

# Deficient Discovery Responses and Disclosures in Family Law Cases: Causes and Alternatives

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Family law practitioners often receive lackluster disclosure and discovery responses.<sup>1</sup> Disclosures frequently run the gamut between vague and confusing to completely nonresponsive. The last two and a half decades saw sweeping reform to the disclosure requirements in California family law cases.<sup>2</sup> But problems persist.

This article discusses the discovery and disclosure problems unique to family law. It first summarizes the law governing discovery in family law – the combined application of the general civil discovery rules and the special Family Code disclosure requirements. Next, it discusses the problem of inadequate discovery responses in family law, and attempts to identify the causes for this problem. This article concludes by suggesting possible solutions.

## I. The Overview: Discovery and Disclosure in Family Law

Two separate bodies of law govern disclosure and discovery in California family law: the Civil Discovery Act<sup>3</sup> and the Family Code disclosure statutes.<sup>4</sup>

The Civil Discovery Act<sup>5</sup> applies in family law as it does in civil cases generally.<sup>6</sup> A wide range of “formal” discovery tools is available to family lawyers, as they are to civil litigators generally. These include interrogatories, requests for production of documents, or a deposition. When they use these discovery devices, family lawyers operate under the Civil Discovery Act.

The Family Code contains additional disclosure requirements unique to family law.<sup>7</sup> In the 1980s and 1990s, the belief took hold that the “gamesmanship” sometimes seen in civil discovery disputes had no place in family law. The Legislature announced that “[s]ound public policy” favored “full disclosure and cooperative discovery.”<sup>8</sup> Disclosures must be made early (“from the date of separation,”)<sup>9</sup> and often (“including an immediate . . . update or augmentation” to report “material changes.”)<sup>10</sup> The amount of

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<sup>1</sup> The words “discovery” and “disclosure” are distinct terms of art: “discovery” refers to formal discovery under the Civil Discovery Act codified in the Code of Civil Procedure (e.g., Interrogatories, Requests for Production of Documents, Depositions, and the like). “Disclosure” refers to the disclosure requirements in Family Code sections 2100 through 2113 (e.g., the Preliminary and Final Declarations of Disclosure). These terms are used interchangeably to make this article easier to read, since both terms denote the process of obtaining information in the course of litigation.

<sup>2</sup> See Vol. A, *Complex Issues in California Family Law: Fiduciary Duties – Nature and Extent* (Matthew Bender 2005) for a discussion on the evolution of the modern disclosure statutes.

<sup>3</sup> Code Civ. Proc. §§ 2016.010–2036.050.

<sup>4</sup> Fam. Code §§ 2100–2113.

<sup>5</sup> Code Civ. Proc. §§ 2016.010–2036.050.

<sup>6</sup> See, e.g., Code Civ. Proc. §§ 2016.020, 2017.010.

<sup>7</sup> Fam. Code §§ 2100–2113.

<sup>8</sup> Fam. Code § 2100(b).

<sup>9</sup> Fam. Code § 2102(a).

<sup>10</sup> Fam. Code § 2102(a)(1).

information required can be extensive. For example, the Final Declaration of Disclosure must include “all material facts and information” about assets, debts, valuation, income, expenses, et cetera.<sup>11</sup> These fiduciary obligations may continue even after entry of judgment.<sup>12</sup> In other words, full disclosure is required.

Sanctions are available against a less-than-forthcoming party. Not revealing an asset may be a breach of the fiduciary duty to disclose, inviting potentially serious sanctions.<sup>13</sup> The Civil Discovery Act also permits sanctions.<sup>14</sup> And failure to honestly and fully comply with the Family Code disclosure statutes precludes entry of the Judgment<sup>15</sup> and may permit the set-aside of an already-entered Judgment.<sup>16</sup>

## **II. The Problem: Inadequate Discovery Responses in Family Law**

Despite the legislature’s adoption of an “open book” approach to family law disclosures, family law practitioners frequently receive deficient responses. Several factors – the parties, the attorneys, the judges, and the economic reality – all seem to contribute to this problem.

### **A. The Parties**

The parties deserve some blame for their deficient disclosures. Gathering, compiling and producing disclosures can be expensive. Parties easily avoid these costs by cutting corners when producing information, resulting in inadequate disclosure and discovery responses.

Parties often fail to understand the importance of full disclosure. A significant task for all family law practitioners is the duty to educate the client on the importance of full disclosure. And “education” is not enough. The attorney must ensure the client follows through. Many practitioners employ paraprofessionals whose job is essentially to coax the clients to provide the information needed to produce adequate discovery responses and disclosures. This underscores the difficulty all practitioners face when gathering information from one’s own client.

The self-represented party, or “pro per,” is the worst offender. They employ no attorney or paraprofessional to hound them for additional information. A motion to compel is often the only way to educate a pro per about the importance of full disclosure. This drives up costs and confounds the discovery process.

### **B. The Attorneys**

Parties should not shoulder all the blame. Unlike family lawyers, they are not “repeat players” (serial monogamists excepted). They lack our understanding of the importance of full disclosure. A client’s disinclination to provide needed documents does not excuse the attorney of his obligation to educate the client regarding the legal mandate of full disclosure.

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<sup>11</sup> Fam. Code § 2105.

<sup>12</sup> Fam. Code § 2102(b) (which provides that the interspousal fiduciary duties regarding an asset, including the disclosure duty, continues “until the asset . . . has actually be distributed.”)

<sup>13</sup> Fam. Code §§ 1101.

<sup>14</sup> See, e.g., Code Civ. Pro. S 2030.290(c)

<sup>15</sup> Fam. Code § 2106.

<sup>16</sup> See Fam. Code § 2120–2129.

