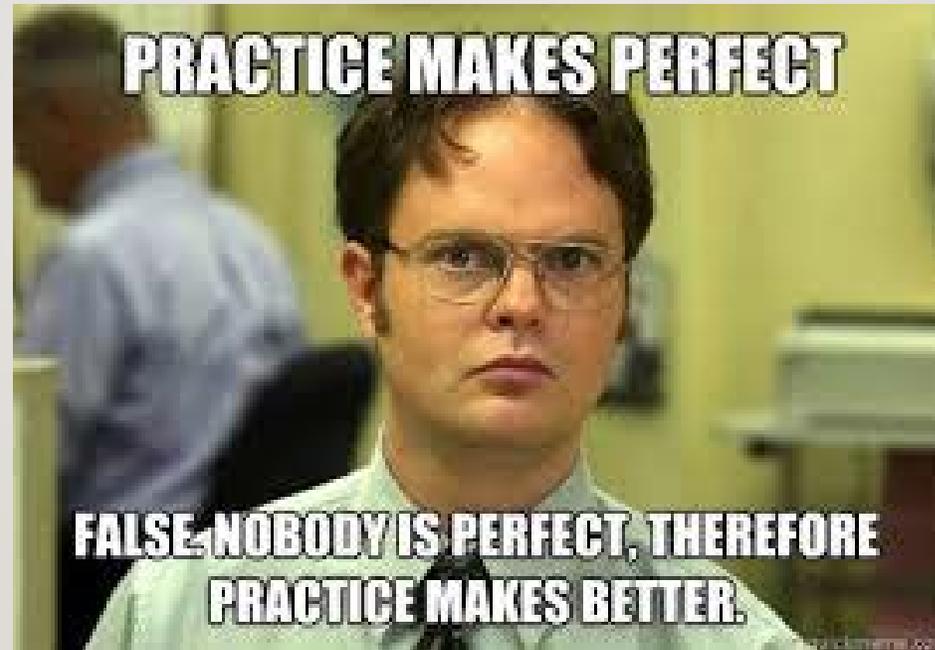
- Written questions
- Party to party
- Yes, you have a duty to answer
 - Within 30 days (unless you agree otherwise)
 - This can be lengthened – shortened by the court
 - If you are the defendant and they are served early in the case – you may have 45 days from service of summons and complaint
- Your answers should be complete
 - You can object – set forth your basis
- Don't be evasive, incomplete, vague, or unreasonably object
 - Remember the party may seek relief under 804.12

INTERROGATORIES

- Keep in mind the scope of your inquest
 - Anything not privileged
- Just like in depositions – the answer might not be admissible but it might reasonably be calculated to lead to admissible information
- If intending to use these answers at trial you'll follow Rules of Evidence (§§901-911)



PRACTICING INTERROGATORIES



PRODUCTION OF DOCUMENTS

§804.09



PRODUCTION OF DOCUMENTS

- Same initial rules as interrogatories
- Same scope
- May request production of or permission to inspect, copy, test, or sample...under party's control
 - Designated documents
 - Electronically stored information
 - Writings
 - Drawings
 - Graphs, charts
 - Photographs
 - Recordings, images
 - Other data or data compilations

