

# Report on the Mandatory Initial Discovery Pilot

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*Federal Judicial Center*

September 2019



**Report**  
**on the**  
**Mandatory Initial Discovery Pilot**

**Results of Closed-Case Attorney Surveys**  
**Fall 2017–Spring 2019**



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**Prepared for the Judicial Conference Advisory Committee on Civil Rules**

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## Executive Summary

This initial report on the Mandatory Initial Discovery Pilot (MIDP) summarizes the results of surveys, conducted by Federal Judicial Center (Center) researchers, of attorneys in MIDP cases in the District of Arizona and the Northern District of Illinois, closed through the spring of 2019. The MIDP replaces the initial disclosures required by the Federal Rules of Civil Procedure with broader disclosure requirements. More than half of survey respondents in the District of Arizona and about half of survey respondents in the Northern District of Illinois reported having participated in MIDP disclosures in pilot cases terminated on or before March 31, 2019.

Pilot participants were asked to evaluate their experience with the MIDP in closed cases. Survey respondents generally agreed that the MIDP resulted in relevant information being provided to the other side earlier in the case. Additionally, most survey respondents either disagreed with or were neutral to the concern that the required MIDP exchanges would result in disclosures that would not otherwise have occurred in the discovery process. They were more or less evenly divided on whether the MIDP focused discovery on important issues, reduced the volume of discovery requests, or reduced the number of discovery disputes in the closed cases. Plaintiff attorney respondents were more likely than defendant attorney respondents to agree that the MIDP enhanced the effectiveness of settlement negotiations, expedited settlement negotiation discussions among the parties, and reduced the number of subsequent discovery requests. In general, survey respondents tended not to agree that the MIDP reduced discovery costs or overall costs in the closed cases, nor did they agree that the disclosures reduced disposition times in the closed cases. Survey respondents were also invited to provide open-ended comments about the MIDP, which are included in the Appendix.

This is not a final report on the MIDP, as the participating districts continue to assign newly filed cases to the pilot. Center researchers will continue to conduct attorney surveys in terminated pilot cases on a regular cycle. In addition, Center researchers are collecting docket-level data on pilot cases and conducting interviews in the participating districts as part of a larger MIDP project.

## Background

In June 2016, the Judicial Conference Committee on Rules of Practice and Procedure approved the MIDP for use in the district courts. The MIDP is based on the expectation that “civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.”<sup>1</sup> The pilot is modeled in part on “the robust initial disclosure rules used in various states,” including state courts in Arizona.<sup>2</sup> In the participating districts, it applies broadly to all civil cases subject to mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1), except patent cases governed by local rules and those included in a multidistrict litigation consolidation. The MIDP disclosures are broader than those under the existing rule because they require disclosure of both favorable and unfavorable information; the existing rule requires a party to disclose only favorable information. Much more information about the MIDP can be accessed on the Center’s public website.<sup>3</sup>

As part of the MIDP study, Center researchers have surveyed attorneys of record in recently closed pilot cases to measure participation in the pilot and participants’ evaluations of it. The District of Arizona began using the MIDP in civil cases filed as of May 1, 2017, and a large number of judges in the Northern District of Illinois began using it in civil cases filed as of June 1, 2017. Both districts expect to apply the MIDP to newly filed civil cases for three years. Pilot cases are identified by searching each district’s electronic records for closed cases in which the pilot standing order was docketed. In addition, certain kinds of case dispositions in which discovery is unlikely to have occurred, such as default judgments, are generally excluded from the surveys. The lists are deduplicated each round, so no attorney in either district should receive more than one survey per round. In both the District of Arizona and the Northern District of Illinois, closed-case attorney surveys have been conducted four times, as of this writing, on roughly a six-month cycle: fall 2017, spring 2018, fall 2018, and spring 2019. Each round of surveys includes pilot cases closed in the six months prior to the survey release. The first round of surveys in fall 2017 included the small number of pilot cases closed since the start of the MIDP a few months earlier.

Through four rounds, 1,612 surveys have been emailed in the District of Arizona, and 3,163 in the Northern District of Illinois. The overall response rate for the District of Arizona, as of this writing, is 29% (473 responses received).

1. Advisory Comm. On Civil Rules, Report to the Standing Committee, May 12, 2016, at 27 (available at <https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf>).

2. *Id.* at 26.

3. <https://www.fjc.gov/content/320224/midpp-standing-order>.



For the Northern District of Illinois, the comparable figure is 35% (1,103 responses received). These response rates are consistent with response rates in similar Center surveys of attorneys.

In terms of representativeness, plaintiff attorneys and defendant attorneys responded in roughly equal numbers, and in similar types of cases, overall. Broadly speaking, respondents' cases are representative of the farraginous dockets of the federal courts: insurance and other contract actions, personal injury torts, civil rights, consumer credit, wage and hour litigation, trademark and copyright, and the catchall "other" statutory actions. The closed cases underlying this report are not representative of case dispositions, however. Some types of case dispositions are likely underrepresented, especially summary judgments, which take longer than most other types of dispositions, on average, and thus may not have closed. For example, if a pilot case was filed on the first day of the pilot and closed by March 31, 2019 (the end of the last survey period), it would have lasted 23 months in the District of Arizona and 22 months in the Northern District of Illinois. Cases filed more recently have, accordingly, had even less time to resolve. Survey responses from attorneys in longer-pending pilot cases will have to be analyzed in subsequent reports. Because the survey results presented in this report are, at best, representative of shorter duration cases, they should be interpreted with caution.

Results for the most part are reported separately for plaintiff attorneys and defendant attorneys because of the study's sampling design. For each closed case included in the study, a survey was distributed to both a plaintiff attorney and a defendant attorney, if possible. That means that in each round of surveys, some closed cases are represented by two responses (one each for plaintiff attorney and defendant attorney) and others by only one response. Reporting responses separately for plaintiff attorneys and defendant attorneys eliminates any double counting of cases that may occur. Reporting the responses separately can also reveal meaningful differences in evaluations of the pilot between plaintiff attorneys and defendant attorneys; these differences will be discussed where appropriate. Respondents' open-ended comments regarding the MIDP, provided in the Appendix, are also presented separately for plaintiff attorneys and defendant attorneys.

## Participation in the Pilot

The surveys asked respondents to answer if, in the recently closed case, "either side provide[d] the other side with mandatory initial discovery, as required by the standing

order." All respondents were informed that their answers applied only to the named closed case. Response options were, "Yes, all required exchanges were made," "Yes, my side did but all sides did not," "Yes, other sides did but my side did not," "No," and "I do not recall."

MIDP disclosures were reported in a majority of closed pilot cases in the District of Arizona, where 43% of plaintiff attorneys and 46% of defendant attorneys responded, "Yes, all required exchanges were made." Another 12% of plaintiff attorneys and 13% of defendant attorneys responded that at least one side, but not all sides, made the required exchanges. As shown in **Table 1**, for most of these responses the attorney

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	43%	46%
Yes, my side	10%	10%
Yes, other sides	2%	3%
No	37%	36%
I do not recall	8%	5%
N	231	236

**Table 1:** Pilot participation in the District of Arizona (Fall 2017–Spring 2019)

noted that their side was the only one to make the required exchanges. At the same time, 37% of plaintiff attorneys and 36% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 5% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

When survey respondents answered that the MIDP exchanges were not made in the closed case, they were asked a follow-up question about why the exchanges were not made. The primary reason Arizona respondents (N=467) gave for not making the MIDP exchanges was early resolution of the case. Fully 87% of plaintiff attorneys and 76% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 6% of Arizona respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts.

In the Northern District of Illinois, 37% of plaintiff attorneys and 38% of defendant attorneys responded, "Yes, all required exchanges were made." Another 7% of plaintiff attorneys and 10% of defendant attorneys responded that at

least one side, but not all sides, made the required exchanges. Again, as shown in **Table 2**, almost all of these attorneys

	Plaintiff Attorneys	Defendant Attorneys
Yes, all	37%	38%
Yes, my side	7%	9%
Yes, other sides	0%	1%
No	48%	46%
I do not recall	8%	7%
<i>N</i>	531	533

**Table 2:** Pilot participation in the Northern District of Illinois (Fall 2017–Spring 2019)

reported that it was their side that provided the required exchanges. At the same time, 48% of plaintiff attorneys and 46% of defendant attorneys reported that the MIDP exchanges were not made in the recently closed case. Additionally, 8% of plaintiff attorneys and 7% of defendant attorneys could not recall whether MIDP exchanges were made in the closed case.

The primary reason Illinois Northern respondents (N=498) gave for not making the MIDP exchanges was early resolution of the case. Fully 65% of plaintiff attorneys and 66% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. Only about 11% of respondents indicated that they had either stipulated that no discovery would be conducted or certified that they were engaged in good-faith settlement efforts. Relatively few survey respondents reported having made use of these specified exceptions. Many more respondents in Illinois Northern than in Arizona selected "Other," although their open-ended responses generally indicated that cases were resolved before the pilot's discovery obligations arose.

In considering rates of MIDP disclosures in both districts, it is important to keep in mind that the pilot's initial discovery obligations are triggered by the filing of a responsive pleading and that in many civil cases no responsive pleading is ever filed. Even when a responsive pleading is filed, many cases assigned to the pilot settle or are resolved without MIDP exchanges.

