ONE HOUR CLE CREDIT

NRCP 16.1(A): IN FULL DISCLOSURE

BY MATTHEW DURHAM, ESQ.

Every litigator must prepare initial disclosures. In fact, many litigators prepare them so routinely that they give little thought to the exact nature or extent of the information they are required to disclose. Litigators may be tempted to disclose the bare minimum, not realizing that their understanding of the bare minimum is much less than what is required. They may also be tempted to indulge in gamesmanship with respect to their disclosure obligations. Litigators should avoid these temptations.[1]

The signature of an attorney on a disclosure document constitutes a certification that it is complete and correct as of the time it is made.[2] If that certification is violated, the court must impose an appropriate sanction unless substantial justification for the violation is shown.[3] In light of this, it is critical that litigators understand their disclosure obligations and fulfill them.

Initial disclosures in Nevada state court actions are governed by NRCP 16.1(a). Rule 16.1(a)'s federal counterpart is FRCP 26(a). The purpose of these rules is to "accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information."[4] Proper initial disclosures can reduce the amount of additional discovery required by the parties, thereby saving money for clients and time for litigators.[5]

The purpose of this article is to provide a refresher course on the disclosure requirements imposed by Rule 16.1(a). We will look to both Nevada and federal law for guidance.[6] We will also identify several key differences between Rule 16.1(a) and FRCP 26(a).

Timing of Disclosures

Consistent with their purpose of accelerating the exchange of basic information, Rule 16.1(a) disclosures must be made without awaiting a discovery request. Generally, they must be made at or within 14 days after the Rule 16.1(b) conference (otherwise known as the early case conference), which must be held within 30 days after filing of an answer by the first answering defendant. However, a different time may be set by stipulation or court order.[7]

During the early case conference a party may object that initial disclosures are not appropriate in the circumstances of the action. If such an objection is made, it must be stated in the Rule 16.1(c) case conference report. In ruling on the objection, the court

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must determine what disclosures, if any, must be made, and set the time for the disclosures.[8]

Any party served or otherwise joined after the early case conference must make its initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.[9]

Content of Disclosures

Witnesses

Although litigators would love to keep under wraps every witness harmful to their client's case, Rule 16.1(a) does not allow it. The rule requires more than disclosing only the witnesses a party intends to call to support its case. Parties must disclose "each" witness known to it to have discoverable information, "including for impeachment or rebuttal, identifying the subjects of the information."[10]

This differs significantly from FRCP 26(a). FRCP 26(a) requires the disclosure of only those witnesses "that the disclosing party may use to support its claims or defenses," and does not require the disclosure of witnesses who will be used solely for impeachment.[11] Thus, under FRCP 26(a), there is no obligation to disclose witnesses harmful to the disclosing party's case.[12] Under Rule 16.1(a), there is.

In addition to the name of each witness, Rule 16.1(a) requires the disclosure of their "address and telephone number," if known. The rule does not state whether personal contact information is required or whether business contact information will suffice. Organizational parties may wish to disclose only the business address and work telephone number of low-level employee witnesses, rather than their personal contact information, hoping to deter or make it more difficult for opposing counsel to contact them. While the Nevada Supreme Court has not addressed whether disclosing only business contact information would satisfy Rule 16.1(a), federal courts have held that it does not satisfy FRCP 26(a).[13] They have held that the employer is required to provide the personal address and telephone number of each employee disclosed. This is so the employees can be contacted in connection with the litigation, for purposes of being interviewed, for being deposed or for conducting background investigations.[14]

This does not hold true, however, for managing-speaking agents of organizational parties. Nevada

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Rule of Professional Conduct 4.2 (commonly known as the no-contact rule) prohibits lawyers from communicating about the subject of the representation with a "person" the lawyers knows to be represented by another lawyer in the matter.[15] The Nevada Supreme Court has held that the no-contact rule should be interpreted according to the managing-speaking agent test.[16] Under this test, the represented "person" in litigation involving corporations includes "those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation."[17] Thus, under NRCP 4.2, lawyers are prohibited from communicating with the managing-speaking agents of represented parties.

In light of this prohibition, the best practice relative to the disclosure of managing-speaking agents as witnesses is to identify their address and telephone number as that of counsel for the organization. This will put the other parties on notice that the individual is one whom the disclosing party believes to be a managing-speaking agent and one whom counsel for the other parties should not contact directly.

Documents

Just as Rule 16.1(a) requires the disclosure of "each" witness with discoverable information, it also requires the disclosure of "all" discoverable documents, data compilations and tangible things that are in the disclosing party's possession, custody or control.[18] The rule does not limit the disclosure obligation to only those documents the disclosing party "may use to support is claims or defenses," as does FRCP 26(a).[19] Instead, Rule 16.1(a) requires the disclosure of all discoverable documents, regardless of whether they be helpful or harmful.

Rule 16.1(a) requires the disclosing party to "provide copies or a description by category and

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location" of the discoverable documents. Thus, the initial disclosure of documents need not include production of the documents themselves; nor need it contain an itemized list of each document. Rather, the disclosure must simply describe and categorize the nature and location of the documents.

As a practical matter, if the disclosed documents are not voluminous, their production with the initial disclosures will save the parties the time and effort of requesting the documents (either informally or through formal written discovery) and responding to such requests. On the other hand, if the documents are voluminous, one may wish to save one's client the costs associated with copying and distributing the documents. In such a case, Rule 16.1(a)'s purpose of accelerating the exchange of basic information and eliminating the paperwork involved in requesting such information can be effectuated by the disclosing party making the documents available for inspection and copying by the other parties.

