



Unraveling SB 235:

A Significant Leap in Initial Disclosures for California Civil Actions (Cal. Code of Civ. Proc. § 2016.090)

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Senate Bill 235 (SB 235) went into effect on January 1, 2024, and has already begun to have a dramatic impact on discovery in civil cases. SB 235 was authored by Senator Thomas Umberg and signed into law by Governor Newsom on September 30, 2023. This legislation significantly alters initial disclosures in civil actions within the state.

As stated by Senator Umberg, the purpose of the law was to model the Federal Rules of Civil Procedure by revitalizing California's Code of Civil Procedure section 2016.090. Previously, section 2016.090 only required initial disclosures upon stipulation by all parties to the action followed by a court order. *Now, initial disclosures are required by all parties pursuant to a demand by any one party.*

Senator Umberg explained the intent behind the law in his legislative comments. Senator Umberg stated: "Discovery is a very important pretrial stage of a trial. It is the process of collecting information in preparation for trial, when both sides engage to collect facts, identify witnesses, and

evaluate a case. Unfortunately, the discovery process is often abused by parties, and especially those with more resources – irrespective of the merits of the matter. These abuses lead to disputes that have become increasingly common, expensive, and time consuming. Currently, California law does not condemn strongly enough that abuse of the discovery process will not be tolerated. SB 235 will reduce this discovery abuse by requiring certain initial disclosures to be mandatory and by changing the current suggested sanction to a mandatory \$1,000 minimum sanction imposed on lawyers that: fail to timely respond to a documents request, intend to cause unnecessary delay, and fail to meet and confer to resolve any dispute regarding the request."

While some attorneys who represent consumers and plaintiffs were initially concerned about the impact of the bill, it is these authors' opinion that the bill will only help to serve plaintiffs. The next sections of this article will delve deeper into the interpretation of SB 235, its practical implications, and comparisons with federal initial disclosure norms. As laws evolve, so must our understanding, and through this article, we aim to provide an insightful discourse on this pivotal piece of legislation. We highly recommend that plaintiffs issue demands under section 2016.090 as part of initial discovery directed to defendants.

Interpreting the Impact: Diving Deeper into SB 235

To understand the impact of SB 235 on California's civil actions, it's crucial to examine the essence of the alterations it institutes. At its core, the law mandates that every party involved in a civil action must adhere to newly defined disclosure prerequisites.

Unlike the 30 days to respond to standard discovery requests or the 45 days under prior section 2016.090, the new law requires responses within 60 days. Any party to the action can demand disclosures, which compels all parties to make such disclosures. Despite this extra time, Defendants can no longer hide behind objections or evasive responses. Instead, all parties must disclose critical information.

First, section 2016.090(a)(1)(A) requires the disclosures of the names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects 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 action or the order on any motion made in that action, unless the use would be solely for impeachment. This section does not require disclosure of expert witnesses under Code of Civil Procedure section 2034.010.

Second, section 2016.090(a)(1)(B) requires the production of "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."

Third, section 2016.090(a)(1)(C) and 2016.090(a)(1)(D) require the production of any insurance policy or other contractual agreement to indemnify or reimburse.

Notably, section 2016.090(a)(2) states that a party is not excused from making its initial disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. This section also does not apply to litigants in pro per.

Issuing a Demand under SB 235

A demand for initial disclosures should largely mirror the language of the statute. Here is the language of the CCP § 2016.090 demand that my firm sends based on the new rules:

"TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs demand that all parties in this action, within 60 days of this demand, make the following initial disclosures pursuant to Code of Civil Procedure section 2016.090:

(A) The names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects 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 action or the order on any motion made in that action, unless the use would be solely for impeachment. The disclosure required by this subparagraph is not

required to include persons who are expert trial witnesses or are retained as consultants who may later be designated as expert trial witnesses, as that term is described in Chapter 18 (commencing with Section 2034.010) of Title 4 of Part 4. Plaintiffs will not accept as a response a broad reference to the medical chart. If a party currently employs a witness or a party represents a witness and has the ability to produce that witness for deposition and trial by way of notice and not a subpoena, Plaintiff will accept the name of the witness without the contact information. However, Plaintiffs demand that for any former employees where a party does not have the ability to produce that employee for deposition and trial, that the party provide the last known addresses, telephone numbers, and email. (See also *Puerto v. Superior Court* (2007) 158 Cal.App.4th 1242 ["Nothing could be more ordinary in discovery than finding out the location of identified witnesses so that they may be contacted and additional investigation performed."].)

(B) 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.

(C) Any contractual agreement and any insurance policy under which an insurance company may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Pursuant

to Code of Civil Procedure section 2016.090(a)(1)(C) and *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 739, Plaintiffs will not accept simply the information coverage in this action or solely the declarations page. Plaintiffs demand that Defendants produce the entire insurance policy.