The extent to which these participation rates reflect opposition to the initial discovery obligations imposed by the pilot is difficult to estimate. It is impossible to know, for example, how many defendants sought an extension to file a responsive pleading to avoid triggering MIDP obligations. (Docket-level data will assist greatly in interpreting the survey results on participation rates.) It is clear, however, from MIDP disclosure rates and from open-ended survey

responses, that many of the MIDP cases do not involve the required exchanges, especially in Illinois Northern.

To better understand the attorneys' reviews of the MIDP, the surveys also included two open-ended prompts:

- "Please provide any additional comments you have regarding the initial discovery in the above-named case."
- "Please provide any comments you have about the district's mandatory initial discovery pilot program."

The second prompt was only added to the survey for the Spring 2019 round. The appendix to this report provides all responses to these prompts, edited only for spelling and to remove identifying information (e.g., name of the case or client). The responses are briefly summarized in the discussion section of this report.

## Participant Evaluations of the Pilot

Survey respondents who reported that at least one side provided MIDP exchanges in the closed case were then asked a series of twelve questions about their recent experience with the pilot and how they believed it affected their case. These questions were designed to address the goals of the pilot, such as reducing discovery disputes and motions practice, and, in a few instances, to address concerns that were raised about potential effects of the MIDP exchanges, such as disclosure of information that would not otherwise have been requested. Respondents stated agreement or disagreement with the following statements about the "exchange of initial discovery" in the closed case:

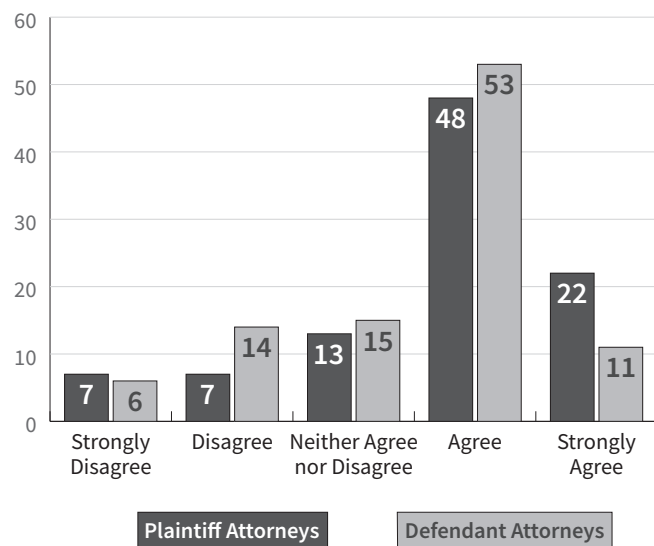
- Provided relevant information earlier in the case
- Led to disclosure of information that would not likely have been requested otherwise
- Focused subsequent discovery on the important issues in the case
- Enhanced effectiveness of settlement negotiations
- Expedited settlement discussions among the parties
- Reduced the number of discovery requests that would have otherwise been made in the case
- Reduced the volume of discovery required to resolve the case
- Reduced the number of motions filed in the case
- Reduced the number of discovery disputes that would have otherwise been made in the case
- Reduced the discovery costs in the case for my client
- Reduced the overall costs in the case for my client
- Reduced the time from filing to resolution in the case

Responses to each question are discussed in order below.

## Participant Evaluations of the Pilot—Relevant information

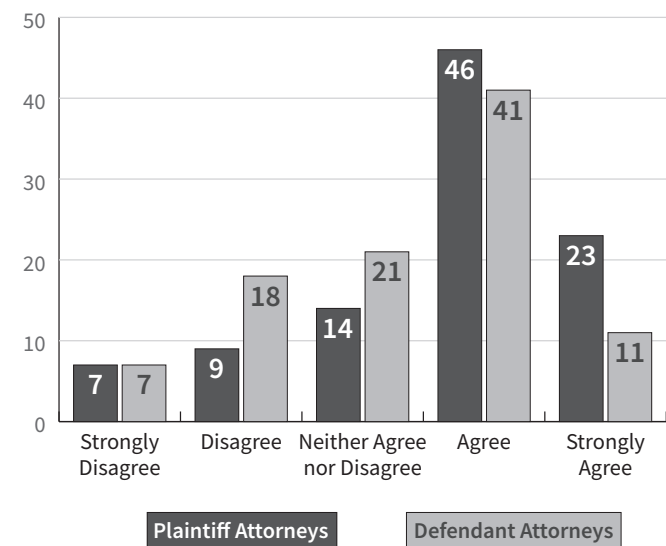
### Provided relevant information earlier in the case.

Respondents agreed with this statement at higher rates than with any other. As seen in **Figure 1**, 70% of plaintiff attorneys in Arizona either agreed (48%) or strongly agreed (22%) with this statement, compared to 14% who either disagreed (7%) or strongly disagreed (6%). Sixty-four percent of defendant attorneys in the same district agreed (53%) or strongly agreed (11%), compared to 20% who disagreed (14%) or strongly disagreed (6%). About one in seven respondents (13% of plaintiff attorneys and 15% of defendant attorneys) neither agreed nor disagreed.



**Figure 1:** District of Arizona (N=254)

Results for Illinois Northern are displayed in **Figure 2**. In that district, 69% of plaintiff attorneys either agreed (46%) or strongly agreed (23%) with this statement, compared to 16% who either disagreed (9%) or strongly disagreed (7%). Fourteen percent of plaintiff attorneys in that district neither agreed nor disagreed. Fifty-two percent of defendant attorneys in the same district either agreed (41%) or strongly agreed (11%), compared to 25% who either disagreed (18%) or strongly disagreed (7%). Twenty-one percent of defendant attorneys neither agreed nor disagreed.



**Figure 2:** Northern District of Illinois (N=468)

## Participant Evaluations of the Pilot—Disclosure of information

### Led to disclosure of information that would not likely have been requested otherwise.

Respondents tended to disagree with or express neutrality toward this statement. In Arizona (**Figure 3**), 51% of plaintiff attorneys either disagreed (38%) or strongly disagreed (13%) with the statement, and another 25% neither agreed nor disagreed. Only 20% of plaintiff attorneys either agreed (14%) or strongly agreed (6%). Fifty-three percent of defendant attorneys either disagreed (39%) or strongly disagreed (14%), and another 33% neither agreed nor disagreed. Only 13% of defendant attorneys in Arizona either agreed (11%) or strongly agreed (2%).

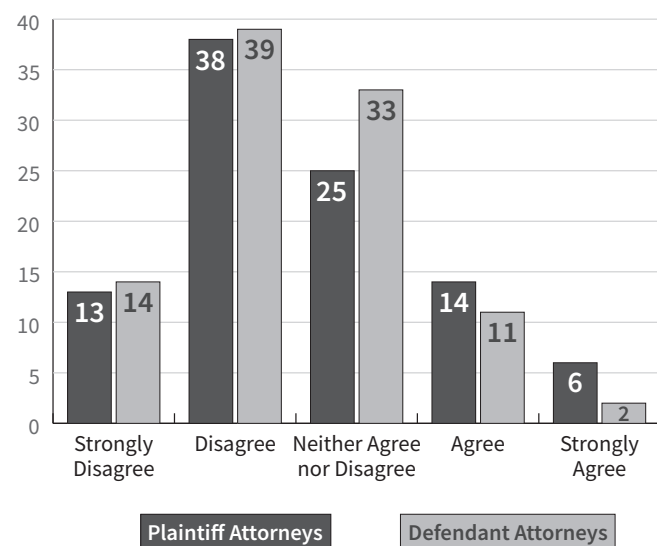


Figure 3: District of Arizona (N=255)

Similarly, in Illinois Northern (**Figure 4**), 55% of plaintiff attorneys either disagreed (33%) or strongly disagreed (22%), and another 21% neither agreed nor disagreed. Twenty-two percent of plaintiff attorneys in that district either agreed (13%) or strongly agreed (9%). Sixty-four percent of defendant attorneys in the district disagreed (39%) or strongly disagreed (25%); 21% neither agreed nor disagreed, 9% agreed, and only 3% strongly disagreed.

