



## Show me what you got

### MAJOR CALIFORNIA CIVIL PROCEDURE CHANGES WITH NEW MANDATORY DISCLOSURES (CCP § 2016.090)

Those California practitioners who like federal Rule 26 initial disclosures but have a mostly state-court practice are now in luck. Cases filed on or after January 1, 2024, in California are now subject to new mandatory initial disclosures. This is a test procedure, sunseting January 1, 2027 absent legislative extension. Code of Civil Procedure section 2016.090 lists the major changes created by Senate Bill 235. Mandatory disclosures do not apply universally. Small claims, family law, probate, Section 36 preference cases, and self-represented parties are not subject to Code of Civil Procedure section 2016.090 mandatory initial disclosures.

#### In full disclosure

What must be disclosed? Witnesses and documents. Code of Civil Procedure section 2016.090, subdivisions (a)(1)(A)-(D) contain the details. Witness disclosure requires full contact information including phone and email. The witness categories are broad: “everyone likely to have discoverable information, along with the subjects of that information, used to support claims, defenses, or that is relevant to the subject matter.” There are two exceptions: witnesses solely for impeachment and experts and consultants.

Document disclosure is similar: “A copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, or that is relevant to the subject matter of the action or the order on any motion made in that action, unless the use would be solely for impeachment.” (Code Civ. Proc., § 2016.090, subd. (a)(1)(B).) There are additional gifts: contractual agreements and insurance policies under which an insurance company or a person, as defined by Evidence Code section 175 (meaning any person or entity type), may be liable to satisfy a judgment or indemnify. (Code Civ. Proc., § 2016.090, subds. (a)(1)(C)-(D).) This includes documents “regarding whether any insurance carrier is disputing the agreement’s or policy’s coverage of the claim involved in the action.” (Code Civ. Proc., § 2016.090, subd. (a)(1)(D).) The contractual and insurance agreement requirements mean stacked layer policies and contractual indemnification provisions from multi-defendant (think construction and trucking) cases have to be turned over.

The witness information and documents are due within 60 days of making the demand for mandatory disclosure. What about objections? They are not addressed. Will folks make them? Probably. Will there be motion practice? Yep. And through a break-in period we’ll reach an accepted practice. The disclosures must be verified by written declaration by the party or party’s authorized representative, or simply signed by the party’s counsel. (§ 2016.090(a)(5).) Expect most to be signed by counsel.

#### Mandatory means a demand after appearance

Mandatory disclosure is triggered by a demand. This means one has to be proactive, i.e., send out a Demand for Mandatory Disclosures under Code of Civil Procedure section 2016.090, to force the disclosure. This can be made after a party has appeared – answered, demurred, or moved to strike. Expect to receive a demand with the answer from defense firms who pay attention. What will a demand look like? The statute does not define it. A pleading making the demand and referencing the statute should suffice. While there’s no ongoing duty to supplement with new information like there is under the federal rule, one can make supplemental requests twice before trial setting and once after.


#### Tactical and practical matters

Why is this a big deal? Because, as Louis Pasteur said, “Chance favors only the prepared mind.” We want to move our cases quickly and judiciously and get our clients great outcomes. The statute change helps. But one has to be prepared. Planning early with one’s clients – before filing – to have this information ready to go will be important.

With any major change, don’t expect everyone to handle mandatory initial disclosures perfectly starting January 1, 2024. As a comparison, remember that the rule requiring expert files be turned over three days prior to a deposition went into effect in 2017. Some firms still seem to be having problems with turning over expert files in a timely fashion (although one might wonder whether this is incompetence, disorganization, or malfeasance – or some combination thereof).

With the mandatory disclosure change, expect some firms to be unaware, some to be disorganized, and some to play games. As for gameplay, the Legislature anticipated this and gave the new rules additional sanction teeth. The same Senate Bill 235 that put the mandatory disclosures into effect also increased discovery abuse sanctions from \$250 to \$1,000. (Code Civ. Proc., § 2023.050.) The statute change also explicitly gives the court discretion to require attorneys to report the sanction to the state bar in writing within 30 days. Will state courts suddenly start sanctioning like federal ones with this change? We see this as unlikely, but one can always dream...

It will be interesting to watch the legal landscape adapt to mandatory initial disclosures. Hopefully it will ease everyone’s discovery burden. But only time will tell.

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