PRODUCTION OF DOCUMENTS



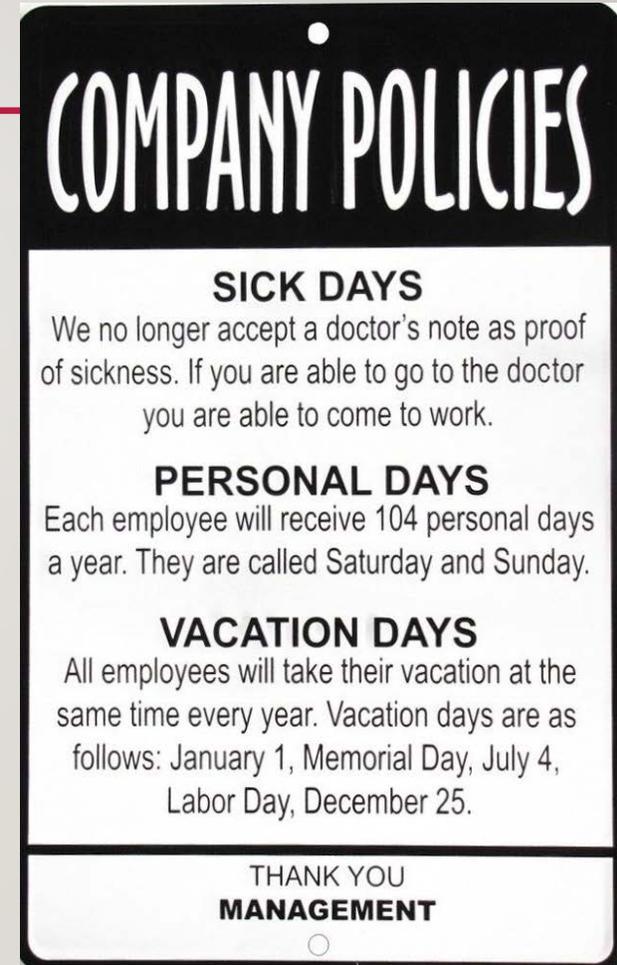
- Your duty to respond or produce
 - Same timelines – within 30 days, unless defendant 45 days within services of summons
 - Court can lengthen or shorten these timelines

PRODUCTION OF DOCUMENTS

- You can still object – lay out your objections
- Produce documents as they are kept within the normal course of business
 - Or you can organize and label the documents to correspond to the categories of the request
- If there was no specific request as to organization
 - Reasonably useable
 - You don't have to produce in more than one form
- Keep in mind if incomplete, late, or your objections are incorrect they can still compell or sanction you

PRODUCTION OF DOCUMENTS

- What can you look for?
 - Policy and Procedure Manuals! Social workers especially
 - Any continuing education social workers are required to do
 - Policies
 - Visitation
 - Volunteer
 - Safety Checklists and how they are scored



COMPANY POLICIES

SICK DAYS
We no longer accept a doctor's note as proof of sickness. If you are able to go to the doctor you are able to come to work.

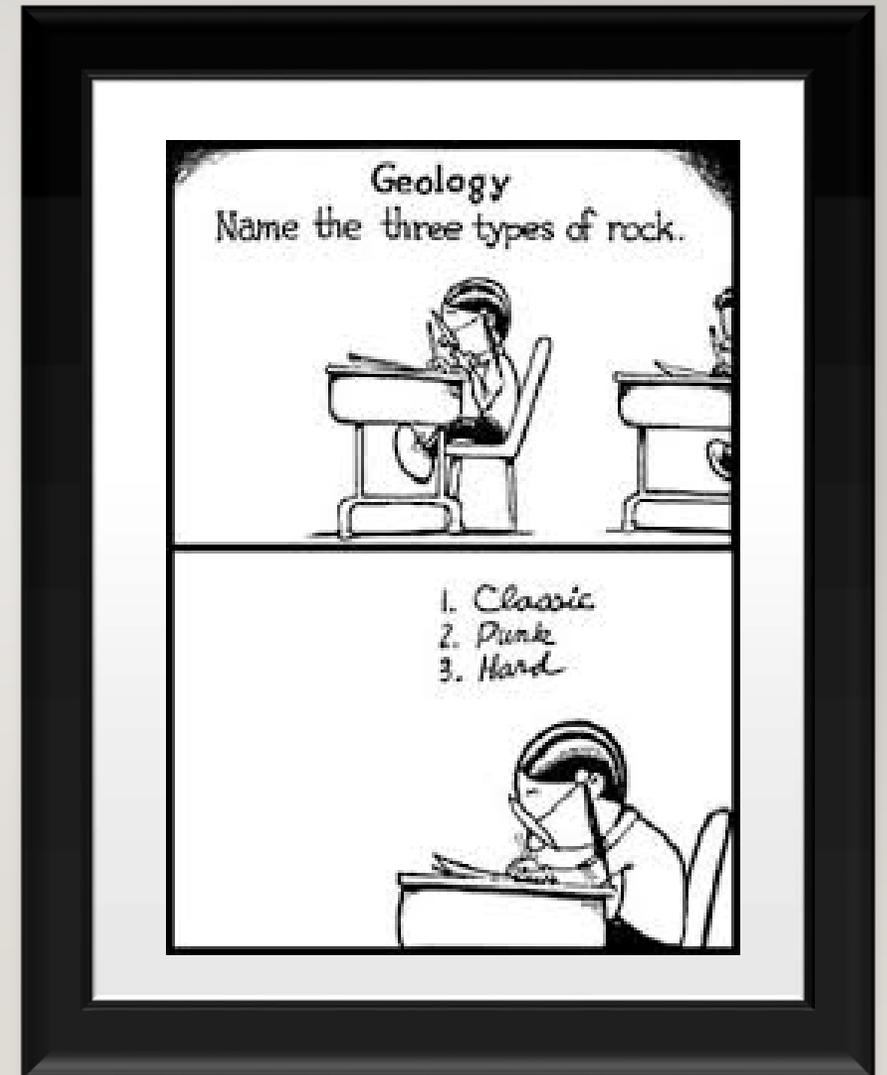
PERSONAL DAYS
Each employee will receive 104 personal days a year. They are called Saturday and Sunday.