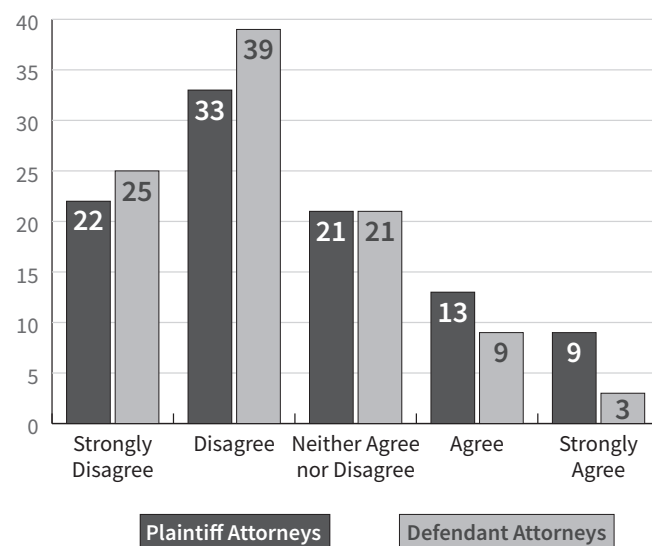
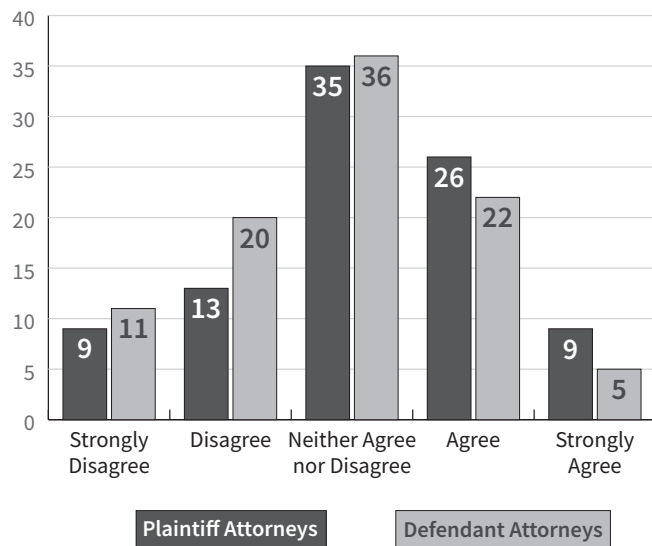


Figure 4: Northern District of Illinois (N=468)

## Participant Evaluations of the Pilot—Focused discovery

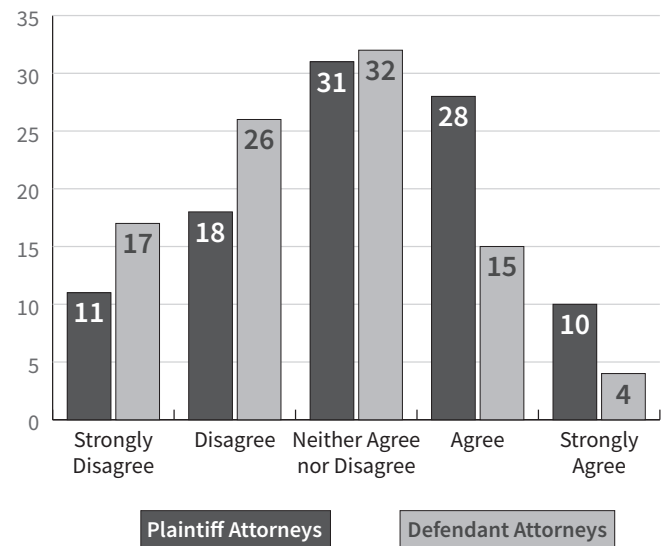
### Focused subsequent discovery on the important issues in the case.

Respondents tended to be evenly divided on this question, except defendant attorneys in Illinois Northern, who were more negative by a 2:1 margin. In Arizona (**Figure 5**), 35% of plaintiff attorneys either agreed (26%) or strongly agreed (9%), 35% neither agreed nor disagreed, and 22% either disagreed (13%) or strongly disagreed (9%). Among defendant attorneys, 27% either agreed (22%) or strongly agreed (5%), 36% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%).



**Figure 5:** District of Arizona (N=254)

In Illinois Northern (**Figure 6**), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 31% neither agreed nor disagreed, and 29% either disagreed (18%) or strongly disagreed (11%). Among defendant attorneys, 19% either agreed (15%) or strongly agreed (4%), 32% neither agreed nor disagreed, and 43% either disagreed (26%) or strongly disagreed (17%).

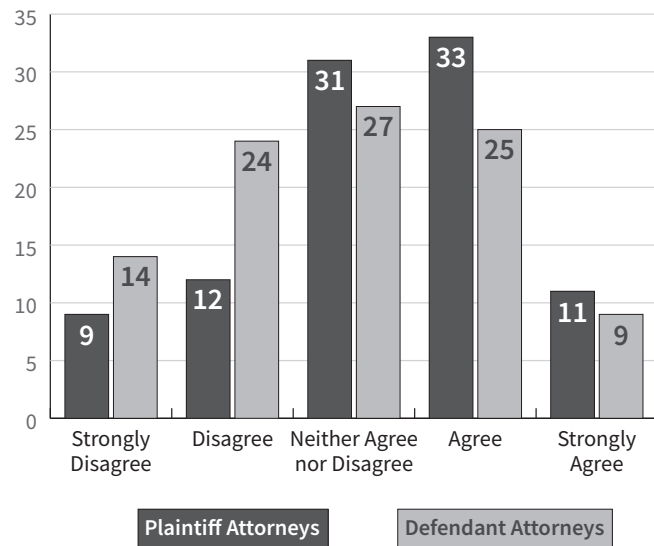


**Figure 6:** Northern District of Illinois (N=467)

## Participant Evaluations of the Pilot—Settlement negotiations

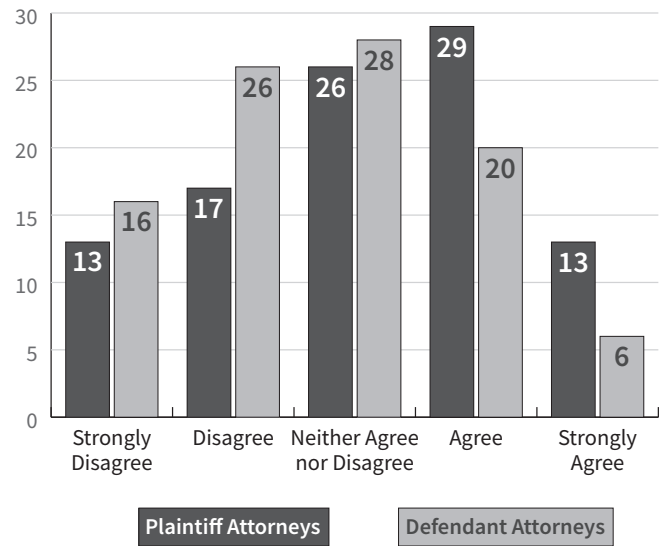
### Enhanced effectiveness of settlement negotiations.

Plaintiff attorneys were more likely to agree with this statement, and defendant attorneys were more likely to disagree. In Arizona (**Figure 7**), 44% of plaintiff attorneys agreed (33%) or strongly agreed (11%), 31% neither agreed nor disagreed, and 21% disagreed (12%) or strongly disagreed (9%). In contrast, 34% of defendant attorneys either agreed (25%) or strongly agreed (9%), 27% neither agreed nor disagreed, and 38% either disagreed (24%) or strongly disagreed (14%).



**Figure 7:** District of Arizona (N=256)

In Illinois Northern (**Figure 8**), 42% of plaintiff attorneys either agreed (29%) or strongly agreed (13%), 26% neither agreed nor disagreed, and 30% either disagreed (17%) or strongly disagreed (13%). In contrast, 26% of defendant attorneys either agreed (20%) or strongly agreed (6%), 28% neither agreed nor disagreed, and 42% either disagreed (26%) or strongly disagreed (16%).



**Figure 8:** Northern District of Illinois (N=468)

## Participant Evaluations of the Pilot—Settlement discussions

### Expedited settlement discussions among the parties.

Similar to the preceding question, plaintiff attorneys were more likely to agree with this statement than defendant attorneys; defendant attorneys evenly split on the question in Arizona but were more negative in Illinois Northern. In Arizona (**Figure 9**), 44% of plaintiff attorneys either agreed (32%) or strongly agreed (12%), 27% neither agreed nor disagreed, and 24% either disagreed (17%) or strongly disagreed (7%). In contrast, 35% of defendant attorneys either agreed (24%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 26% either disagreed (10%) or strongly disagreed (7%).

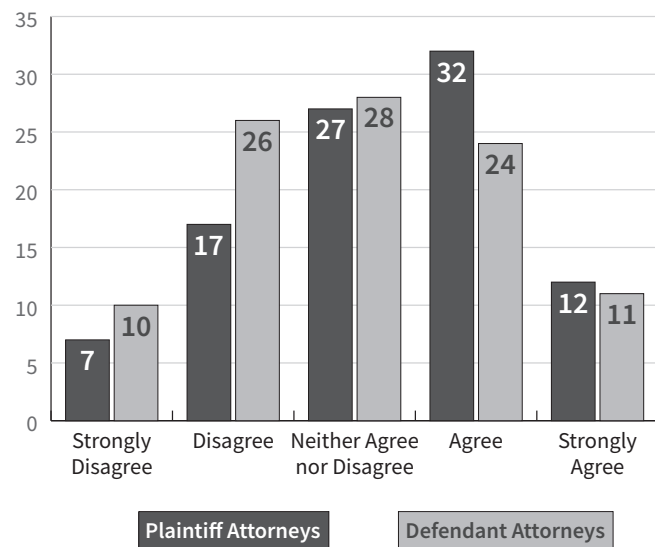


Figure 9: District of Arizona (N=256)

In Illinois Northern (**Figure 10**), 44% of plaintiff attorneys either agreed (31%) or strongly agreed (13%), 21% neither agreed nor disagreed, and 33% either disagreed (18%) or strongly disagreed (15%). In contrast, 29% of defendant attorneys either agreed (22%) or strongly agreed (7%), 25% neither agreed nor disagreed, and 43% either disagreed (30%) or strongly disagreed (13%).

