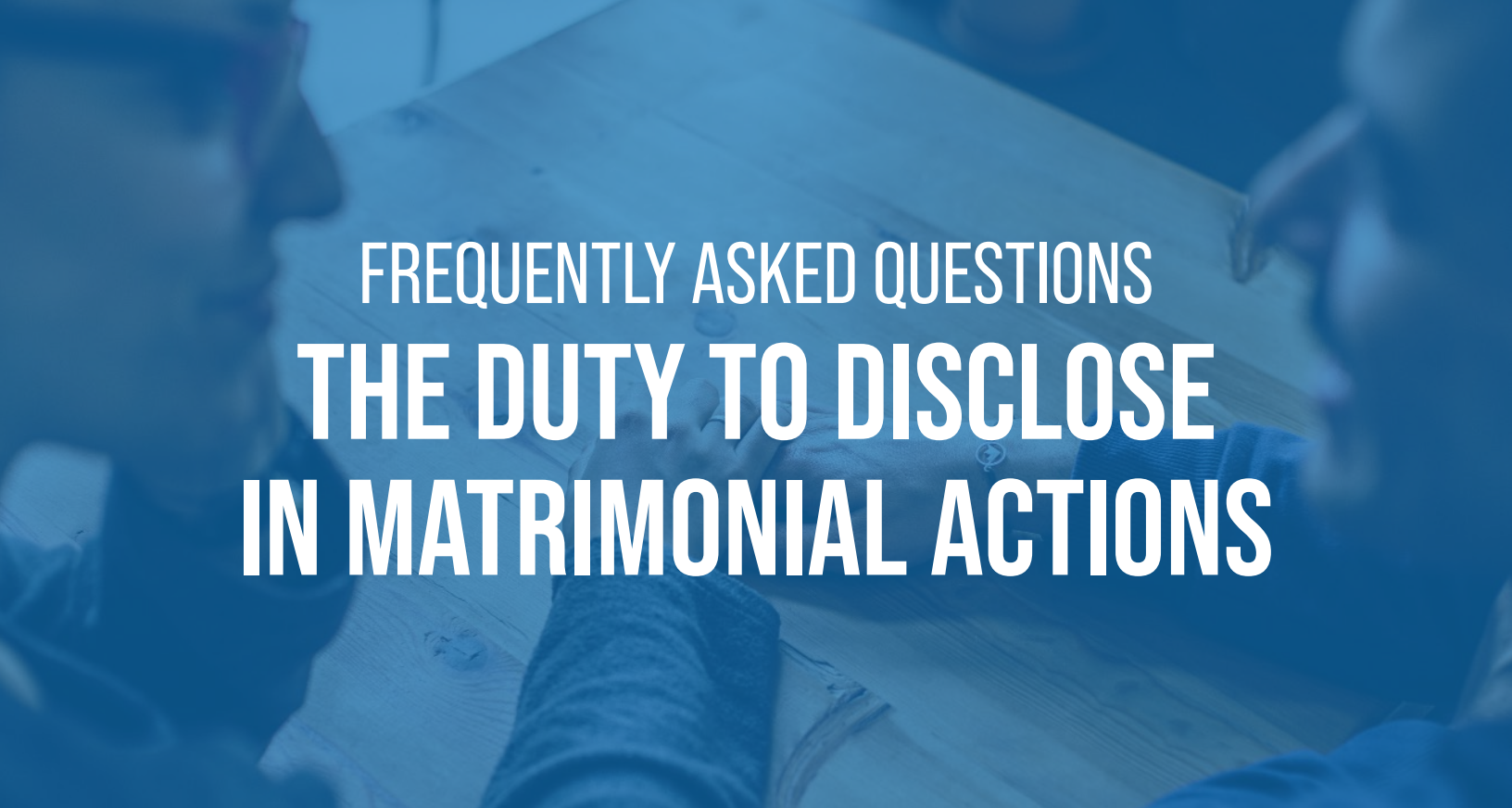


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# FREQUENTLY ASKED QUESTIONS THE DUTY TO DISCLOSE IN MATRIMONIAL ACTIONS

Q: What is the duty of disclosure?

Q: Why is the duty of disclosure important in dissolution of marriage or legal separation actions?

Q: How are disclosures made?

Q: What material information are parties required to disclose?

Q: Are investment opportunities considered an “asset” subject to the duty to disclose? Is this the case even if the opportunity yields no money and/or is a money-losing venture?

Q: What happens if either of the parties fails to comply with the duty to disclose? Does it matter if the failure was inadvertent or purposeful?

Q: When does the duty to disclose end?

While marital rights can vary from state to state, most states recognize that when people get married, spouses and/or partners owe a fiduciary duty to one another. What that means is that, once married, spouses have a duty to be honest with one another regarding finances and property, similar to the relationship between business partners.