VACATION DAYS
All employees will take their vacation at the same time every year. Vacation days are as follows: January 1, Memorial Day, July 4, Labor Day, December 25.

THANK YOU
MANAGEMENT

EXAMINATION OF PARTIES

§804.10



EXAMINATION OF PARTIES

- Physical or Mental exam
- The court may order upon receiving a motion
- Notice has to be given to all parties
- Take a look at §48.295
 - Paid by the court
 - § 48.295(3) Child, parent or expectant mother can object and the court can appoint a different examiner

EXAMINATION OF PARTIES

- No indication through case law yet that you can object to the requirement of an evaluation
- But what if they wish to do so prior to the grounds phase?
 - Look back to the 1979 version of §48.295(1) noted that the child's physical, psychological, mental or developmental condition "may be considered in the disposition of the case."
 - Prosecutors argue – that language has since been omitted so the legislature intended to have the parent submit to evaluations prior to the fact finding hearing.
 - Your argument? Look at §48.235(1)(g) – it references §48.295 and may mean that these pre-fact finding compelled evaluations are only to determine competency to proceed.
 - There is an argument that an exam prior to the fact finding hearing violates your client's right to present a defense.
 - 14th Amendment applies to TPRS! *Brown County v. Shannon R.*, 2005 WI 160.

ADMISSIONS!

Admit it. We have all
hidden our favorite
food from our family
at least once.

VIA FUNNYSTATES.COM

ADMISSIONS

- Again, party to party
- Only for the purpose of the pending action
- Anything not privileged
 - The more they admit the less you have to defend!
 - You are not limited to the facts in the pleadings
 - *Schmid v. Olsen*, 111 Wis. 2d 228, 330 N.W.2d 547 (1983)
- Admissible or reasonably calculated to lead to admissible information
- Yes, you are still subject to rules of evidence at trial

ADMISSIONS

- Each one done separately
- Try to avoid compound or complex – keep it to one fact
- If you don't respond within 30 days – **THEY ARE DEEMED ADMITTED**
- You need to support your denials
 - If the court thinks your denial is insufficient it may be deemed admitted unless you are allowed to amend
- Be specific in your objections
- You can parse it out – deny in part admit in part
- But its pretty final – issues admitted are conclusively established for trial unless the court permits you to withdraw the admission or amend

PRACTICING ADMISSIONS



OTHER DISCOVERABLE OPTIONS?

- Non party sources?
 - Subpoenas
 - Releases
 - Your client can sign a lot of these!
 - Open Records Requests?



SUBPOENAS - §805.07

- The attorney of record can sign them
- They can require your to produce records
 - If you don't want to - don't just ignore – get a protective order
- §885.01 – Issuable by:
 - Judge, Clerk, Court Commissioner
 - DA, AG
 - Committee Chairperson
 - Coroner, medical examiner
 - DCFS
- §885.03 – service
 - Served by anyone (not a party) exhibiting and reading it to the witness, or by giving the witness a copy or by leaving a copy at their abode.

AND IF THEY DON'T PLAY NICE?

