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LOS ANGELES SUPERIOR COURT

A hidden gem in the California Code of Civil Procedure

THE CIVIL BAR HAS NOT YET TAKEN HOLD OF THE NEW INITIAL DISCLOSURE LAWS IN THE CIVIL DISCOVERY ACT

Having been involved in civil litigation since the early-to-mid-1980s, both as a litigator/trial attorney, and as a Superior Court judge, I would like to consider my knowledge of the California Code of Civil Procedure (C.C.P.) to be somewhat above average. In further point of fact, during my last decade in being assigned to a Civil Independent Calendar (I/C) Court at the Mosk Courthouse, I deal with the C.C.P. on a daily basis. Indeed, it is essentially the Bible for civil litigation.

The sole purpose of this missive is to uncover, for both lawyers and judges involved in the civil arena, some hidden gems or "gold nuggets" which are actually contained in the Civil Discovery Act of the C.C.P. (§§ 2016.010 et seq.), which are rarely, if ever, utilized by any party or lawyer, despite their potential considerable benefits.

The first hidden gem is a somewhat recent addition to the Civil Discovery Act (§ 2016.090 – Initial Disclosures). In essence, in many ways this statute mirrors the mandatory initial disclosures contained in Federal Rules of Civil Procedure, rule 26. Those of you who have practiced civil litigation in the federal courts are well familiar with this rule and would certainly understand and appreciate the importance and benefits of Rule 26.

History

The history of this initial disclosure law in California is somewhat uneventful. The original law became effective on January 1, 2020. Suffice it to state, not many litigators or judges noticed. Perhaps the impending COVID-19 crisis may have something to do with that, since the civil courts in California were greatly impacted, to say the least.

This earlier version applied only "to a civil action upon an order of the court following stipulation by all parties to the action…." (Code Civ. Proc. § 2016.090(a) effective January 1, 2020 to December 31, 2023). In other words, all of the parties had to stipulate to its utilization and submit a court order for approval. I can unequivocally state that no one ever submitted such a stipulation to me during that three-year period. Indeed, at the initial Case Management Conference I would advise counsel of this new law, but it apparently fell upon indifference.

Recent amendment

Perhaps due to its utter lack of use or success, our legislature passed AB 235, effective January 1, 2024, which made this section *mandatory* in providing that: "The following shall apply in a civil action unless modified by stipulation by all parties to the action…." (Code Civ. Proc. § 2016.090(a).) This new law applied only to cases filed on or after January 1, 2024.

Of course, the key and major change is that only a *single party* can unilaterally invoke and initiate these procedures without a stipulation from any other party, and moreover, without the need to meet and confer before doing so. ("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…') (§ 2016.090(a)(1).)

Types and format of disclosures

As stated previously, the categories of the initial disclosures mirror its federal rule counterpart. (A) The names and index information or potential witnesses (not including experts); (B) A copy or description of all documents which support that party's claims or defenses (except for impeachment purposes); (C) insurance policies or (D) indemnity agreements which may be applicable.

As to the manner of disclosures, the law sets forth two requirements for the party making the disclosures:
(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.
(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.
(Code Civ. Proc., § 2016.090(a)(2) & (5).)

Supplemental demands

As in the case of interrogatories (Code Civ. Proc., §2030.070) and requests for production of documents (Code Civ. Proc., §2031.050), the law provides for supplemental demands under Code of Civil Procedure section 2016.090(a)(3) as follows:
(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.

(Code Civ. Proc., § 2016.090(a)(3).)

Exceptions to initial disclosures

Code of Civil Procedure section 2016.090, subdivisions (b) and (c) set forth the exceptions as follows:
(b) Notwithstanding subdivision (a), this section does not apply to the following actions:
(1) An unlawful detainer action, as defined in Section 1161.
(2) An action in the small claims division of a court, as defined in Section 116.210.
(3) An action or proceeding commenced in whole or in part under the Family Code.
(4) An action or proceeding commenced in whole or in part under the Probate Code.
(5) An action in which a party has been granted preference pursuant to Section 36.
(c) This section does not apply to any party in the action who is not represented by counsel.
(Code Civ. Proc., § 2016.090(b)-(c).)

Of importance to the civil litigator are the exceptions that it does *not* apply to parties who are in pro per and/or a party who has obtained a trial preference under CCP section 36. (The latter seems somewhat illogical, since the early disclosure laws would be quite helpful in a trial preference situation.)

Motions to compel

As in any type of discovery, demanding compliance with this rule allows any party to file a motion to compel. However, unlike all other discovery, the Court, on its own motion, may compel compliance.

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.
(Code Civ. Proc., § 2016.090(a)(4).)

Concluding observations

Suffice it to state, since this initial early disclosure law was adopted in California in 2020, I often wondered why hardly anyone ever utilized same. As I previously stated, I have not yet seen any party in any of my current 1,200 cases do so. Perhaps some have, and I just haven't noticed, since nothing needs to be filed with the court unless there is a motion to compel and/or a subsequent motion to exclude evidence based upon a failure to disclose.

Moreover, the law appears to be silent in the event a party does not provide the required information which is in their knowledge, possession, custody or control at the time of the disclosures. Would that mean that that party would be precluded from utilizing that information or document at trial, or at some other hearing? Common sense and the case law governing other types of discovery certainly would support such a potential remedy.

Last, but not least, unlike in federal court, there is not continuing duty to supplement one's initial disclosure, absent a supplemental demand.

Perhaps these are the reasons the civil bar has not yet taken hold of these new initial disclosure laws as a standard litigation practice?

More likely, though, is the simple fact that these obligations are *mutual*. In other words, be careful for what you ask. These obligations are time-consuming and can be consequential.

Change is often not easy. However, I have noticed that most changes to civil procedure are often good, and in response to problems of the past.

I would urge the civil practitioner to carefully review and reflect on this new law, and determine whether this makes any sense for you, your client, and your case. Ask yourself : "Why not?"

Indeed, if you are a conscientious and straight-forward litigator, there should be no harm to you, your client or your case. The benefits to you should easily outweigh any detriments.

As one of my all-time favorite bands, DEVO, aptly shouted out:
"Twist away the gates of steel
Unlock the secret voice
Give in to ancient noise
Take a chance a brand new dance
Twist away the gates of steel"
(*Gates of Steel*, Freedom of Choice, 1980)

I urge you to take a chance. Give it a try. It may be the hidden gem you have been looking for…

Randolph M. Hammock is a Superior Court judge, currently sitting in an Independent Calendar ("IC") Court at the Stanley Mosk Courthouse, in which he presides over unlimited civil cases. He graduated from San Diego State University (1980) and the University of San Diego, School of Law (1983). During his almost 25 years of practicing law (primarily as a civil trial attorney), Judge Hammock was admitted to and actively practiced law in a total of 15 states, as well as over 20 federal district courts and courts of appeal. As such, he is likely to have had passed more bar exams than any other practicing lawyer in the United States. He was a member of LATLA/CAALA from the mid-1980s to his appointment as a Superior Court Referee in the juvenile dependency court in 2008, where he served until he was elected as a judge of the Los Angeles Superior Court in 2010. He has been a member of the American Board of Trial Advocates (ABOTA) since 2000.