



What trial teaches us about discovery

How to analyze defendant's motion in limine to exclude evidence not produced in discovery

BY AL STOLL

In our practices the vast majority of our cases settle prior to trial. At trial a party's answers to both written and oral discovery are scrutinized. It is only when a case is tried that we truly see the impact that our answers to discovery have on the case.

We all have a basic understanding of our obligations to disclose relevant evidence requested in discovery. We are motivated to share evidence that supports our case, in an effort to get the case fully evaluated and hopefully settled. When trial arrives, admissibility issues can present themselves if the claims, documents and witnesses we plan to rely on have not been specifically identified in our formal discovery responses.

A common motion in limine is the motion to exclude evidence not disclosed or produced during discovery. This motion is usually broadly stated to exclude all documents and evidence not produced in discovery. Judges generally do not rule on this type of motion until they are presented with specific facts related to a specific piece of evidence.

Thoren v. Johnston & Washer

The most cited case on this issue is *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270. *Thoren* was a construction site trip-and-fall case. Plaintiff Walter Thoren tripped and fell over a wire and injured his arm. He alleged that the subcontractors on the job negligently created a dangerous condition which caused his injury. Prior to trial Mr. Thoren was served with an interrogatory that asked him to identify all witnesses who arrived at the scene of the accident immediately

or shortly after it happened. On January 27, 1969, Mr. Thoren answered without objection and identified one individual, Dick Moscrop. Now fast forward to plaintiff's opening statement, on August 30, 1971: Plaintiff's counsel refers to the expected testimony of "Robert B. Clubb, who arrived at the scene of the accident shortly after it occurred."

The defendant objects to the testimony of Mr. Clubb on the grounds that plaintiff had willfully omitted Clubb's name from the answer to the interrogatory. The trial court conducted a hearing and learned that Clubb was a union representative who went to the scene of the accident as soon as he heard about it. Clubb took pictures of the scene and was prepared to testify to the condition of the area where the accident occurred. Plaintiff's counsel conceded that Clubb sent him pictures of the scene and also referred the case to his office. However, plaintiff himself revealed at his deposition that Clubb had taken pictures of the accident scene the day after the injury occurred. The trial judge in *Thoren* held that the omission of Clubb's name from the answer to the interrogatory was willful and barred Clubb's testimony of observations at the accident scene.

Saxena v. Goffney

The more recent case of *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, discusses the scope of the holding in *Thoren* and clarifies when evidence not identified in discovery responses may be excluded at trial. *Saxena* involved a wrongful death claim against a doctor that arose out of a series of debridement procedures. The trial judge excluded two defense witnesses, Gary Flashner, M.D., a treating

doctor and Nurse James Palmer, neither of whom were specifically identified in discovery. The defendant's offer of proof at trial was that each of these witnesses would rebut plaintiff's claim that the decedent, Mr. Saxena, was not a candidate for surgery.

During formal discovery the defendant doctor, Goffney, was served with Judicial Council Form Interrogatory No. 12.1 and 15.1. Form Interrogatory 12.1 calls for the identification of individuals who witnessed the incident or events occurring immediately after the incident, including anyone who made or heard any statements about the incident. Defendant Dr. Goffney stated he was, "not aware of any witnesses to decedent's medical care other than those individuals identified in her [*sic*] medical records." (*Saxena* at p. 331.)

Form Interrogatory 15.1 calls for witnesses having information that would support a denial or affirmative defense. Defendant stated, "it is anticipated that some of these entire affirmative defense [*sic*] will be supported by documents in [*sic*] decedent's medical records that are available to all parties." (*Saxena* at p. 331.)

Ten days before trial plaintiff served a motion in limine for an order excluding the testimony of "witnesses not identified in discovery." The motion was non-specific, neither Dr. Flashner nor Nurse Palmer were identified. The record on appeal did not contain any information regarding the trial judge's ruling on this motion in limine.