- §804.01(3) – Is a protective order necessary?
 - Annoyance
 - Embarrassment
 - Oppression
 - Undue burden/expense
 - The court might allow through a different mechanism, place limits, or seal responses.
- §804.12(1) – Motion to compel
- §804.12(2) – Sanctions!



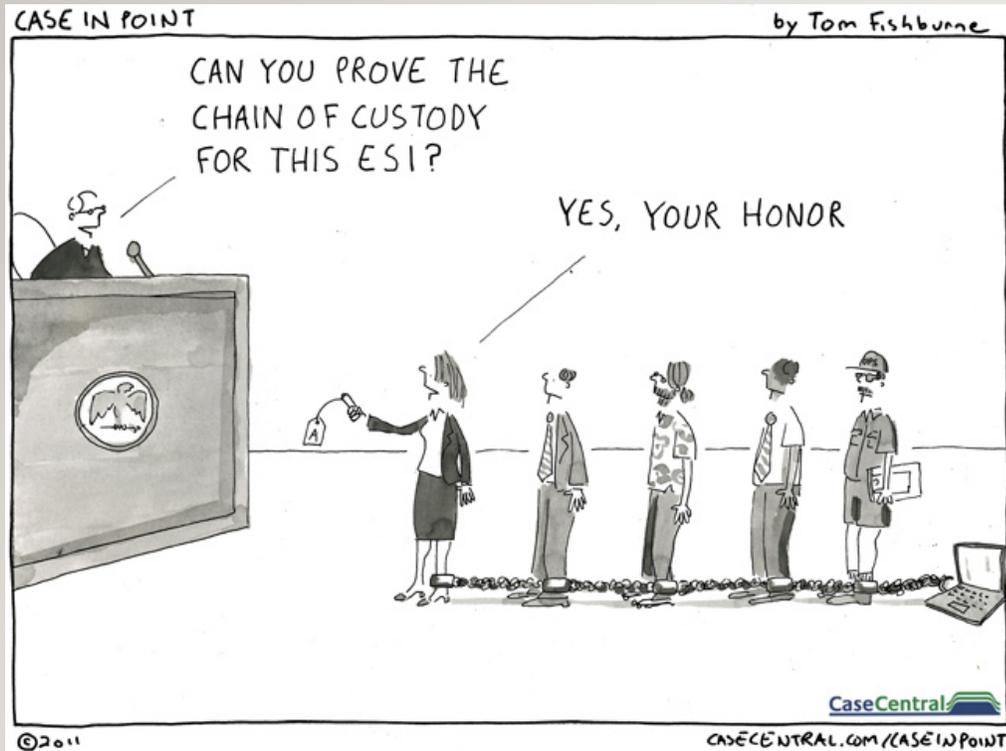
CHICKEN OR EGG COMPEL OR SANCTION

- Is it proper to ask for sanctions under §804.12(2) for discovery violations without first seeking to compel under §804.12(1)?
- Look to the plain language of the statutes... it would appear that compelling comes first
- Can you ask for dismissal as a sanction?
 - This requires a finding of bad faith or egregious conduct, supported by a reasonable factual basis. *Sentry Ins. v. Davis*, 2001 WI App 203.
 - Failure to comply with a circuit court scheduling order without a clear and justifiable excuse is egregious conduct. *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19.

SANCTIONS?

- With reasonable notice file your motion to compel discovery
- Evasive or incomplete responses may be deemed a failure to respond
 - Failing to admit...
 - Truthfulness
 - Unless there is a valid objection, the issues was not of substantial importance, or the party denying the admission had reasonable belief to prevail, or good cause for failing to admit
- If granted the court may award costs without any notice or an opportunity for a hearing
- If you don't comply with motion to compel?
 - Court might just make an order, deem a matter established, prohibit you from defending or pursuing your claim, strike pleadings, or even dismiss the case. (extremely disfavored in 48 cases)
 - This is treated just like contempt of court

TAKE CARE AND CUSTODY....



- §804.01(6) – The party initiating the discovery keeps the originals
- Keep in mind if you take a deposition keep the original transcript sealed until you enter it in the record or for as long as necessary for the appeal.
- Remember – discovery is ONGOING!