## Q: WHAT IS THE DUTY OF DISCLOSURE?

The duty of disclosure is an expansion of the fiduciary duty spouses owe to one another to protect and preserve the assets of a marriage and not to dispose of them without the consent of the other. In most jurisdictions, disclosure law requires spouses to exchange any information about the marital estate and its affairs that would be reasonably required for the proper exercise of each spouse's rights and duties. Unless the demands are unreasonable or improper under the circumstances, a spouse must disclose any information regarding the marital estate, without demand. In other words, the duty to disclose is mandatory and must be complied with, even if the other party has not made an inquiry or formally requested disclosure.

Typically, the duty of disclosure requires, but is not limited to:

- An accounting to the spouse and holding as trustee any benefit or profit derived from any transaction by one spouse without the consent of the other which involves "community property" (in community property jurisdictions)
- Providing upon request true and full information of all things affecting any transaction which concerns the community property (for community property jurisdictions); and
- Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

## Q: HOW ARE DISCLOSURES MADE?

In most jurisdictions, spouses or partners in a dissolution or legal separation are required to exchange court forms that disclose complete information about all their property and debts, as well as details of their income and expenses.

## Q: WHAT IS INFORMATION THAT WOULD *MATERIALLY AFFECT* COMMUNITY ASSETS AND DEBTS? IS IT SUBJECT TO DISCLOSURE?

As mentioned above, each spouse in a divorce or legal separation proceeding must provide full and accurate disclosure of all assets, debts, and other liabilities in which one or both parties may have an interest. Not only must these disclosures include a current income and expense declaration (both supported by documentation), but the declaration should also include any changes that could *materially affect* community assets and debts.

The type of information that would be deemed to *materially affect* community assets and debts includes (but is not limited to):

- Any change in employment status (including an increase in salary, bonuses, commissions, etc.)

- Offers to purchase real property owned by both parties, major repairs, lawsuits involving real property (owned by both parties) any notices from governmental agencies, any information concerning tax issues
- Changes to retirement, or investment plans, exercise or granting of stock options, maturity to CDs, investment opportunities\*
- Offers to purchase art, collectibles, car collections, or other investments
- Offers to purchase community businesses, major investments, lawsuits involving said business, notices from any governmental agencies, any information regarding taxes issues, change in board of directors, new partners, key employees, shareholders

### Q: ARE INVESTMENT OPPORTUNITIES CONSIDERED 'ASSETS' FOR PURPOSES OF DISCLOSURE? IS THIS SO EVEN IF THE OPPORTUNITY YIELDS NO PROFIT OR LOSES MONEY?

Yes. In most states, the duty to disclose contemplates disclosure of any *business, investment, or income-producing opportunity* from the date of the marriage until the date of the separation. Failure to disclose such an opportunity is a violation of a spouse's fiduciary duty and could result in various sanctions, monetary and otherwise. This is the case regardless of whether the opportunity yields no profit at all or even ultimately results in loss of profits.

### Q: WHAT HAPPENS IF A PARTY FAILS TO COMPLY WITH THE DUTY OF DISCLOSURE?

Failure to disclose (whether inadvertently or purposefully) is a deemed a violation of the fiduciary duty owed to spouses and could result in various monetary and other sanctions including, but not limited to:

- Awarding any non-disclosed asset to the other party without offset. In 2001 for example, a California Court of Appeals awarded a husband 100% of \$3 million in California state lottery winnings that was not disclosed to him by his wife during divorce proceedings.
- Payment of the other party's attorneys and court costs;
- 50% of the value of an intentionally undisclosed asset
- Preventing the other, non-disclosing spouse from presenting evidence regarding the omitted asset;
- Vacatur of a judgment that was entered as a result of the party's failure to comply with the disclosure law or intentional omission of an asset; and
- Monetary sanctions, like in the case of *Marriage of Feldman*. This California case involved a 34-year marriage where the millionaire husband, Aaron Feldman, set-up a series of privately held companies for the purpose of developing real estate and car dealerships *without the knowledge or consent of his then spouse*. It was also learned during the dissolution proceeding that Mr. Feldman repeatedly failed to fully disclose numerous investments (many of which were made at the time of or shortly after the couple separated). During court proceedings, Mr. Feldman was said to have made his disclosures as "difficult" and as "opaque" as possible and the Court even went so far as to characterize his behavior regarding disclosure as "hide the ball". As a result of his failure to comply with the duty of disclosure, the court imposed sanctions in the amount of \$250,000 and ordered Feldman to pay \$140,000 in attorney's fees.

*\*Even when there is no economic harm caused by the nondisclosure, the court will still impose sanctions to demonstrate the importance of and encourage compliance with disclosure requirements.*

## Q: HOW LONG DOES THE DUTY OF DISCLOSURE LAST?

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It is important for parties to a dissolution proceeding to remember that in states like California, the fiduciary duty to disclose does not necessarily end by simply filing the final judgment of divorce with the court. As stated above, disclosure requirements are mandatory and not dependent upon the other party seeking the information through discovery. It is a continuing obligation that starts at the commencement of dissolution and terminates only *when all assets (debt or property) are distributed and divided*.