Olivier Taillieu
BD&J, PC

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Show and *Tell*

A PRACTICAL ANALYSIS OF THE NEW MANDATORY DISCLOSURE RULE

Litigation is, in some ways, like chess. It's a strategy battle between two adversaries requiring its players to make calculated moves by always thinking a few steps ahead. Chess is, however, a game that truly involves no hidden information – everything is literally on the board. In theory, litigation is supposed to be the same, but if you're reading this article, you know that this is not how things really work. The 2024 changes to Code of Civil Procedure section 2016.090 (hereafter, CCP 2016.090) were intended to make that transparency a reality by forcing all parties to disclose, early on, all facts, documents, and witnesses that may lead to discoverable evidence or that may be "relevant" to the claims and defenses.

Personally, I think it fails in that endeavor. Instead, the changes to the code add yet another layer of things to disagree about, with no added benefits for the plaintiff. In this article, I discuss the new rules and highlight why it is not in a plaintiff's best interest to "opt in" in a personal-injury case. I leave the discussion of other areas of law to the experts in those fields.

As a trial lawyer, I often say that cases are won in discovery. It is the single most effective tool that we have to draw out the good, the bad, and the ugly facts of the case on either side. Much has been written about discovery strategies in the past and this article will not repeat the large body of work in that area. Rather, I will discuss some of my main discovery strategies, and how those strategies change or remain the same considering the new set of discovery rules effective for cases filed after January 1, 2024 – CCP 2016.090.

> **"Take great care very early on to perform a full investigation and disclose to the defense any and all potential information one may want to use in a trial at a later date."**

The introduction of voluntary disclosures in California

The changes to CCP 2016.090 began in 2019 and were designed to reduce gamesmanship in the discovery process. Effective on January 1, 2020, the changes required parties to exchange information about witnesses, insurance information, documents, ESI, and other tangible materials relevant to their claims or defenses. The provision only applied if the parties stipulated and obtained a court order. Not surprisingly, these changes had little impact – hardly anyone stipulated.

The 2023 amendments now make CCP 2016.090 disclosures mandatory in most civil actions upon "a demand by any party to the action." The 2023 amendments also make the disclosure requirements broader – requiring disclosure of information "relevant to the subject matter of the action" instead of just information that may be used to support claims or defenses. The obligations contained in CCP 2016.090 are now actually broader than the obligations found in Rule 26 of Federal Rules of Civil Procedure.

The new rules also allow the parties to make two demands to supplement before a trial date is set and potentially a third afterwards. The new rules also increase the potential sanctions for discovery violations from $250 to $1,000. A court may also require counsel to report any sanctions to the state bar, notwithstanding Business & Professions Code section 6068, subdivision (o).

My initial reaction to these changes was, frankly, negative. I have always appreciated the more informal nature of state court discovery practice. I find that the CCP is more forgiving and contains fewer traps than the Federal Rules do when it comes to discovery. One rarely knows all there is to know about one's case early on and the nature of mandatory disclosures creates the potential to miss things, to one's great detriment.

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Nonetheless, because the new rules can be invoked by a simple demand by any party (even a co-plaintiff), I felt it important to delve more deeply into them and see how they could improve my discovery strategies – if at all.

The impact of CCP 2016.090 on basic discovery strategy

I have a basic discovery strategy that I use in most cases. It's a sequenced strategy because, even though the code allows for two requests to supplement before the setting of a trial date, most courts tend to set a trial date rather early in the case and we therefore lose the ability to get the defense to supplement throughout the discovery process (as in, for example, during the hub years in Los Angeles County where a trial date was set almost immediately after the case was filed). As a result, we are left with only one meaningful opportunity to get the defense to supplement their responses and we generally wait until the end of the discovery period to do that.

My basic discovery strategy is neither revolutionary nor complicated but it works for me: Generally speaking, as soon as we can after filing and serving the complaint, we send out very basic discovery requests (form interrogatories) to ascertain the identities of the parties, the general background of the individual or corporate defendants (2.0 et seq, 3.0 et seq.), the insurance available (4.0 et seq.), whether the defendant was injured or claims other damages (6.0 et seq., 8.0 et seq., and 11.0 et seq.), the extent of the property damage (7.0 et seq.), whether the defendant had any physical limitations (10.0 et seq.), whether any investigation was done (12.0 et seq.), and what the basic facts of the case are from the defense's perspective (if it's an MVA case) (20.0 et seq.). We serve the 13,14, 15, and 16 series later in the case because early responses to these interrogatories are often useless.

We will also typically send out document requests that match the topics discussed above. Finally, we will send out deposition notices for individuals (defense or third parties) that we have already identified as well as for a PMK if an entity is involved (such notice to include substantive topics as well as topics related to insurance coverage).

