

A CIVIL LITIGATOR'S EDUCATION IN DISCLOSURE DUTIES



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The Cast:

Carol Candid, divorce lawyer
Susan Stonewall, real estate litigator and
 Candid's divorce client

The Scene:

Candid's law office

Candid	Good morning, Susan! It's just great to see you again! My goodness, how long has it been?
Stonewall	The last time we saw each other was the day we graduated from law school. Don't you remember the graduation party?
Candid	Well, vaguely. Then twenty years go by and you've become the best – or at least the most aggressive – real estate litigator in the county.
Stonewall	Carol, my dear, the most aggressive real estate litigator IS the best real estate litigator – in this county or in any other county. You've just never had that killer instinct, have you?
Candid	I guess not.
Stonewall	But somehow you became the best-respected divorce litigator in the county, despite a notable absence of bloodlust. It just amazes me.
Candid	I settle what I can, and try what I must.
Stonewall	The other thing that amazes me is the fact that I'm here in your office needing your services. I thought Harold and I would last forever.
Candid	Is there any way the marriage can be saved?
Stonewall	Nope. So let's rend it asunder, shall we?
Candid	Alright.

Stonewall	<i>Stonewall's cell phone rings. Stonewall opens the phone, telling Candid: I'm sorry, Carol. This will only take a minute.</i> <i>Stonewall speaks into phone: Okay, Barry. What's up?</i> <i>After listening, Stonewall replies: No way, Barry! Don't give plaintiff's counsel a single document! If that nincompoop doesn't know how to phrase a document inspection demand, he doesn't deserve to receive any discovery responses! That idiot demanded a production of "writings" without referencing Evidence Code section 250 or otherwise defining the term "writings." Well, in that case I choose to interpret the term "writings" to refer only to documents made in "handwriting." Since none of the documents was made in handwriting, he gets nothing!</i> <i>Stonewall closes the phone.</i>
Candid	Wow, you take a pretty hard line approach to discovery responses, don't you?
Stonewall	I'm proud to report that in my law firm discovery avoidance is a well-honed skill. Frankly, we're brilliant at it. We discuss avoidance techniques so frequently that we've nicknamed our discovery responses "Hard Ball," or simply "HB," and we refer to our discovery department the "HB Department." Every lawyer joining our firm is required to complete a three-hour training class with HB Department Head Barry Blackwell, a nationally-recognized discovery avoidance genius. Barry is known in the legal community as "Black Hole Blackwell" because serving a discovery request on my law firm is like sending it into a black hole.
Candid	Well, Susan, you're going to discover a completely different culture regarding discovery in the family court. Here's a packet containing family law disclosure statutes and cases. Please sign at the bottom to acknowledge your receipt of the packet.

Stonewall	Hey, it looks like there's some "cover your assessment" going on here, eh, Carol?
Candid	You bet there is. I never want to get into trouble, either with an angry judge or with a client who's been sanctioned for improper disclosure. That's the reason I give this disclosure packet to every client, and require every client to acknowledge receipt of the packet in writing.
Stonewall	I don't like the way this is sounding. In my view, requiring a party to share information with her litigation adversary is like requiring FDR to share his D-Day plans with Hitler.
Candid	Susan, you are definitely in need of some serious education regarding family law disclosure duties.
Stonewall	Well, let's start. Give me a quick overview tour of this disclosure packet, will you?
Candid	I'd be happy to. OK if I refer to "Family Code sections" simply as "Sections?"
Stonewall	Okay.
Candid	Sections 721(b) and 1101(e) describe interspousal fiduciary duties, and Sections 2100 through 2106 describe specific disclosure duties. Section 721(b) makes spouses "subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." Section 1101(e) requires each spouse to "act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable."
Stonewall	Okay. So those are the general interspousal fiduciary duties.
Candid	Correct. You'll notice that on the last pages of the handout I've summarized five cases: <i>Haines, Delaney, Brewer, Rossi and Feldman</i> .
Stonewall	You're being careful. I respect that.
Candid	Once I've described the sanctions that family law judges impose for disclosure violations, you'll see why care is needed. Let's put case law on hold for now and review more statutes. Divorce lawyers have nicknamed a preliminary declaration of disclosure a "PDD," and have nicknamed a final declaration of disclosure a "FDD."
Stonewall	Pronounced like the "Fudd" in "Elmer Fudd"?

Candid	Sure. Section 2105(a) requires the spouses to exchange FDD's and current income and expense declarations. Section 2105(b) requires a FDD to include: <ul style="list-style-type: none"> • All material facts and information regarding the characterization of all assets and liabilities; • All material facts and information regarding the valuation of all community property assets; • All material facts and information regarding the amounts of all community obligations; and • All material facts and information regarding the earnings, accumulations, and expenses of each party.
Stonewall	It's my understanding that a PDD lists community assets and obligations, but needn't value them, whereas a FDD both lists and values community assets and obligations. Is that the distinction?
Candid	Basically, yes.
Stonewall	And I understand that Harold and I can waive the exchange of FDD's, electing to merely exchange PDD's instead. Do I have that right, too?
Candid	No. What you've stated is a common misunderstanding. Section 2105(d)(3) conditions FDD waiver upon each spouse's having disclosed "all material facts and information regarding . . . the <i>valuation</i> of all [community] assets . . . and the <i>amounts</i> of all [community] obligations."
Stonewall	So, in effect, spouses can waive the FDD exchange only by exchanging FDD's?
Candid	Pretty much.
Stonewall	In civil discovery, each party must specifically <i>request</i> information in order to receive it. From the way you've described it, family law discovery is the opposite – each party has an affirmative duty to <i>volunteer</i> all material information.
Candid	Exactly. And the disclosure duty is a <i>fiduciary</i> duty.
Stonewall	Hmm. You know, Carol, this reminds me of something. I've always been impressed by the dramatic impact that a summary judgment motion has on litigation information exchange. When propounding discovery, Plaintiff first has to guess what information is important to Defendant's arguments, then has to send discovery requesting that specific information. Defendant, naturally, does everything possible to hide the ball. But let Plaintiff file a summary judgment motion, you'll be amazed how quickly the picture changes. Now Defendant is falling all over itself to detail its arguments and disclose all information supporting those arguments. Fear of failure is a powerful incentive to information exchange.
Candid	I noticed the same thing when I did civil litigation back in the day. Family law information exchange has taken a radically different path than civil discovery did, by placing the obligation on each party to <i>provide</i> information instead of requiring each party to <i>seek</i> the information.

