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Compulsory Initial Disclosures are Here to Stay in California: Now What?

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The California legislature's efforts to streamline the discovery process, promote transparency and fairness in civil proceedings, and reduce discovery abuse began in 2019, when California Code of Civil Procedure (C.C.P.) § 2016.090 was amended to provide for initial disclosures, but only if the parties stipulated to such an exchange. Unsurprisingly, the rule change had little impact, as very few parties agreed to make the exchange. In 2023, legislation was passed to make the exchange potentially involuntary—now every party to the action must make initial disclosures so long as any other party demands them.

When the new rule took effect on January 1, 2024, practitioners across the state expected that these sweeping changes would dramatically alter California's discovery landscape. And now, the experiment, originally set to sunset on January 1, 2027, was recently made permanent by Senate Bill 66, which became law in July. And yet no dramatic shift in discovery practices has occurred, and not a single judicial decision has given any guidance, leaving litigators navigating in largely uncharted territory. Why has seemingly nothing changed, and what's next?

The Basics: What CCP § 2016.090 Requires

In civil cases filed on or after January 1, 2024—except for small claims, family law, probate, and Section 36 preference cases—any party may serve a written demand for initial disclosures. Once that demand is served, all parties (unless self-represented) must provide the following initial disclosures within just 60 days, including the party that issued the demand:

1. The names and contact information of all persons likely to have discoverable information, and the subject of that information, that the disclosing party may use to support its claims or defenses, or that is relevant to the subject matter of the litigation, excluding impeachment-only witnesses and expert witnesses.

2. A copy, or a description by category and location, of all documents, ESI, 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 litigation, except for impeachment-only documents.
3. Contracts and insurance policies covering payment of judgment.

Disclosures must be based on the information "reasonably available" to the disclosing party, must be verified, and failure to comply may lead to mandatory sanctions of $1,000 under C.C.P. § 2023.050.

Sounds Like Federal Court – What's the Big Deal?

There are significant differences that make the California rule different:

Timing. Unlike in federal court, where initial disclosures are not required until after the Rule 26(f) conference, there is no requirement to meet and confer with the other parties before forcing initial disclosures in California. Parties may therefore be served with a demand before they have had a chance to meaningfully investigate their case, and yet the rule expressly states that lack of investigation is not an excuse for not making initial disclosures.

Objection? F.R.C.P. 26 provides a mechanism for a party to object that initial disclosures are not appropriate in the action. C.C.P. § 2016.090 is silent on objections.

Breadth. A party's disclosure duties under C.C.P. § 2016.090 are much broader than its federal counterpart. Under F.R.C.P. 26(a), parties only need to disclose information and materials that the disclosing party may use to *support* its claims or defenses. In California, parties subject to initial disclosures must disclose information and materials that are *relevant to the subject matter of the action*—meaning that parties must disclose information that is neutral or even harmful for their case, not just what helps them.

Last year, the rule change was met with questions. What will it mean for information to be "reasonably available" to the disclosing party, and what level of investigation must be completed? Will the rule's provision allowing for only a "description by category and location" of relevant documents be interpreted according to the 1993 Committee note to F.R.C.P. 26, which makes clear that the federal rule, at least, does not actually require the production of documents? What about objections—*can* they be made, and how?

Now What?

Nearly two years on, not a single judicial decision provides guidance. The likely culprits: burden and risk. The new rule is simply too uncertain, and too broad—litigants have little incentive to subject themselves to an early disclosure obligation that could possibly get them sanctioned for not having investigated their case sufficiently, or may require them to hand over harmful or sensitive documents within just 60 days, without a prescribed procedure for objection, and before the scope of the case has been clarified through motion practice. Uncertainty over the scope of disclosure and investigation obligations may be encouraging attorneys to simply stick with what they know.

But now that the rule is here to stay, litigants may become more willing to test the waters, and courts may be more eager to lend their interpretations to the rule. The rule's intention to avoid gamesmanship and deliberate obstruction of discovery is a welcome one—cases should not be won by gamesmanship or the withholding of tough documents and information in discovery. Litigants who have conducted substantial pre-suit investigation and are ready to make the required disclosures are in a good position to forge a speedier and more transparent path in their California cases, and hopefully a path to gaining more certainty from the judiciary, for everybody else.

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