We will also send out subpoenas to third parties to assist us in conducting our investigation if we believe some of the information we need is in their hands. These could be insurance companies who have access to some of the vehicles or data, police departments, tow yards, fire departments, hospitals, witnesses, businesses who have access to video evidence, etc. Generally, we have sent out an evidence-preservation letter to most of these entities a long time ago and at this point we're just collecting the evidence we could not get before but hope they preserved.

We then follow up on specific topics as the evidence develops through the responses to the above or any of the depositions we take. Only much later in the process do we send out the omitted form interrogatory series above along with requests for admissions and request for production of documents tailored to specific issues so that a non-code compliant response can be compelled through motion practice. Presumably, by the time we send this next round of discovery, the defense has had enough time to formulate its defenses and theories about the case and a "premature" objection no longer carries the day. Toward the end of the discovery period, we send a request to supplement all prior discovery and start preparing for trial.

This is a methodical way of getting what we need, while at the same time preparing us for what the defense will argue. Most defense lawyers do not use such a "timed" approach and tend to issue a large batch of discovery requests early on, all at once and covering all topics, followed by depositions and a request to supplement at the end of the discovery period. Then again, they do not have the same burden we do and often this is enough for them to defend the case.

Technically, the changes to the CCP do not alter any of this. We are free to conduct our discovery through the means stated above regardless of whether the defense makes a demand for early disclosure and I will likely do so. The new rules do not supplant the existing discovery framework. Frankly, I see very little benefit in having a plaintiff making a demand for early disclosures. Considering that the defense can withhold evidence it considers "impeachment evidence" and considering that a plaintiff can get what it needs through traditional discovery tools, the early disclosure process offers very little upside. The downside is that if such a request is made by any party, the plaintiff now has to make significantly more disclosures much earlier than it normally would have to and unfortunately, increases the chance for inadvertent omissions.

The statutory language

CCP section 2016.090 states the following:

> (a) The following shall apply in a civil action unless modified by stipulation by all parties to the action:
> (1) Within 60 days of a demand by any party to the action, each party that has appeared in the action, including the party that made the demand, shall provide to the other parties an initial disclosure that includes all of the following information:
> (A) The names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, or that is relevant to the subject matter of the action or the order on any motion made in that action, unless the use would be solely for impeachment. The disclosure required by this subparagraph is not required to include persons who are expert trial witnesses or are retained as consultants who may later be designated as expert trial witnesses, as that term is described in Chapter

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2024

18 (commencing with Section 2034.010) of Title 4 of Part 4.
(B) A copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, or that is relevant to the subject matter of the action or the order on any motion made in that action, unless the use would be solely for impeachment.
(C) Any contractual agreement and any insurance policy under which an insurance company may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.
(D) Any and all contractual agreements and any and all insurance policies under which a person, as defined in Section 175 of the Evidence Code, may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Only those provisions of an agreement that are material to the terms of the insurance, indemnification, or reimbursement are required to be included in the initial disclosure. Material provisions include, but are not limited to, the identities of parties to the agreement, the nature and limits of the coverage, and any and all documents regarding whether any insurance carrier is disputing the agreement's or policy's coverage of the claim involved in the action.
(2) A party shall make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its initial disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures.
(3) (A) A party that has made, or responded to, a demand for an initial disclosure pursuant to paragraph (1) may propound a supplemental demand on any other party to elicit any later-acquired information bearing on all disclosures previously made by any party.
(B) A party may propound a supplemental demand twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with Section 2024.010) of Title 4 of Part 4, once after the initial setting of a trial date.
(C) Notwithstanding subparagraphs (A) and (B), on motion, for good cause shown, the court may grant leave to a party to propound one additional supplemental demand.
(4) A party's obligations under this section may be enforced by a court on its own motion or the motion of a party to compel disclosure.
(5) A party's disclosures under this section shall be verified either in a written declaration by the party or the party's authorized representative, or signed by the party's counsel.
CCP 2016.090.

The rest of the provisions exclude matters in small-claims court, family court, probate court and preference matters as well as any matters where the litigant is pro per. The law also sunsets on January 1, 2027 unless renewed. (CCP § 2016.090 (b)-(e).)

CCP § 2016.090 broadens the scope of discovery

The new rules require all parties, within 60 days of receiving a request to disclose from any party in the case, to list and produce "[t]he names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, or that is relevant to the subject matter of the action or the order on any motion made in that action, unless the use would be solely for impeachment."

The statute excludes "persons who are expert trial witnesses or are retained as consultants who may later be designated as expert trial witnesses, as that term is described in Chapter 18 (commencing with Section 2034.010) of Title 4 of Part 4." Therefore, based on a plain reading of the statute, it is not entirely clear whether treating physicians and their staff are excluded from disclosure. Certainly, medical providers that are to be deposed only to ascertain facts (nurses, EMT, etc.) are likely not excluded from disclosure.