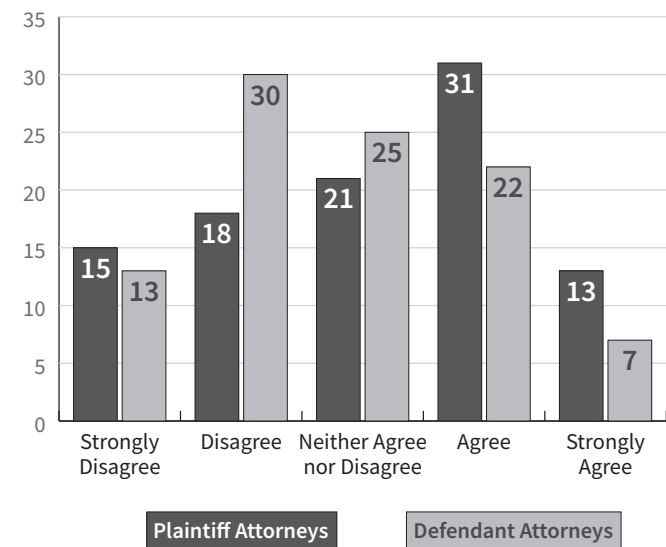


Figure 10: Northern District of Illinois (N=468)

## Participant Evaluations of the Pilot—Number of discovery requests

### Reduced the number of discovery requests that would otherwise been made in the case.

As with the preceding question, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively (and much more negatively than Arizona defendant attorneys. In Arizona (**Figure 11**), 49% of plaintiff attorneys either agreed (34%) or strongly agreed (15%), 20% neither agreed nor disagreed, and 21% either disagreed (15%) or disagreed strongly (6%). Forty-three percent of defendant attorneys either agreed (33%) or strongly agreed (10%), 23% neither agreed nor disagreed, and 27% disagreed (22%) or strongly disagreed (5%).

In Illinois Northern (**Figure 12**), 48% of plaintiff attorneys either agreed (36%) or strongly agreed (12%), 19% neither agreed nor disagreed, and 30% either disagreed (15%) or strongly disagreed (15%). In contrast, 23% of defendant attorneys either agreed (15%) or strongly agreed (8%), 22% neither agreed nor disagreed, and 49% either disagreed (30%) or strongly disagreed (19%).

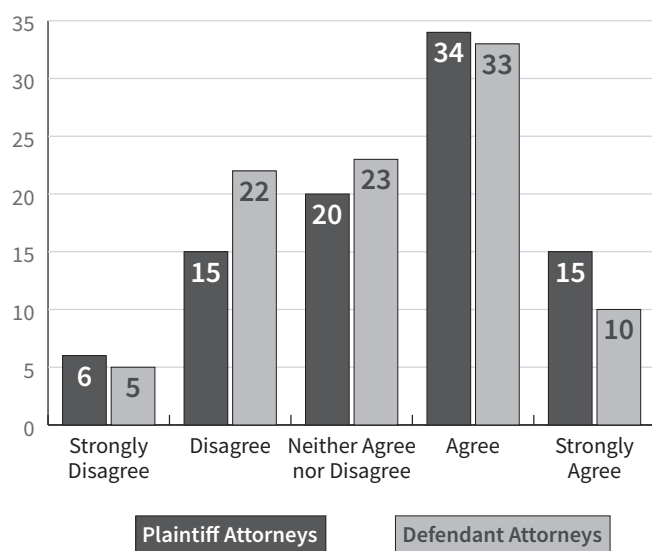


Figure 11: District of Arizona (N=256)

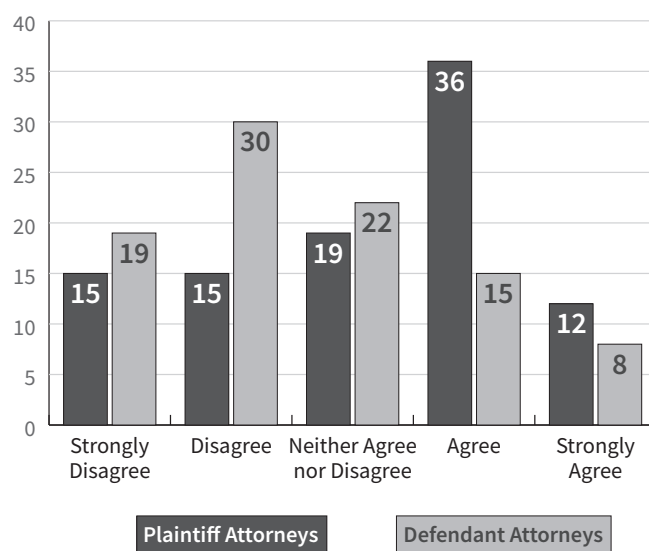


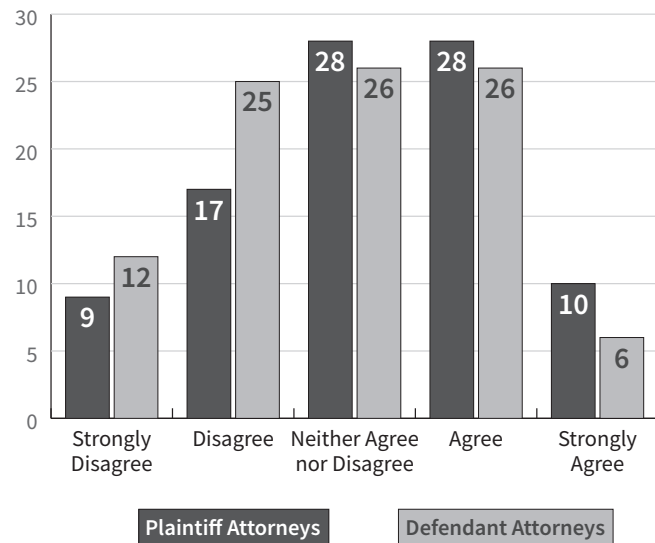
Figure 12: Northern District of Illinois (N=466)



## Participant Evaluations of the Pilot—Volume of discovery

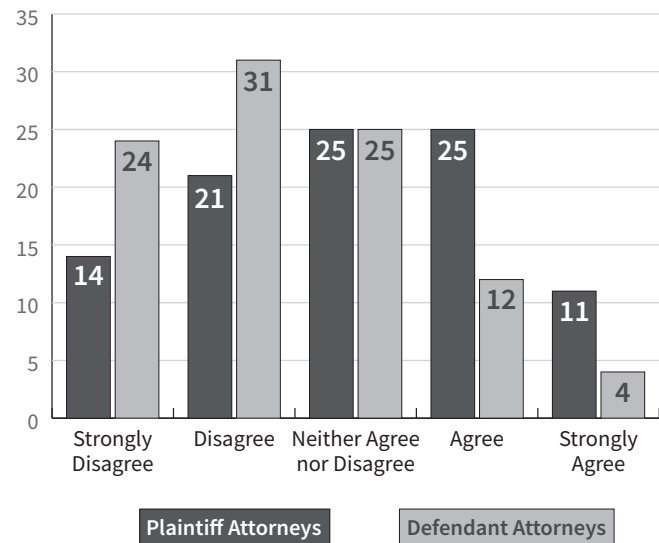
### Reduced the volume of discovery required to resolve the case.

As with the prior two questions, defendant attorneys in Illinois Northern evaluated the pilot's effects most negatively. In Arizona (**Figure 13**), 38% of plaintiff attorneys either agreed (28%) or strongly agreed (10%), 28% neither agreed nor disagreed, and 26% either disagreed (17%) or strongly disagreed (9%). For defendant attorneys, about one-third (32%) either agreed (26%) or strongly agreed (6%), 26% neither agreed nor disagreed, and 37% either disagreed (25%) or strongly disagreed (12%).



**Figure 13:** District of Arizona (N=256)

In Illinois Northern (**Figure 14**), 36% of plaintiff attorneys either agreed (25%) or strongly agreed (11%), 25% neither agreed nor disagreed, and 35% either disagreed (21%) or strongly disagreed (15%). In contrast, 16% of defendant attorneys either agreed (12%) or strongly agreed (4%), 25% neither agreed nor disagreed, and 55% either disagreed (31%) or strongly disagreed (24%).