(D) Any contractual agreement and any insurance policy under which a person, as defined in Section 175 of the Evidence Code, may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Only those provisions of an agreement that are material to the terms of the insurance, indemnification, or reimbursement are required to be included in the initial disclosure. Material provisions include, but are not limited to, the identities of parties to the agreement and agreement, the nature and limits of the coverage, coverage, and whether any insurance carrier is disputing the agreement's or policy's coverage of the claim involved in the action.

Pursuant to Code of Civil Procedure section 2016.090(a)(2), each party shall make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its initial disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. Pursuant to Code of Civil Procedure section 2016.090(a)(5), these initial disclosures must be verified in a written declaration by each party's counsel.

Should any party not fully comply with these initial disclosures,

Plaintiffs intend to do the following: 1) move to compel compliance and request monetary sanctions; 2) move to exclude at trial any evidence, documents, or witnesses not produced in the initial disclosures."

The Penalties for Refusing to Follow SB 235

At first blush, the penalties seem light. The penalties under section 2023.050 were raised from \$250 to \$1,000 against any party or attorney who fails to timely respond to a documents request, intend to cause unnecessary delay, and fail to meet and confer to resolve any dispute regarding the request.

However, similar to Federal Rule of Civil Procedure section 26, the impact of Senate Bill 235 may be felt more at trial. While there is no specific section that discusses exclusion of undisclosed witnesses or documents at trial, the fact that there is now such a clear legislative scheme mandating disclosure of relevant documents and witnesses would strongly support any motion *in limine* to exclude previously undisclosed witnesses and documents from trial.

Indeed, in our demands, we include the following language: "Should any party not fully comply with these initial disclosures, Plaintiffs intend to do the following: 1) move to compel compliance and request monetary sanctions; 2) move to exclude at trial any evidence, documents, or witnesses not produced in the initial disclosures."

Ensuring that the Plaintiff's Attorney Follows SB 235

Of course, by issuing a demand, the plaintiff's attorney must also make

disclosures. But, again, given that most discovery is produced by defendants, the bill overall is extremely helpful for plaintiff attorneys.

Indeed, while SB 235 has nearly the same impact as Federal Rule of Civil Procedure section 26 for Defendants, it is not nearly as onerous for plaintiffs. Specifically, there is no requirement that the plaintiff provide a computation of each category of damages, such as in FRCP 26(1)(A)(iii).

Also, given that we can decide when to file the action, we will naturally have more time to identify documents and witnesses for disclosure. In most cases, we will also have less to disclose.

Nonetheless, it is important for the plaintiff practitioner to ensure that he/she/they is ready to disclose all of the contact information (including email addresses) for all witnesses and produce those relevant documents.

For witnesses, the disclosure also requires the "subjects of information." For medical providers, the plaintiff-side attorney is responsible for identifying who she realistically believes she will call at trial. For treating providers, we intend to state: "*This witness is expected to testify regarding the nature, extent, specifics, outcome, complications, and other issues as to medical care and treatment provided to Plaintiff.*"

The plaintiff attorney also needs to identify all family members, friends, supervisors and others who will provide testimony on damages. For subject of information we intend to mirror the jury instruction on damages and state the following: "*This witness is expected to testify regarding Plaintiff's damages, including*

physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress, and economic damages." For wrongful death actions, we intended to include the following: *"This witness will testify as to the loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, and financial support of Plaintiff."*

Unlike standard discovery responses, section 2016.090(a)(5) does not require verification by a client but rather a declaration by the party's counsel.

SB 235 and the Future of Civil Litigation in California

In summary, Senate Bill 235 marks a milestone in California's civil law landscape, introducing monumental changes to the initial disclosure practices in civil litigation. By mandating new, extensive disclosure obligations and streamlining the litigation process, SB 235 augments the status quo, edging California's civil laws closer to the Federal Rules of Civil Procedure.

The implications of SB 235 stretch beyond procedural changes, carrying the potential to reshape the dynamics of civil actions in California. The law's commitment to transparency, equity, and thoroughness is expected to bolster trust among parties and contribute significantly to the efficiency of the State's judicial system.

The comparison with federal disclosure norms underscores the forward-thinking approach of SB 235. As local laws increasingly align with federal jurisprudence, legal practitioners are afforded the benefits of a cohesive and unified legal platform. This encourages progressive adaptation in a constantly evolving legal landscape.

SB 235, through its far-reaching implications and progressive tenets, entails a watershed moment for California's civil procedures. Both practitioners and parties alike can look forward to a more equitable, transparent, and efficient future for civil proceedings in California based on these new initial disclosure rules.



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