Also ten days before trial, defendant Goffney listed Dr. Flashner and Nurse Palmer on his trial witness list. On the first day of trial, Dr. Goffney served a



supplemental response to Interrogatory 12.1 listing 16 names, including Dr. Flashner and Nurse Palmer. Dr. Goffney's counsel referred to the anticipated testimony of both Flashner and Palmer during his opening statement without objection by plaintiff. As plaintiff's case neared its end, the defendant announced that Flashner and Palmer would be witnesses the next day. Plaintiff objected, and the judge excluded the testimony of both witnesses.

The trial judge reasoned that the exclusion of the witnesses was proper because their identities were "well known" to defendant Goffney when he responded to plaintiff's interrogatories and because Goffney "unjustifiably failed to list them in his responses." (*Saxena* at p. 331.) In an opinion written by Justice Raymond J. Ikola, The Fourth District Court of Appeals disagreed and held the trial court abused its discretion by excluding the two defense witnesses.

Saxena noted *Thoren* does not stand for the proposition that evidence may be excluded based on the mere failure to supplement or amend an answer that was truthful when originally served. The original answers given by defendant Goffney were technically true, assuming the names of Flashner and Palmer were contained within the medical record. *Saxena* also noted *Thoren* did not hold that evidence may be excluded when an answer is evasive or incomplete. Dr. Goffney's response identifying witnesses in the medical records available to all parties was both evasive and incomplete.

Saxena held that "The Civil Discovery Act (§ 2016.010 et seq.) provides specific remedies for evasive or incomplete discovery responses. The imposition of an evidence sanction is not one of the remedies." (*Saxena* at p. 322.) The remedy for a party served with an evasive and/or incomplete discovery response is to file a motion to compel. (§ 2030.300(a)(1).) An evidence sanction is available only where the responding party fails to obey an order compelling further responses. (§ 2030.300(e)).

Saxena distinguished *Thoren* as involving conduct not specifically covered by the Civil Discovery Act. "Giving a willfully false answer is not even included in the Civil Discovery Act's definitions of a 'misuse of discovery,' unless the prohibition against causing 'unwarranted annoyance, embarrassment, or oppression, or undue burden and expense' is broadly construed. (See § 2023.010 subd. (c))" *Saxena* at p. 333.) *Saxena* also pointed out that *Thoren* was relying on a former provision of the Civil Discovery Act.

Deter v. Angus

Another often cited case is *Deter v. Angus* (1986) 179 Cal.App.3d 241. *Deter* involved a dispute over the payment of a commission between a real estate broker, plaintiff Thomas Kite, and the purchaser of an apartment building, defendant Glen Angus. At trial the defendants objected to the introduction of a tape-recorded conversation between plaintiff and defendant. During discovery the plaintiffs were asked two different interrogatories that arguably called for the identification of the tape recording. The court of appeal cited to *Thoren* and found that there was a willful withholding of evidence and excluded the tape from evidence.

Biles v. Exxon Mobil Corporation

The case of *Biles v. Exxon Mobil Corporation* (2004) 124 Cal.App.4th 1315, confronted the issue of an undisclosed witness in the context of a summary judgment motion. The issue in *Biles* was whether or not Mr. Biles was exposed to asbestos while working at Exxon's refinery. After plaintiff was served with a motion for summary judgment, plaintiff submitted evidence in opposition to the motion from one of his co-workers, Roger Bellamy. Exxon objected to the Bellamy declaration on the grounds that he was not disclosed in a prior interrogatory asking plaintiff to identify all persons with knowledge of his asbestos exposure at the Exxon refinery. The trial

judge agreed, granted the motion for summary judgment and the plaintiff appealed. On appeal the *Biles* court distinguished *Thoren* both factually and procedurally and held that unlike the Federal Discovery rule, in California there is no duty to supplement interrogatory responses upon the receipt of new information. The Court of Appeals determined that the plaintiff was not aware of Mr. Bellamy until after the interrogatory was answered. Therefore, the initial response was not willfully false; as a result exclusion of the statement was not justified as a discovery sanction.