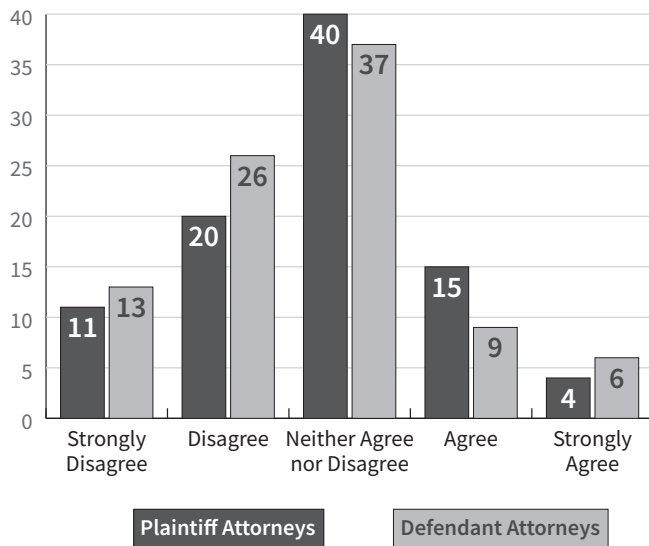


**Figure 14:** Northern District of Illinois (N=467)

## Participant Evaluations of the Pilot—Number of motions filed

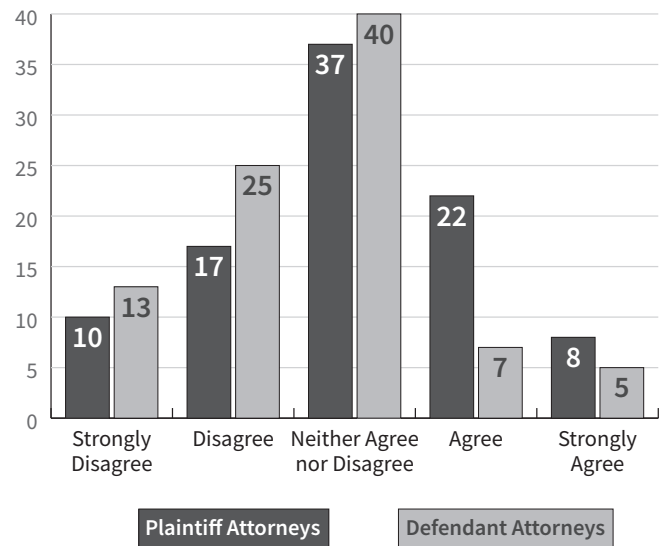
### Reduced the number of motions filed in the case.

Respondents tended to respond neutrally or disagree with this statement and were unlikely to agree with it (except Illinois Northern plaintiff attorneys). In Arizona (**Figure 15**), 19% of plaintiff attorneys either agreed (15%) or disagreed (4%), 40% neither agreed nor disagreed, and 31% either disagreed (20%) or disagreed strongly (11%). Defendant attorneys either agreed (9%) or strongly agreed (6%) in just 15% of closed cases, neither agreed nor disagreed in 37%, and disagreed (26%) or strongly disagreed (13%) in 39%.



**Figure 15:** District of Arizona (N=256)

In Illinois Northern (**Figure 16**), 30% of plaintiff attorneys either agreed (22%) or strongly agreed (8%), 37% neither agreed nor disagreed, and 27% either disagreed (17%) or strongly disagreed (10%). In contrast, 12% of defendant attorneys either agreed (7%) or strongly agreed (5%), 40% neither agreed nor disagreed, and 38% either disagreed (25%) or strongly disagreed (13%).



**Figure 16:** Northern District of Illinois (N=465)

## Participant Evaluations of the Pilot—Number of discovery disputes

### Reduced the number of discovery disputes that would otherwise have been made in the case.

Respondents tended to respond neutrally to this statement (except Illinois Northern defendant attorneys). In Arizona (Figure 17), 27% of plaintiff attorneys either agreed (20%) or strongly agreed (7%), 37% neither agreed nor disagreed, and 24% either disagreed (16%) or disagreed strongly (8%). Defendant attorneys agreed (13%) or strongly agreed (5%) in just 18% of closed cases, neither agreed nor disagreed in 38%, and either disagreed (23%) or strongly disagreed (8%) in 31% of closed cases.

In Illinois Northern (Figure 18), 28% of plaintiff attorneys either agreed (20%) or strongly agreed (8%), 35% neither agreed nor disagreed, and 30% either disagreed (20%) or strongly disagreed (10%). In that district, 18% of defendant attorneys either agreed (13%) or strongly agreed (5%), 31% neither agreed nor disagreed, and 39% either disagreed (25%) or strongly disagreed (14%).

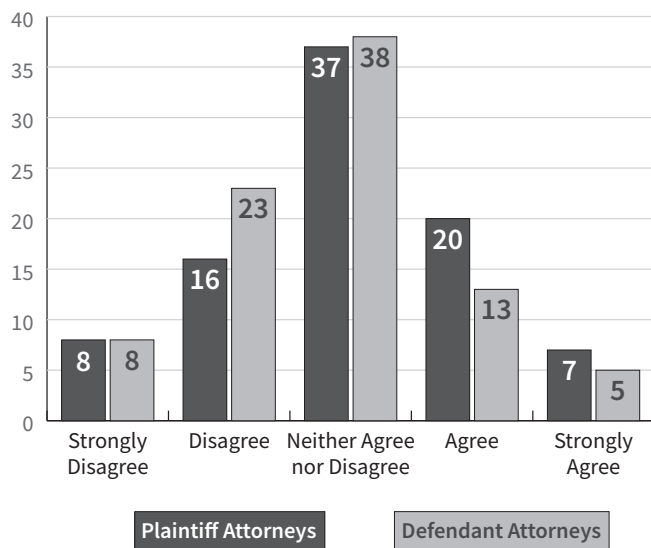


Figure 17: District of Arizona (N=256)

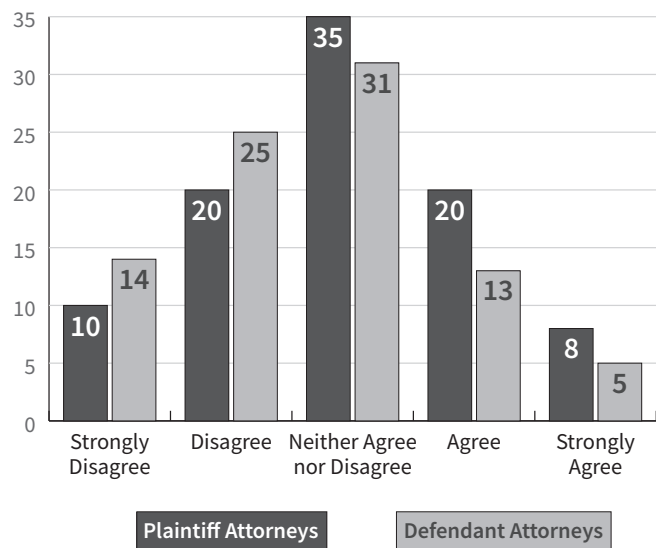


Figure 18: Northern District of Illinois (N=465)

## Participant Evaluations of the Pilot—Discovery costs

### Reduced the discovery costs in the case for my client.

Defendant respondents, in particular, tended to disagree with this statement, and all respondents expressed neutrality or disagreed at least 60% of the time. Defendant attorneys in Illinois Northern were, again, the most negative group in their evaluation of the pilot's effects. In Arizona (Figure 19), 29% of plaintiff attorneys either agreed (22%) or strongly agreed (7%), 32% neither agreed nor disagreed, and 31% either disagreed (20%) or strongly disagreed (11%). Defendant attorneys in that district either agreed (17%) or strongly agreed (9%) in 26% of closed cases, neither agreed nor disagreed in 23%, and disagreed (24%) or strongly disagreed (23%) in 47% of closed cases.

In Illinois Northern (Figure 20), 34% of plaintiff attorneys either agreed (23%) or strongly agreed (11%), 28% neither agreed nor disagreed, and 35% either disagreed (20%) or strongly disagreed (15%). Defendant attorneys in that district either agreed (14%) or strongly agreed (5%) in only 19% of the closed cases, neither agreed nor disagreed in 28%, and either disagreed (28%) or strongly disagreed (28%) in 56% of the cases.

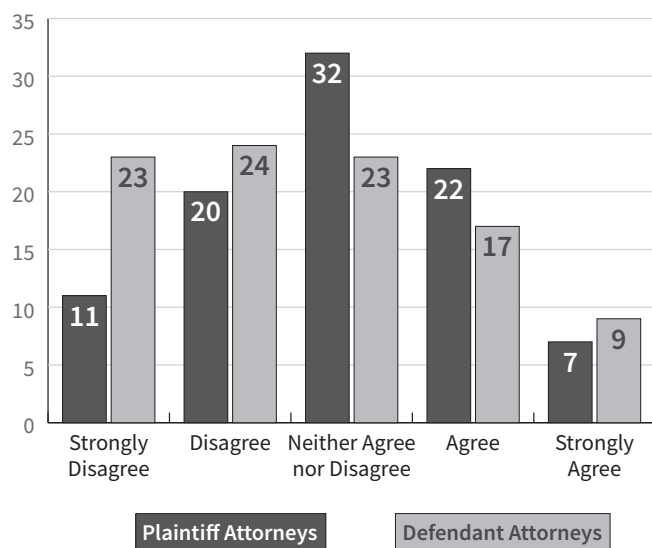


Figure 19: District of Arizona (N=256)