It should be noted that if one decides to provide a description by category and location of the documents, rather than producing the documents themselves, the description must be specific enough to enable opposing parties to make an informed decision concerning which documents they may need to examine and to frame their document requests in a manner "likely to avoid squabbles resulting from the wording of the requests."[20]

Damages

Rule 16.1(a) requires parties to disclose a computation of any category of damages claimed by the disclosing party.[21] Although the rule specifically states "any" category of damages, the drafter's notes to Rule 16.1 state that this rule "is intended to apply to special damages, not general or other intangible damages."[22] This differs from FRCP 26(a), which applies to all types of damages, including special and general.[23]

Under Rule 16.1(a), disclosure of the computation alone is insufficient. The rule also requires the disclosing party to make available for inspection and copying all non-privileged, non-protected documents or other evidentiary matter on which each computation of damages is based, just as if there had been a formal request for production under NRCP 34.

Parties sometimes mistakenly believe that Rule 16.1(a) does not require them to provide a computation of their alleged damages if they intend to produce a damages expert report later in the case. Future expert analysis does not relieve a party of its obligation to provide information reasonably available regarding its computation of damages.[24] Nor is a party excused from making its disclosures because it has not fully investigated the case.[25] A party should provide its computation of damages in light of the information currently available to it in sufficient detail so as to enable the other parties to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery. [26]

Insurance

Although insurance information is ordinarily inadmissible at trial, Rule 16.1(a) requires that any liability insurance agreement that may be used to satisfy a potential judgment be disclosed and made available for inspection and copying as under NRCP 34.[27] The purpose behind this requirement is to allow early evaluation of the claim and, thus, to facilitate settlement.

The disclosure obligation applies only to an "insurance agreement under which a person carrying on an insurance business" may be liable. Thus, it does not require disclosure of private indemnity or surety agreements. Nor does it require the disclosure of the insured's application for insurance coverage, unless it is attached to and is part of the "insurance agreement."[28]

Rule 16.1(a) requires not only the disclosure of the insurance agreement itself, but also "any disclaimer or limitation of coverage or reservation of rights" under such agreements. This differs from FRCP 26(a), which requires the disclosure of only the "insurance agreement."[29] Reservation of rights letters to the insured are not insurance agreements and, thus, need not be disclosed.[30]

Conclusion

This review of Rule 16 reminds us not only of Rule 16.1(a)'s requirements, but also of its utility. Proper initial disclosures can start a case off on the right track and set the stage for an early resolution. Improper or incomplete initial disclosures, on the other hand, can lead to distrust between counsel, costly and time-consuming discovery battles and prolonged litigation. The choice is yours. ■

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1 Fed. R. Civ. P. 26(a), advisory comm.'s note, 1993 amend. ("Litigants should not indulge in gamesmanship with respect to the disclosure obligations.").
2 Nev. R. Civ. P. 26(g)(1).
3 Nev. R. Civ. P. 26(g)(3).
4 Fed. R. Civ. P. 26(a), advisory comm.'s note, 1993 amend.
5 *See id.* ("[T]he experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved.").
6 See *Exec. Mgmt., Ltd., v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (Federal cases "interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.")
7 Nev. R. Civ. P. 16.1(a)(1).
8 *Id.*
9 *Id.*
10 Nev. R. Civ. P. 16.1(a)(1)(A).
11 Fed. R. Civ. P. 26(a)(1)(A)(i).
12 Fed. R. Civ. P. 26(a), advisory comm.'s note,, 2000 amend.
13 *Thurby v. Encore Receivable Mgmt., Inc.,* 251 F.R.D. 620,621-22 (D. Colo. 2008); Dixon v. Certainteed Corp., 146 F.R.D. 685, 698 (D. Kan. 1996) (organizational party's Rule 26(a)(1) obligation not satisfied by disclosing as its employees' address and telephone number the organization's business address and phone number, unless organization knows of no other address and number).
14 See Thurby, 251 F.R.D. at 622; *Biltrite Corp v. World Road Markings,* Inc. 202 F.R.D. 359, 362 (D.Mass. 2001).
15 The only exceptions is where the lawyer has the consent of the lawyer of the represented person, or where such communication is authorized by law or a court order.
16 *Palmer v. Pioneer Inn Associates, Ltd.,* 118 Nev. 943, 960 (2002) (analyzing NRCP 4.2's predecessor, Supreme Court Rule 182).
17 *Id.* quoting *Wright by Wright v. Group Health Hospital,* 691 P.2d 564 (Wash. 1984).
18 Nev. R. Civ. P. 16.1(a)(1)(B).
19 Fed. R. Civ. P. 26(a)(1)(A)(ii).
20 Fed. R. Civ. P. 26(a), advisory comm.'s note, 1993 amend.
21 Nev. R. Civ. P. 16.1(a)(1)(C).
22 Nev. R. Civ. P. 16.1(a)(1)(C), drafter's note, 2005 amend.
23 *See City & County of San Francisco v. Tutor-Saliba Corp.,* 218 F.R.D. 219, 221 (ND Cal. 2003).
24 *See CCR/AG Showcase Phase I Owner, LLC v. United Artists Theatre Circuit, Inc.,* 2010 WL 1947016, *6 (D. Nev. 2010).
25 Id. at *4; Fed. R. Civ. P. 16.1(a)(1).
26 City & County of San Francisco at 221; United Artists at *4.
27 Nev. R. Civ. P. 16.1(a)(1)(D).
28 *See.* advisory comm.'s note, 1993 amend.
29 Fed. R. Civ. P. 26(a)(1)(A)(iv).
30 *Excelsior College v. Frye,* 233 F.R.D. at 586.

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