In California the duty is on the propounding party to initiate the updating process, which may be done twice before the initial setting of the trial date (see Code of Civil Procedure (herein CCP), § 2030.070.)

Procedurally, in *Biles* the discovery of the omitted witness occurred before a trial date was set, however in *Thoren* the disclosure and intent to rely on the unidentified witness came at the start of trial, a year and a half after the original interrogatory was served. The *Biles* court notes these distinguishing facts, (*Biles, supra*, p. 1324), but does not base its holding on an evaluation of whether or not Exxon was prejudiced by the timing of the witness disclosure.

Prejudice to the objecting party was a factor in the case of *Campaign v. Safeway Stores, Inc.* (1972) 29 Cal.App.3d 362. In July 1966 Lois Campaign slipped and fell at Safeway and sustained a serious knee injury. At Lois Campaign's October 1967 deposition, her lawyer stated, "I believe she was studying real estate at the time of the accident. There may be a claim for future loss of earnings, but we are not claiming that she lost any immediate employment." In April 1969 plaintiff was served an interrogatory which asked, "Are you making any claim for loss of wages or earning capacity as a result of the accident alleged in your complaint?" Plaintiff Campaign answered, "No." In December 1969 plaintiff filed an



amended complaint increasing her general damage claim and stating that she now had a permanently stiffened left knee. During the February 1971 jury trial, Campaign offered evidence of her prospective employment at the time of the accident. Safeway objected on the grounds that loss of earnings was no longer an issue in the case. Ultimately the trial court allowed plaintiff to introduce evidence that before the July 1966 Safeway slip and fall she was studying real estate at home and intended to start work in a real estate office at \$75 a week in July 1966. The jury returned a \$75,000 verdict in favor of plaintiff. Safeway took the introduction of the wage loss up on appeal.

The court of appeal focused on the verified April 1969 interrogatory response when plaintiff declared she was not making a wage loss claim. "Prejudice to Safeway is apparent... Safeway acted reasonably in relying on pretrial discovery in the preparation of its case for trial... Safeway was genuinely surprised, and consequently unprepared to meet Campaign's claim for loss of earnings... when that issue was injected into the trial." (*Campaign* at p. 366.)

Learning points to keep in mind

• **Offensive Discovery:** From the standpoint of discovery propounded by plaintiffs, it is helpful that the interrogatories analyzed in *Saxena* were the Judicial Council of California Form Interrogatories, specifically 12.1 and 15.1. Defendants in personal injury cases commonly provide nonresponsive, evasive and incomplete answers to the 12, 13, 14, 15 and 16 series of the form interrogatories. The answers provided by defendant Goffney are common. Justice Ikola wrote, "Goffney's interrogatory answers were incomplete and evasive, and clearly merited the issuance of an order compelling further answers and an award of monetary sanctions." (*Saxena* at 334.) A short meet and confer letter to defense counsel citing Justice Ikola should be enough to

induce defense counsel to provide supplemental responses. If you are forced to file a motion to compel, you are likely to get the sanctions Justice Ikola suggested.

• **Defensive discovery:** As plaintiffs' attorneys, when we are answering discovery it is important to keep both *Saxena* and *Thoren* in mind. Trial is stressful enough. The last thing any plaintiff's trial attorney needs is more stress and drama. The initial burden of proof evidence exclusion generally hurts a plaintiff more than it hurts a defendant. This is especially true when the subject is witness exclusion.

When preparing to answer form interrogatory 12.1, which calls for identification of all individuals who witnessed, made statements or overheard statements at the scene, take care and make sure your answer is complete. From a best practices standpoint, an answer that refers to "plaintiff and defendant and the individuals identified in the police report" should be avoided. Take the time to put the names of each individual person identified in the police report itself into the answer. Also include the name of the officer who prepared the report and the supervising officer who approved the report, if known.