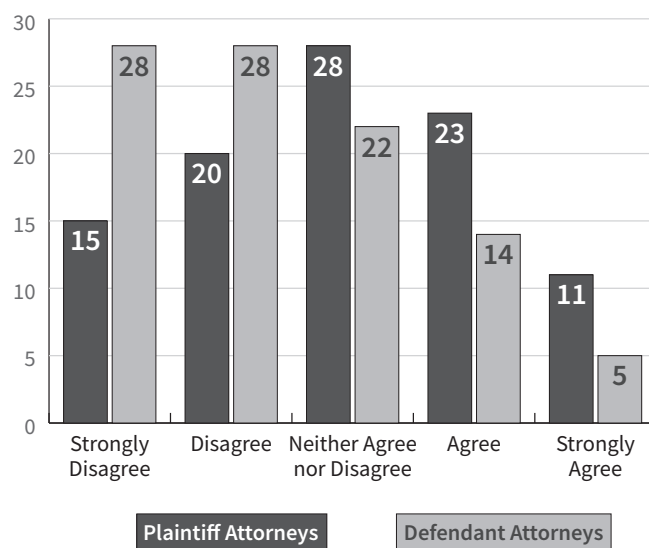


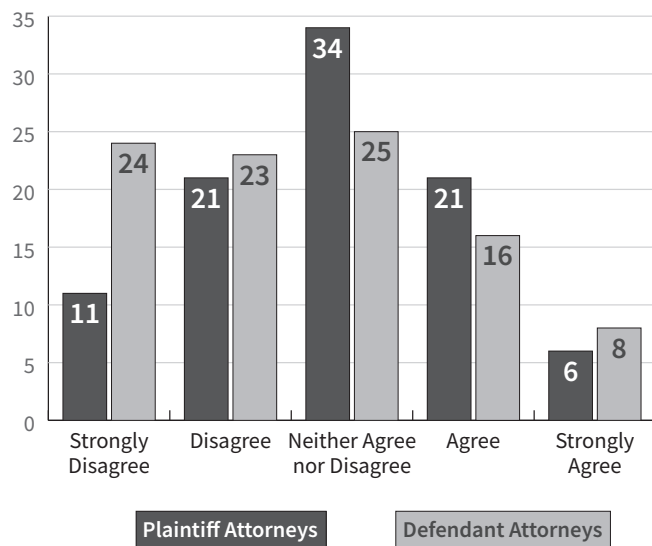
Figure 20: Northern District of Illinois (N=467)

## Participant Evaluations of the Pilot—Overall costs

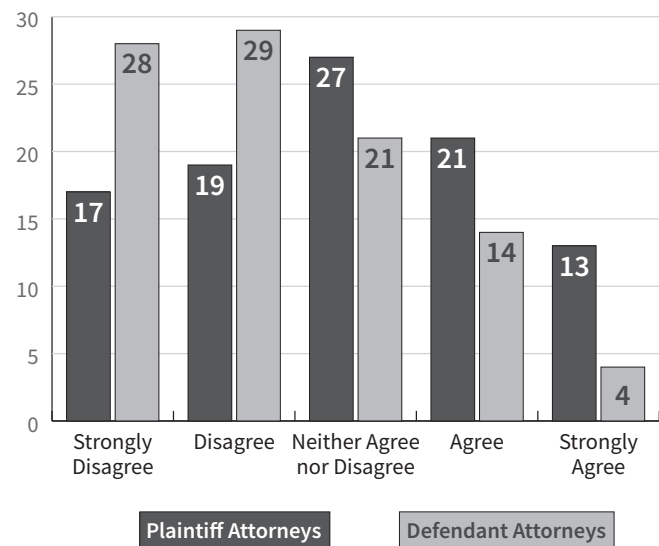
### Reduced the overall costs in the case for my client.

In Arizona (**Figure 21**), 27% of plaintiff attorneys either agreed (21%) or strongly agreed (6%), 34% neither agreed nor disagreed, and 32% either disagreed (21%) or strongly disagreed (11%). Defendant attorneys either agreed (16%) or strongly agreed (8%) in 24% of closed cases, neither agreed nor disagreed in 25%, and disagreed (23%) or strongly disagreed (24%) in 47% of closed cases.

In Illinois Northern (**Figure 22**), 34% of plaintiff attorneys either agreed (21%) or strongly agreed (13%), 27% neither agreed nor disagreed, and 36% either disagreed (19%) or strongly disagreed (17%). Defendant attorneys in that district agreed (14%) or strongly agreed (4%) 18% of the time, neither agreed nor disagreed 21%, and disagreed (29%) or strongly disagreed (28%) in 57% of the closed cases.



**Figure 21:** District of Arizona (N=255)

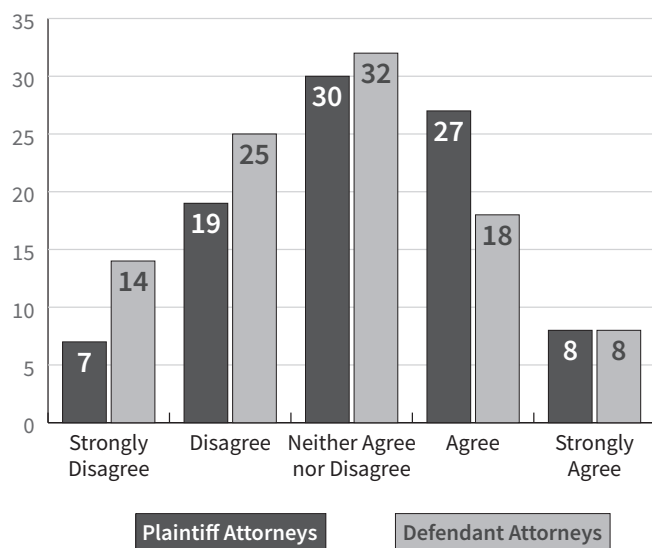


**Figure 22:** Northern District of Illinois (N=466)

## Participant Evaluations of the Pilot—Length of case

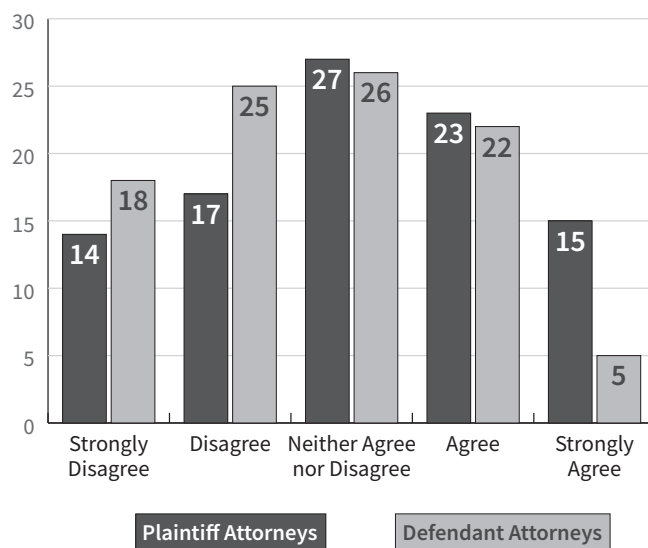
### Reduced the time from filing to resolution in the case.

Of course, docket-level data will provide a better measure of the effects of the pilot on disposition times, but this question rates participants' perceptions with respect to disposition times. Plaintiff attorneys were more likely to agree than defendant attorneys, and defendant attorneys were more likely to disagree than plaintiff attorneys. In Arizona (**Figure 23**), 35% of plaintiff attorneys either agreed (27%) or strongly agreed (8%), 30% neither agreed nor disagreed, and 26% either disagreed (19%) or strongly disagreed (7%). Defendant attorneys in that district either agreed (18%) or strongly agreed (8%) in 26% of closed cases, neither agreed nor disagreed 32%, and disagreed (25%) or strongly disagreed (14%) in 39% of closed cases.



**Figure 23:** District of Arizona (N=256)

In Illinois Northern (**Figure 24**), 38% of plaintiff attorneys either agreed (23%) or strongly agreed (15%), 27% neither agreed nor disagreed, and 31% either disagreed (17%) or strongly disagreed (14%). In that district, 27% of defendant attorneys either agreed (22%) or strongly agreed (5%), 26% neither agreed nor disagreed, and 43% either disagreed (25%) or strongly disagreed (18%).



**Figure 24:** Northern District of Illinois (N=465)

## Discussion

This is not a final report on the MIDP. These preliminary results represent the views of attorneys participating in only the relatively short-pending MIDP cases. Accordingly, the results presented here should be interpreted with a great deal of caution. It will be informative to see how attorneys in cases of longer duration evaluate the effects of the MIDP. Subsequent surveys will complement the figures presented here, as will analysis of docket-level data from pilot cases and structured interviews conducted in the participating districts.

Despite their preliminary nature, however, some of the survey results presented here merit discussion. It is noteworthy, for example, that participants generally did not rate the MIDP as having reduced discovery costs or overall costs for their clients in the closed cases about which they were surveyed. In the District of Arizona, for example, 29% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced their client's discovery costs, and in the Northern District of Illinois, 34% of plaintiff attorneys and 26% of defendant attorneys agreed or strongly agreed that the MIDP reduced client discovery costs. Defendant attorneys were more negative about the pilot's effects on discovery costs, disagreeing or expressing neutrality in about three-quarters of cases in both districts and, in Illinois Northern, disagreeing or strongly disagreeing a majority of the time.

