

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month



Disclosure Scope and Discovery Timing Changes under the MIDP

Scenario

A manufacturing company just was served with a complaint filed in the United States District Court for the Northern District of Illinois. The company's general counsel heard about some new discovery rules in some of the federal courts and inquires how those rules will change the way parties litigate in federal courts.

The Mandatory Initial Discovery Pilot Program (MIDP)

The federal courts in the District of Arizona and the Northern District of Illinois have begun participating in the Federal Judicial Center's Mandatory Initial Discovery Pilot Program ("MIDP"), which radically changes both the scope of parties' initial disclosures and the timing for discovery more generally. With limited exceptions, all civil cases filed in the District of Arizona beginning May 1, 2017, and in the Northern District of Illinois beginning June 1, 2017, are governed by these new rules.

Disclosure Scope Changes with the MIDP

The MIDP brings with it three crucial disclosure changes of which all litigants and practitioners subject to the program should be aware:

1. A motion to dismiss generally will no longer delay the time to answer the complaint. The court *may* defer the filing of an answer "for good cause" but only where the motion is based on lack of subject-matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity or qualified immunity. This means that, in most cases, a defendant seeking to dismiss a complaint will still have to prepare and file an answer.
2. With limited exceptions, 30 days after a responsive pleading is filed, the parties must serve an expanded set of initial disclosures that must include:
 - a. The names and contact information of all persons likely to have discoverable information relevant to *any* party's claims or defenses, along with a description of the nature of the information that each person is believed to possess.
 - b. The names and contact information of anyone to whom the disclosing party has given written or recorded statements relevant to any party's claims or defenses, along with copies of the same if within the party's possession, custody or control.
 - c. A list of documents, ESI, tangible things, land, or other property that may be relevant

to any party's claims or defenses, regardless of whether in the disclosing party's possession, custody or control, along with the names and contact information of the custodians of any items not within the producing party's possession, custody, or control. Items may be listed in specifically described categories if they are sufficiently numerous that listing them individually would be impracticable. In addition, with the exception of ESI, all such evidence within a party's possession, custody or control must be produced or made available on the date of the initial disclosure.

- d. For each of the disclosing party's claims or defenses, the relevant facts and legal theories on which it is based.
 - e. From each party asserting a claim for relief, a computation of each category of damages claimed and a description of the documents or other evidence on which that computation is based. Alternatively, the party may produce the materials directly in lieu of providing a description.
 - f. A specific identification and description of any insurance or other similar agreement, including indemnification agreements, under which somebody else may be liable to satisfy all or part of any possible judgment.
3. Absent a court order, ESI must generally be produced within 40 days of serving a party's initial disclosures. However, parties are required to confer "on matters relating to its disclosure and production" including with respect to each party's preservation obligations, custodians and search terms, the use of technology-assisted review, and the form in which ESI will be produced.

Parties are under a continuing duty to supplement their initial disclosures whenever new or additional information or documents are discovered or revealed and must do so within 30 days of discovering the additional information or documents.

Although, as before, parties are not to file their initial disclosures and later supplements with the court, parties must now file a notice of service of their initial disclosures and later supplements.

Timing Changes with the MIDP

The timing changes are perhaps the most significant, particularly as they relate to discovery of ESI. Under the MIDP, parties now have only 70 days following the responsive pleading deadline to identify, preserve, collect, process, review and produce ESI. Although the MIDP allows that each party's disclosures are to be "based on the information then reasonably available to it," leaving open the possibility of conducting "rolling" productions as parties churn through often significant quantities of ESI, the MIDP nevertheless puts substantial pressure on parties to speed up the process of collecting and producing ESI.

Conclusion

In summary, the MIDP imposes important changes on the timing and strategy of discovery and motion practice at the very beginning of federal court litigation. Although the MIDP has only been adopted by two federal district courts, it behooves lawyers in all jurisdictions to become familiar with these rules because they may be adopted in other jurisdictions.

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