



June 2017

Northern District of Illinois Commences Mandatory Initial Discovery Pilot Program

On June 1, 2017, the [Mandatory Initial Discovery Pilot Project](#) (MIDP) took effect in the Northern District of Illinois. With only limited exceptions, the MIDP applies to all cases filed after June 1 and significantly impacts how cases in the Northern District of Illinois will proceed. In particular, cases in which defendants are seeking to dismiss a complaint or which involve large amounts of discovery will be most affected by the changes. Only a few types of cases are exempt from the MIDP: (a) cases exempted from initial disclosures by Rule 26(a)(1)(B); (b) cases transferred for consolidated administration by the Judicial Panel on Multidistrict Litigation; (c) patent cases; and (d) actions under the Private Securities Litigation Reform Act.

Three key changes are:

1. A motion to dismiss no longer delays the time to answer the complaint. ([Standing Order](#), at *para.* A.3.) Unless a defendant seeks dismissal on a few specific grounds (*e.g.*, lack of personal jurisdiction, lack of subject matter jurisdiction, or a claim of immunity) and the judge grants permission to delay filing an answer, a defendant must file its answer with any motion to dismiss by the deadline for responsive pleadings.
2. Extensive Mandatory Initial Discovery is due under the Standing Order 30 days after the responsive pleading deadline. This discovery includes, among other things, a list of all documents and electronically stored information (ESI) relevant to any party's claims or defenses and a list of all witnesses believed to have any relevant information. ([Standing Order](#), at *para.* B.1, *para.* B.3.) The court has made clear that this court-ordered discovery includes all relevant evidence – either favorable or unfavorable – and relates to the claims or defenses of every party to the litigation. ([Standing Order](#), at *para.* A.2.) All relevant documents must be produced at the time of the Mandatory Initial Discovery and all relevant ESI must be produced 40 days later. ([Standing Order](#), at *para.* B.3, *para.* C.2.c.)

3. The duty to disclose under the MIDP is ongoing. If, during the course of litigation, any relevant evidence is discovered, whether favorable or unfavorable, it must be disclosed to the other parties within 30 days after discovery. ([Standing Order](#), at *para.* A.6.)

The Northern District of Illinois has made clear that it “will vigorously enforce the requirement to provide mandatory initial discovery responses through the imposition of sanctions.” ([Users’ Manual](#), at *para.* A.2.h.) If a party fails to disclose evidence favorable to its own case, it will not be allowed to “use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the Court determines that such use would be appropriate under Rule 37(b)(2).” ([Users’ Manual](#), at *para.* C.1.i.) On the other hand, if a party fails to disclose unfavorable information which is later discovered, the Court may impose any costs the other party incurred obtaining it. ([Users’ Manual](#), at *para.* F.)

Under the MIDP, all responses to the Mandatory Initial Discovery must be made based on the information reasonably available to the parties at the time of the responses. ([Standing Order](#), at *para.* A.1.b.) While it is not clearly defined what that means, this may provide latitude for providing discovery on a rolling basis in cases with large quantities of documents. However, these rolling responses would be supplemental responses under *para.*A.6 and must be made within 30 days after discovering the relevant evidence.

The MIDP will also put substantial pressure on parties in lawsuits involving large amounts of ESI. In particular, parties will have a mere 70 days after the responsive pleading deadline to identify, preserve, collect, process, review and produce their ESI. Parties in complex matters – sometimes with terabytes of data among numerous custodians – may have little choice but to rely on technology-assisted review and other sophisticated technology processes just to meet the ESI production deadline.

Some facets of the MIDP will benefit defendants. In particular, the sanctions previously described are also applicable to the requirement that plaintiffs must provide a computation of each category of damages claimed, including a description of the documents or evidentiary material on which such damages are based. ([Standing Order](#), at *para.* B.5.) All parties will be required to state the facts relevant to each claim or defense and all legal theories upon which the claim or defense is based. ([Standing Order](#), at *para.* B.4.) These requirements should provide defendants far more clarity regarding plaintiffs’ claims at an earlier stage in the litigation.

These changes represent a significant departure from current practice. How will this impact the cost of litigation for defendants? Ultimately, it means costs will likely be front-loaded in cases in the Northern District of Illinois. Defense counsel will now need to simultaneously begin preparing: (1) a motion to dismiss (if applicable); (2) an answer; and (3) document production on all matters relevant to all claims or defenses in the litigation.

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