These evaluations can probably be explained, in some cases, by low expectations with respect to discovery in the first place. The MIDP can hardly be expected to reduce discovery costs in cases in which those costs typically would be limited regardless of the extent of the initial disclosures. At the same time, large pluralities of plaintiff attorneys tended to agree that the MIDP reduced the number of discovery requests in pilot cases—49% of the time in Arizona and 48% in Illinois Northern. That reducing the number of requests did not reduce overall costs, in some attorneys' estimation, may suggest that the disclosures made unnecessary some discovery requests that would typically be made but did not reduce the need for the discovery itself. But again, these findings are limited to the relatively short-pending MIDP cases that have already closed. If the MIDP is to have a demonstrable effect on discovery costs, it might be in longer MIDP pilot cases that have not yet become eligible for these surveys. Along these lines, majorities of both plaintiff and defendant attorney respondents agreed or strongly agreed that the pilot resulted in an earlier sharing of information than would otherwise have occurred.

In terms of reducing discovery disputes, respondents may have rated the MIDP neutrally because full-blown

discovery disputes are likely relatively rare, especially in short-pending cases. As with the discovery costs question, one cannot expect the expanded disclosures that are part of the MIDP to influence cases where the problems it is aimed to address would not occur in the first place. To some extent, the same may be true of the question about focusing discovery on the important issues in the case. After all, if these are relatively straightforward from the outset, the MIDP can hardly be expected to focus discovery appreciably.

These preliminary survey results suggest that concerns that the MIDP will result in disclosure of information that would not otherwise come to light in the discovery process have been overstated. Majorities of respondents in both districts, and majorities of plaintiff and defendant attorneys, disagreed or strongly disagreed that such disclosure was an effect of the pilot.

In general, and consistent with some of the open-ended responses reproduced in the Appendix, plaintiff attorneys tended to evaluate the effects of the MIDP more positively and defendant attorneys more negatively. Plaintiff attorneys, for example, were more likely to assess the MIDP positively in its effects on the timing and effectiveness of settlement negotiations than were defendant attorneys. Similarly, plaintiff attorneys were more likely to agree that the MIDP reduced time to disposition in the closed case; defendant attorneys were more likely to disagree. Although, as shown in the Appendix, some plaintiff attorneys expressed negative views of the MIDP. The overall tendency of plaintiff attorneys to rate the MIDP positively makes sense in light of the observation that plaintiff attorneys are, broadly speaking, more likely to represent requesting parties in the discovery process and defendant attorneys producing parties. The bulk of discovery materials, and most deponents, are likely to be on the defendant side of most cases. Expanded disclosure requirements should, all things considered, benefit the requesting side more than the producing side. Some survey respondents also pointed out that, in terms of the timing of the MIDP obligations, plaintiff attorneys know what their claims will be and thus can make use of the pre-filing period to prepare disclosure materials, unlike defendants whose disclosure obligations are substantially based on plaintiffs' claims.

## Appendix: Attorney Comments

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### District of Arizona

#### Question One

Responses to “Please provide any additional comments you have regarding the initial discovery in the above-named case.”

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#### Plaintiff Attorney Comments

All federal civil rules unfairly favor government parties, but MIDP is particularly unfair.

Ultimately the judge’s unfair actions led to the final unfair outcome, but MIDP did nothing at all except raise costs for the plaintiff

As former Civil defense attorney for XX years and a small Plaintiffs only firm of 3 I found that the Pilot project made everyone a little more conscious of duties owed to the other side than the old way of doing things. It felt like in this “Products and Premises” case that Plaintiffs had to be very aware of all the prior medical issues and records while defendants had to focus on duties of disclosing prior accidents, claims and design drawings that could easily be delayed. The ordinary course of “producing” only after specifically being requested with a limited number forced upon Plaintiffs by the RFP rules. It is a good rule change.

Case settled almost contemporaneously with the exchange of the MIDP Responses

Case was remanded prior to the substantive exchange of discovery

Counsel for both parties were exceedingly passive and did almost nothing for 18 months. Their bills were large and in my opinions excessive, considering they got nothing done. Shortly after I was hired I started depositions, I insisted documents be exchanged, a private mediation be scheduled. With that, the case settled.

Defense counsel in this employment dispute did not seem to take its MIDP obligations seriously.

Their MIDP responses provided almost no meaningful information, and they clearly treated it as a pro forma obligation that could be met with minimal disclosures and a catchall phrase like “to be supplemented later,” even

though they should have and could have had the information before the initial MIDP deadline. Stronger oversight (such as having initial MIDP responses reviewed by the judge or staff) would help. MIDP was not helpful to achieve any of the above-identified goals because defense counsel knew its failure to comply would have no adverse consequences. Even if my client had the money to pay for me to pursue court intervention on these failures, it is likely that the only outcome would have been that they would have eventually complied with the order in a way that they should have done from the beginning.

Defense discloses nearly nothing in the MIDP responses other than the bare minimum, if that.

Requires judicial intervention to force production of relevant information despite disclosure clearly being required by the MIDP rules.

Exchanging MIDP disclosures provides an early deadline that can accelerate settlement of straightforward cases. Parties are eager to settle the case quickly before being forced to complete the disclosure.

Honestly, I don’t quite get the purpose of the MIDP. Why not just stick with the initial disclosures under Rule 26 but move those deadlines up?

I believe it is a good idea, but the orders governing mandatory initial discovery should be simplified.

I generally appreciate the MIDP. However, requiring MIDP Responses while a motion to dismiss is pending is unnecessary for obtaining clear results—which was the reason articulated for the inflexible nature of the MIDP. In fact, doing so skews the results to make MIDP appear more productive than it really is, because meritless lawsuits regularly terminate early. And, of course, requiring early MIDP notwithstanding a pending motion to dismiss boosts the cost (and the shakedown value) of a meritless lawsuit.



In practice, the attorneys often do an incomplete/dumbed down version of the MIDP, which is unhelpful.

I think it's a great idea!

I think MIDP Responses provide LESS information, though it is earlier, than Initial Disclosures.

I was local counsel and was not involved with the discovery production to fully know its impact on the above issues.

It made it more difficult for me, because the timelines were too short. I have a small practice and need more flexibility.

It was already my custom as Plaintiff's counsel to provide almost all information required by the MIDP. Defendants behaved as they normally do: failing to timely or fully disclose evidence, witnesses, pushing off the burden of creating and filing the MIDP and pretrial order onto the Plaintiff, meanwhile providing as little as possible. In this case, I represented a Plaintiff against parties and counsel I am often opposite. While it is the Defendants tack to delay and embargo discovery, I have a high regard for the lawyers who represent the defendants. We have so much experience opposite each other that we were able to quickly assess the case, its value, and settle it fairly. The lawyers on the other side were extremely cooperative in the unique nature of litigating this case alongside a bankruptcy. However, they still didn't give us everything required by the MIDP.

Judge \*\*\*\* exhibited hostility towards MIDP and said that because nobody ever consulted with him prior to it being initiated that he wasn't going to care about it.

Judge \*\*\*\* is sharp. It was a pleasure to be before a judge who reviews the papers and treats litigants with courtesy.

Mandatory disclosures may well be advantageous in general, but are not always appropriate, and in my particular case, increased the overall expenses of all parties without corresponding benefit.

Mandatory discovery is a complete waste of time and the defense does not provide any items that were not in disclosure.

Mandatory discovery was required way, way before the parties were prepared to provide meaningful answers, and wasted fees in a time that they were working on settlement

MIDP should be used in ERISA cases, because it has helped when we have used it. Defendants should have to watch [the video] to understand the purpose of the MIDP. If utilized effectively, it will save costs and change the landscape of discovery for the better.

Most of the documents obtained through initial discovery were exchanged prior to the filing of the suit. It is difficult to assess the benefit of the program in this situation, as the parties had already exchanged previously.

Our case settled before the mandatory disclosures, so I don't have much to share regarding the program

Our case was an interpleader action and the discovery program did not seem well-suited for that type of case since the discovery it called for was duplicative of what the parties already had in their possession from the underlying lawsuits.

Overly burdensome

The actual rules and deadlines are irrelevant and ineffective if they are not enforced

The case settled before any substantial discovery occurred.

The case was voluntarily dismissed early in the proceedings with leave to re-file. I regret my answers could not be more substantively helpful.

The Defendant did what it always does. It produced a lot of material, but embargoed information required for class certification, provided non-responsive information and a lot of it, piecemealed responses, objected to all written discovery, required extensive meet and confers. The reasons we avoided contacting the court for compulsion are (1) we have litigated deeply against the defendant, (2) this was a related case to one we litigated deeply against Wells Fargo & so we knew most of what we needed; (3) the required face to face settlement conference. One thing that would be an effective adjunct to the MIDP is a settlement conference with a magistrate judge.

The Defendant treated the MIDP the same way defendants generally treat mandatory disclosures and discovery generally, with delay, incompleteness, and deception. I was not truly able to craft the RFPs, Interrogatories, and RFAs to be more targeted only because of the general refusal to produce information that it should have produced in the MIDP. I feel that the case settled after a long meet and confer process that produced almost nothing, several depositions, and the threat of a motion to compel. This was pled as a class action, and the only thing that enabled us to settle was pushing for the information about whether a class existed. Which should have been easy to determine at the MIDP stage, saving time and costs.