Take a simple auto v. auto case where your client has suffered an injury that required any amount of hospitalization and that will affect their quality of life and thus warrant non-economic damages. In such a case, you would be required to list within 60 days from a demand all liability witnesses, potentially all medical providers, including all ambulance personnel, all surgery center staff, assistant surgeons, nurses, physical therapists, etc., any individual who may have information about any of the bills incurred, co-workers or supervisors for any loss-of-earning claims, all family members or friends who ever witnessed the plaintiff struggle with their injuries, all family members or friends who can speak to the level of the plaintiff 's activity prior to the incident, and anyone else who is "likely to have discoverable information" that "may be used" to support your claims or that is "relevant."

Along with these disclosures, a party is required to include their "names, addresses, telephone numbers, and email addresses." This potentially encompasses hundreds of people in even the smallest of cases. Conveniently, this provision allows the defense to withhold any information that "would be used for impeachment." This places an extraordinary burden on Plaintiffs who may just have become acquainted with their case with no meaningful offsetting benefits.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2024

Early disclosure requires early investigation

Further, the statute specifies that "[a] party is not excused from making its initial disclosures because it has not fully investigated the case" – which means that all of this information needs to be gathered, assessed, evaluated, and disclosed within 60 days from the onset of discovery – regardless of how helpful or harmful it may be to your case and regardless of whether the defense asks for it. It's difficult to predict how this will be interpreted, but one can easily imagine how the failure to disclose a damages witness early on in the case may be used to bar that party from calling that witness at trial. As long as the identity of that witness was "reasonably available," one may be barred from presenting that testimony. This is particularly problematic if you have recently substituted into a case and the prior attorney omitted some crucial information that was never asked for by the defense, yet required to be produced per the new rules.

This would also require the gathering of all medical records, bills, photos, reports, family videos or photos, and any other documents you may have access to. This would include documents related to any pre-crash medical care on any potentially related body parts. Because the initial disclosures are not properly objected to due to a lack of a "full investigation," a Plaintiff's attorney would arguably be required to fish through a client's prior medical records at the outset and obtain all of the relevant documents in a shortened period of time – even if only to prove that the client had no pre-existing medical issues related to the body parts in the case.

These disclosure requirements place an incredible burden on plaintiffs at a time where they arguably know the least about the case but may be presumed to know enough by a court much later in the case.

More discovery battles, not less

The new rules do not supplant the existing discovery rules. Therefore, a party may be subject to up to four sets of mandatory disclosures over time under the mandatory terms, as well as all the other modes of discovery made available by the CCP including special interrogatories, requests for admissions, request for productions of documents and other tangible things, etc. – also potentially with three sets of supplementals. This is likely to increase the potential for disputes and gamesmanship associated with discovery, not decrease it.

Additionally, CCP 2016.090 introduces a whole new set of standards and requirements not previously found in the CCP. Hence, there is likely going to be a great deal of uncertainty in how these various standards and requirements will be interpreted by the various courts involved in resolving these issues. The traditional discovery rules are well settled, and there is a large body of judicial decisions to assist the parties in determining what is and what is not a good-faith argument in discovery disputes. The new rules are so broad and so devoid of traditional standards, that it may take years for courts to reach a consensus on how to address some of these issues. In the meantime, cases and parties may find themselves in limbo during this judicial process.

For instance, when the statute states that "[a] party shall make its initial disclosures based on the information then reasonably available to it" – how will this be interpreted? How much of an investigation must a party engage in prior to making its disclosures? The statute states that "[a] party is not excused from making its initial disclosures because it has not fully investigated the case." Will it then require a corporate defendant to perform a full investigation of all of the employees who may have relevant information?

Certainly, these individuals are available to the defense and nothing prevents them from gathering that information. Will a plaintiff be required to disclose a client's entire past medical history file, regardless of body parts involved because it may have some relevance (namely that the client had no pre-existing conditions)? The list goes on for any and all subjects that may lead to "discoverable information . . . that the disclosing party may use to support its claims or defenses . . . or that is relevant to the subject matter of the action."

Conclusion

In short, the mandatory disclosure rules are with us for the next three years whether we like them or not. Although a plaintiff may choose not to make a demand for such disclosures, a defendant may co-opt that choice by making its own demand and we must thus navigate the pitfalls.

As in every case, the best policy is full disclosure and this article should not be construed as advocating withholding information or playing games in discovery. Nonetheless, section 2016.090 is so broad that it may lead to not only sanctions, but prejudicial outcomes, for simple, innocent, or unintentional omissions early in the case. Therefore, the practitioner should take great care very early on to perform a full investigation and disclose to the defense any and all potential information one may want to use in a trial at a later date. Failing to do so may jeopardize your case in ways not previously contemplated by the code. Time to polish off that crystal ball . . .

Olivier Taillieu is a partner of BD&J, PC, *and an experienced trial attorney. He routinely serves as faculty in the ABOTA trial skills program and gives lectures and CLE (Continuing Legal Education) presentations in the field of TBI, trial skills, and other related matters to his fellow attorneys. Mr. Taillieu serves on the CAALA Executive Committee as incoming Secretary and on the board of the Consumers Attorneys of California (CAOC).*