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Stonewall	I guess it makes sense that I should be obligated to disclose all information about community property. After all, since Harold and I jointly own the asset we should be jointly entitled to the information. And the same with community obligations. But I don't have to tell him much about assets I own alone or had before marriage, do I?
Candid	Yes, under the family law disclosure statutes you have to tell him about everything you own or owe, even if he does not own any part of it. Disclosure duties apply to separate property as well as to community property. Section 2102(a) requires each party to provide the other an "accurate and complete disclosure of <i>all assets and liabilities in which the party has or may have an interest or obligation</i> and all current earnings, accumulations, and expenses." The Section 2101(a) definition of "asset" isn't limited to community assets, and the Section 2101(f) definition of "liability" isn't limited to a community liabilities. Also, if he makes any claim to any of your separate property, you must disclose the same information as if you agreed that it was community property.
Stonewall	So once I've sent Harold a FDD and a current income and expense declaration, I've fulfilled my duties, right?
Candid	Not exactly. Both of you have a continuing disclosure duty. If anything changes after you send him your FDD and income and expense declaration, Section 2102(a)(1) requires you to send Harold an "immediate, full, and accurate update or augmentation" to your previous disclosures.
Stonewall	Wow. Looks like I have to tell him <i>everything!</i> So, what happens if I don't play by all these rules? You know that playing by the rules has never been my strong suit, Carol. Will the court just slap me on the wrist?
Candid	I'm afraid it's worse than that. If you fail to properly disclose, Family Code 2107(c) requires the court to impose money sanctions against you in an amount sufficient to deter repetition of your conduct and also order you to pay Harold's attorney's fees and costs, unless it finds that you acted with substantial justification or that other circumstances make imposition of the sanction unjust. We would have to have some pretty good excuse for not disclosing, though.
Stonewall	It sounds like family law discovery disputes carry a presumption that the at-fault party will pay sanctions. The legislature must have copied and pasted that language from several CCP discovery sanctions statutes I'm familiar with.
Candid	Yeah – (<i>chucking</i>) – I'll just bet you're familiar with those!
Stonewall	Ha ha. The discovery department is like home to me. My firms files or defends an average of three discovery motions every week. It's all part of the game.

Candid	Yeah, but that's the point – in family law, we aren't supposed to play games. The legislature has even said that the purpose of all of these rules is to encourage settlement and be sure both parties know everything before they settle or litigate the case. Your wimpy little CCP sanctions are nothing compared with our Family Code sanctions.
Stonewall	What do you mean?
Candid	Have you ever had a civil judgment set aside due to a discovery violation?
Stonewall	Not a chance; <i>res judicata</i> rules! Once judgment is entered, any dirty tricks played along the way are irrelevant.
Candid	Well, guess what? Section 2122(f) authorizes the court to set aside a family law judgment if a party has violated a disclosure duty.
Stonewall	No way, Carol! Wow, that's frightening.
Candid	Way! Not only that, but Section 1101(h) provides that when a fiduciary duty breach "falls within the ambit of Section 3294 of the Civil Code" available sanctions "shall include . . . an award to the other spouse of <i>100 percent . . . of any asset undisclosed or transferred in breach of the fiduciary duty.</i> " That means that if we fail to disclose a community asset, Harold can end up owning the whole asset instead of just half, to punish you for playing hide-the-ball.
Stonewall	You're kidding! Has that ever actually happened?
Candid	You bet it has. Your disclosure packet includes a copy of <i>In re Marriage of Rossi</i> (2001) 90 Cal.App. 4th 34. Read the case. The Wife won a \$1.3 million community property lottery jackpot, but breached her duty to Husband by trying to hide the fact that she had won. When Husband found out about the jackpot, he filed a motion asking for the entire amount to be awarded to him under Section 1101(h). The trial court granted his motion and the court of appeal affirmed. She had to give him the whole \$1.3 million.
Stonewall	Good grief!
Candid	Your disclosure packet also includes a copy of <i>In re Marriage of Feldman</i> (2007) 153 Cal.App.4th 1470. Read that case, too. Husband violated his disclosure duties, and even though Wife wasn't harmed by his violations because she found out about all of the undisclosed items, the trial court ordered Husband to pay a \$250,000 sanction for his disclosure duty violations. The court of appeal affirmed.
Stonewall	Yikes! These family law judges of yours are brutal!
Candid	Don't blame the judges; they are just enforcing the statutes. The legislature must have gotten tired of "trial by ambush" in divorce cases, and enacted the statutes to be sure that divorcing people didn't play games in the divorce case. I don't want to be the attorney whose client gets hit with a <i>Feldman</i> motion, so take these disclosure forms and fill them out. I want you to be forthright, detailed, and exhaustive.
Stonewall	I will. You've made a believer out of me – but Black Hole Blackwell will never believe it.