Additionally, lawyers are often accused of gamesmanship in discovery battles. Professor Wayne D. Brazil<sup>17</sup> conducted a large and well-regarded empirical study of discovery practices involving 180 Chicago attorneys. His results showed that “intentional tactical jockeying by counsel” contributed significantly to discovery problems.<sup>18</sup>

The practice of family law is sufficiently difficult without obstreperous opposing counsel. Attorneys have a professional obligation to ensure discovery responses are “timely, organized, complete and consistent with the obvious intent of the request.”<sup>19</sup> This obligation should temper the duty to zealously advance the client’s interests.

Some contend, however, that the pendulum has swung too far in favor of full disclosure. Since “full disclosure” is a high standard, anyone can probably find something to criticize in even the most conscientious response. Operating under the theory that “if you complain loud enough, they might believe you,” some attorneys stridently accuse their opponent of discovery deficiencies to gain leverage. This approach may have caught on: *Feldman*<sup>20</sup> (a case upholding severe discovery sanctions due to a failure to disclose) is perhaps today’s most cited family law opinion.<sup>21</sup>

### C. The Judges

A law is effective only to the extent it is enforced. Judges are tasked with enforcing the Civil Discovery Act and the Family Code disclosure provisions. A wide range of penalties are available to the court. Without the ever-present specter of judicially-imposed sanctions, few discovery requests would be honored.

But some question whether this enforcement scheme really works. In his comprehensive study, Professor Brazil noted that “many judges respond to discovery conflicts with an air of undisguised condescension, impatience, or open hostility – implying that involvement in these kinds of disputes is either beneath their dignity or an unjustifiable intrusion on their time.”<sup>22</sup> Litigators involved in the study “complained that most courts are transparently reluctant to impose sanctions at all and that when sanctions are imposed they often are too mild to serve as significant deterrents to future abuses.”<sup>23</sup>

Perhaps this judicial unwillingness to delve into discovery disputes makes the problem worse. If lawyers believe they will not be sanctioned, they have little incentive to comply with discovery. The cost to provide adequate responses (measured in attorney time and resources) will likely exceed the alternative cost (the risk of sanctions) for failure to do so. As a result, lawyers are given an economic disincentive to comply fully with discovery or disclosure requirements.

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<sup>17</sup> Professor Brazil went on to become a Federal Magistrate Judge for the Northern District of California until he retired from the bench in 2009. He currently is on the faculty at Boalt Hall.

<sup>18</sup> 1980 ABA Found. Research J. 219, as reprinted Lerman & Schrag, *Ethical Problems in the Practice of Law* (Aspen 2005) at 523—524.

<sup>19</sup> Standards of Professional Courtesy at II(B), located at Appendix B to Contra Costa County Local Rules.

<sup>20</sup> *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470.

<sup>21</sup> A Shepard’s Summary run February 15, 2009 reveals that *Feldman* is cited 37 times in appellate decisions, 43 times in law reviews, statutes and treatises, and 58 times in briefs and other court documents published on Lexis Nexis. This is notable considering *Feldman* was published less than three years ago.

<sup>22</sup> 1980 ABA Found. Research J. 219, as reprinted Lerman & Schrag, *Ethical Problems in the Practice of Law* (Aspen 2005) at 523-524.

<sup>23</sup> *Ibid.*

#### **D. The Economic Reality**

Practice realities (usually financial) also hinder adequate disclosures. Family attorneys represent individuals; not deep-pocket corporations. They represent individuals. Many family law clients pay hundreds of dollars for one hour of their lawyer's time. It makes sense to the clients to spend less effort on disclosure responses. Composing quality discovery responses does not add much value to the client's case. If anything, it helps out the opposing party. From a client's perspective, those resources are better spent advancing their own case, perhaps by drafting quality motions or in trial preparation.

Lawyers want to keep costs down. The less they bill a client, the more likely they will be paid. These economic factors all tend against quality discovery responses.

#### **III. Possible Solutions**

Attorneys and parties have confronted these types of discovery problems for years. This article does not presume to suggest a comprehensive solution. But having considered the causes of unresponsive discovery responses and disclosures, a few possible solutions come to mind.

Courts should be more willing to sanction parties for failing to submit adequate responses. The Civil Discovery Act contemplates mandatory sanctions under certain circumstances;<sup>24</sup> perhaps mandatory sanctions should exist in family law discovery disputes also. The Elkins Task Force recommended ramping-up sanctions for various reasons;<sup>25</sup> why not consider heightened (or mandatory) discovery sanctions in family law?

Courts are swamped. The financial crises exacerbated the backlog of cases. Courts understandably have neither the time nor the inclination to delve into discovery disputes. Perhaps appointing discovery referees, or facilitating the appointment of private judges for discovery disputes, would help prevent lax discovery responses. The goal is to create a perception that discovery abuses will be carefully considered by a judicial officer and dealt with accordingly.

Further, family lawyers could be educated about the heightened disclosure requirements and the consequences for failure to disclose. MCLE classes on this issue might be helpful. If all family lawyers decided to demand full disclosure from their clients, this would go a long way to deter inadequate disclosures.

In conclusion, perhaps the best way to overcome the financial disincentive to produce quality responses is by creating a powerful countervailing economic incentive. Heightened judicial oversight, combined with a high probability that abuses will be sanctioned, would send a strong message that the discovery and disclosure requirements must be obeyed.

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<sup>24</sup> See, e.g., Code Civ. Proc. § 2030.290(c) (which provides for mandatory prevailing-party sanctions in a motion to compel a response to interrogatories, unless the Court finds the party acted with "substantial justification" or sanctions are otherwise "unjust.")

<sup>25</sup> See draft recommendations of Elkins Task Force issued October 1, 2009, at items 3(12) and 14(1).