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Show me what you got

Major California civil procedure changes bring mandatory disclosures (CCP § 2016)



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By Miles B. Cooper

The lawyer reviewed the material from defendants in the federal action. Rule 26 mandatory disclosures were wonderful. They kicked the case off and made federal cases much easier on the discovery front. Wouldn't it be wonderful if California state court had something similar?

It's here

Like federal Rule 26 disclosures? Lucky you! Starting with cases filed on or after January 1, 2024, California will implement mandatory initial disclosures. This is a test procedure, sunsetting January 1, 2027 without legislative extension. California Code of Civil Procedure § 2016.090 lists the major changes under 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 CCP § 2016.090 mandatory initial disclosures.

In full disclosure

What must be disclosed? Witnesses and documents. Code of Civil Procedure §§ 2016.090(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." (CCP § 2016.090(a)(1)(B).) There are additional gifts: contractual agreements and insurance policies under which an insurance company or a person, as defined by Evid. Code § 175 (meaning any person or entity type), may be liable to satisfy a judgment or indemnify. (CCP § 2016.090(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." (CCP § 2016.090(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. (CCP § 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 CCP § 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 this article being published in December 2023, there's an additional one-time consideration: if one has the option to wait until January 1, 2024 to file, consider the discovery advantages afforded by waiting a few weeks.

With any major change, don't expect everyone to handle it perfectly starting January 1, 2024. The rule requiring expert files be turned over three days prior to a deposition went into effect in 2017, and some firms are still having problems with it. With the mandatory disclosure change, expect some firms to be unaware, some to be disorganized, and some to play games. This was anticipated. The same Senate Bill 235 that put the mandatory disclosures into effect also increased discovery abuse sanctions from $250 to $1,000. (CCP § 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...

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Back to our lawyer. Thrilled to learn about state mandatory disclosures, the lawyer made sure the knowledge was spread throughout the firm so that folks would be ready to get their disclosures out and hopefully speed cases toward just resolution.

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