The learning point from *Campaign* is to amend your discovery responses which no longer accurately describe the plaintiff's claims. In *Campaign*, when the plaintiff's injury worsened, the prior interrogatory response should have been amended, and Ms. Campaign should have been offered up for a limited deposition on the subject of her wage loss. Making the change to the interrogatory and offering the plaintiff for another deposition, will effectively remove an argument that the defendant was prejudiced and unprepared to defend the new wage loss claim at trial.

Responding to or making the motion to exclude evidence

If you are in trial arguing one side or the other of the motion to exclude evidence at trial not produced in discovery,

keep the following principles in mind. *Thoren* applies to the circumstance where a party answering a properly crafted interrogatory calling for witnesses makes a straightforward (non-evasive) answer which leaves out a witness which they obviously were aware of at the time the question was responded to. If a party can make a showing that they did not know of the witness until after the interrogatory was answered, the requirement of giving a willfully false, i.e., intentionally not true answer is not met and the motion to exclude should be denied. (*Biles* at p. 1328.) Further, if a party can argue that the answer was technically true but evasive or incomplete, such as "see the names in the medical records" or "corporate employees of defendant," the motion to exclude should also be denied, because the only remedy available for evasive or incomplete discovery responses is to file a motion to compel. (*Saxena* at p. 322.)

In *Thoren*, the fact that the excluded witness, Clubb, had taken pictures at the accident scene the day after the injury was revealed at plaintiff's deposition. Meaning the defendant had knowledge of his existence on the scene with a camera the day after the accident. However, the trial judge's ruling excluding the witness's observations at the accident scene focused on the willfully false interrogatory response, not on the question of whether the defendant was prejudiced. Based on the facts of *Thoren*, a party opposing an exclusionary motion cannot necessarily rely on the fact that the moving party was aware of the evidence from an independent discovery tool.

Saxena applies to the circumstance where an answer calling for witnesses is technically true but is evasive or incomplete. For example, changing the facts in *Thoren*, if the attorney had responded to the question by identifying, "All witnesses identified in the OSHA report which is equally available to the defendant" and Mr. Robert B. Clubb's name was in fact in the OSHA report; then the answer would be technically true, but also evasive and



incomplete. Here the burden is on the propounding party to file a motion to compel before trial and the trial judge does not have authority to make an evidentiary sanction unless a prior discovery order was violated. (§ 2030.300(e)).

Attorney work product may come into play when making or opposing a motion in limine to exclude evidence not produced in discovery. For example, an interrogatory calling for a list of all persons with relevant facts is proper, but an interrogatory calling for a list of all witnesses a party intends to call at trial is subject to a qualified work product privilege. (See *City of Long Beach v. Superior Court*, (1976) 64 Cal.App.3d 65.) Further, Judicial Council form interrogatories 12.2 and 12.3, which request production of a list of potential witnesses actually interviewed and their statements, may also call for work product depending on the circumstances. (See *Nacht & Lewis Architects, Inc. v. Superior Court*, (1996) 47 Cal.App.4th 214, and *Coito v. Superior Court*, (2012) 54 Cal.4th 480.)

Charts and diagrams, derived from evidence, which contain an attorney's evaluation or interpretation of evidence or facts may also be qualified work product, and not be subject to production in discovery. (See *The Rutter Group, Cal. Prac. Guide Civ. Pro. Before Trial*, Ch. 8C-4, [8:218].)

Conclusion

Being diligent about our obligations to disclose the evidence that supports our cases does nothing more than help each side make a complete evaluation of the case prior to trial. Generally that is a good thing for the plaintiff who has the burden of proof. Discovery calling for all witnesses and or documents that support a claim or defense cannot be taken lightly. Even though California specifically prohibits so-called "continuing interrogatories," (CCP, § 2030.060(g)) and places the burden on the propounding party to serve supplemental interrogatories (CCP, § 2030.070); the best practice for plaintiffs is to be vigilant and update

your discovery responses whether or not you are asked to do so by the defendant. This practice will lessen the chances of unnecessary admissibility disputes arising at trial. Further, you will be in a better position to object if the defendant attempts to introduce any undisclosed evidence or make any claims contrary to their discovery responses.



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