The MIDP process greatly increases the costs of litigation in the District. It should be abandoned as soon as possible.

The other side did not take its obligation to produce all relevant information seriously. There were two discovery conferences as a result, and there does not appear to be a clear enforcement mechanism for failure to produce all relevant information at the outset of the case.

The other side produced documents they intended to use but not all documents relevant to the case. We eventually sought a discovery conference pursuant to the judge's procedures, but the court vacated the conference without scheduling a new one after the other side stated they had a scheduling conflict but would continue to work towards a resolution of the discovery dispute. They were not working towards a resolution, and they did not work toward a good faith resolution after the court vacated the discovery conference. We ultimately had to request another discovery conference on the same issue months later after incurring thousands of dollars of attorneys' fees. My experience the pilot program has some benefit, but that benefit is greatly outweighed by the cost added to litigation.

The previous procedures were better.

The problem with any new procedure is that it has to be enforced. Plaintiff did not get anymore by the mandated discovery than he would have in discovery. Surprisingly the same evasive answers were used and a minimum of documentation provided. Because of the opponent the settlement was not much effected It does put much of the cost upfront. It feels like another way to dissuade plaintiff and will unless the opponent's answer's become real. Justice Zlacket used to say if it hurts then it is clearly needs to be disclosed.

There is a lack of uniformity between the divisions in the district court as to what is expected to be disclosed. I had a prior Case in the Tucson division and it was satisfactory. In the Phoenix division the Court believed my disclosures were not sufficient, even though they were essentially identical to what I did in Tucson.

This case did not have many factual disputes. The primary issue in the case was the legal effect of the agreed-upon circumstances.

This case was governed by ERISA which has its own set of limited discovery precedents. The controversy which required motion and threat of discovery motion related to the scope of guidelines by an insurance company relating to a specific decision made in terminating a claim. Anyone familiar with the industry knows that such guidelines exist internally. But it was continually denied, until an eventual agreement with a Protective Order allowed disclosure, the

use of a protective order to shield embarrassing information which is relevant is an abuse which often occurs in these cases, but continues to exist because companies have no disincentive when caught in not providing information which should have been provided.

This gave us the Defendant's information far earlier, as in months than we would get it. Also, the game of objecting to all questions was not played. This enabled me to see what the real defense was and went a long way towards settlement.

This non-compete case involved a global restriction. We filed for judgment on the pleadings, which would have largely resolved the case in our client's favor if granted. Meanwhile the judge made clear he could not get to the motion quickly. Both sides spent hundreds of thousands of dollars in MIDP compliance, including ESI gathering and review. After six months, and large expenditures of fees, both sides agreed to settle. The MIDP was a disservice to both sides in this case.

Too complicated and confusing; inhibited resolution

Useful in forcing parties to move the case along promptly, be prepared much earlier.

We are currently still litigating. Therefore, my answers may be premature.

### **Defendant Attorney Comments**

Absolutely unnecessary. Made the cost of litigation exponentially more expensive than it should have been. Parties should be able to opt out of the MIDP when the facts of the case call for it.

Briefly, the case settled relatively soon after MID, but it seems unlikely, or at least hard to say, that settlement decisions were made based on those initial disclosures.

Case lacked merit and was settled for a very, very small amount, but costs related to mandatory disclosures were 100x more than settlement amount. Arizona state court rule is better—if case can be dismissed on motion to dismiss, no disclosures required. That saves litigation costs for defendants in cases clearly without merit.

Conducting discovery with a motion to dismiss pending ADDED costs in time and money to this matter. Court should have ability to stay discovery pending Motion to Dismiss.

Difficult to say. Plaintiff dropped case because it was meritless on our side filing Motion to Dismiss with our agreement not

to pursue costs. Early disclosure may have played a part in convincing them their case was meritless, or

Front loading disclosure / discovery costs, without any meaningful alternatives, is a significant burden in a case where the goal is early settlement.

I find that the United States complies with MIDP and most private parties do not. Rather than turning over discovery, private plaintiffs “identify” documents that everyone already knew existed and then the United States has to make repeated requests to obtain the actual documents. MIDP has not helped settle cases sooner. If parties really want to settle, they will make the necessary disclosures.

I get it, but I prefer the old system. Sometimes MIDP imposes too great a burden on the front end in cases that would settle quickly without compliance.

I served as local counsel in this matter. I was not involved in settlement discussions and the case did not proceed to a stage that allowed me to respond meaningfully to the majority of the questions asked.

I think the initial discovery under the MIDPP is generally more effective than historical requirements. It helps to understand the positions and weight of evidence early and reduces regular discovery. My disagreement that discovery in my case was not equally fair is probably because the Plaintiff in my recent case was Pro Per. I had to basically guide the \*\* on how the case gets litigated yet had to contend with his refusal to work together to get through discovery his lack of knowledge of the process made him distrustful and stubborn. The court expected me to and I complied in drafting all the preliminary documents and take the initiative to follow court rules and stay on schedule regarding meet and confer, joint report, joint case management order, even though the plaintiff was the one bringing suit. The plaintiff was late responding, did not effectively respond, belligerent and did not obey certain of the court’s instructions. Because he is a Pro Per, the district court must treat the plaintiff leniently for fear of being chastised or reversed by the 9th Circuit. That situation is a disincentive to bring discovery disputes or missed deadlines to the judge because the Pro Per is going to get a pass. This dynamic lengthened the case and significantly lessened the efficacy of MIDPP requirements regarding initial discovery and meeting deadlines.

If the Court just required that parties follow the initial disclosure requirements imposed in Arizona state court, it would be much better. Instead, the process is strange and the other rules that are imposed (such as requiring an

answer even when a motion to dismiss is filed) are very bad and costly.

In this case, the District Judge enforced its scheduling order. The other side did not provide timely disclosure and ultimately this was one of the reasons the plaintiff ended up dismissing the case.

It’s a good thing. I would hope lawyers would be doing it anyway based on Rule 26, but hope springs eternal.

MIDP disclosures can make defending cases with nominal or marginal merit unnecessarily expensive for defendants.

MIDP is a GREAT program and is effective but only if both sides take it seriously. There needs to be some precedent of sanctions or other penalty when any party does not abide by the spirit and letter of the requirements. My experience is that the serial filers in consumer cases - on plaintiffs’ side - just repeat in the MIDP the minimum they normally do in disclosure, and you have to press them to provide specifics, documents, and what seems to be required by the program.

MIDP makes me substantially less likely to settle cases because all my work has to be done up front. There’s no benefit to settling. MIDP also takes the skill out of lawyering at the discovery stage, and when dealing with pro se litigants, it’s a giant disaster that makes my job substantially harder and more frustrating.

MIDP seems to cause more expense when the other side is pro per and/or their claims have little merit.

My client provided all information (including electronic documents) up front. The other side did not.

My experience has been that in most cases, this program adds to the cost of litigation.

One size fits all should be re-examined and perhaps do something more like uniform interrogatories in Superior Court to avoid waste.

Plaintiff misread the MIDP rules to allow him to serve intentionally oppressive discovery with his Complaint so long as he also served MIDP responses. The instructions MUST be clarified to prevent this.

Plaintiff’s counsel believed providing plaintiff’s discovery responses with service of the complaint immediately entitled him to serve written discovery.

Plaintiff’s “facts” in the MIDP were no more than a restatement of the allegations of the complaint and provided almost no details. The requirement for facts should be made

more explicit and strengthened to make all parties required to provide detailed facts relevant to claims or defenses.

Plaintiffs only facially, but not substantively, complied with the MIDP, which has been my experience in the two Arizona cases in which I have been involved. The case was so front loaded by discovery for a complying defendant that there was no value in settling to avoid discovery. As most work for defendant was done on the front end, there was a disincentive to settle.

Plaintiffs' claims in this case clearly lacked merit and were even subject to res judicata based upon a prior case. There was not, however, a vehicle for us to request that all discovery be stayed pending a motion to dismiss and that we be relieved from filing an answer. MIDP is a waste of resources where the claim is without prima facie merit and subject to a motion to dismiss.

Rule closely matches AZ Rule 26.1 Disclosure. Defense is placed at a somewhat disadvantage given the acceleration for disclosure as plaintiff had the case for some time.

Sanctions were awarded by the Court due to Plaintiff's failure to properly comply with his MIDP obligations, and Plaintiff agreed to voluntarily dismiss his case in exchange for avoiding such sanctions.

The 30-day timeline is so short that it undermines settlement, as it forces the parties to incur significant cost (particularly defendants) prior to the ability to have meaningful settlement discussions.

The burden of significant discovery early in the case does not speed up discovery, it incurs more costs. Not being able to file a motion to dismiss before filing an answer also incurs more costs.

The cost of complying with discovery was great given that we had to file and answer and exchange discovery even though we filed a motion for judgement on the pleadings.

The discovery is not geared toward different types of cases like labor and employment.

The discovery just does not apply to all cases - this was a wage and hour case and it was not tailored to that.

The early discovery costs more to start, but is worthwhile to have early and full disclosures and will save costs latter in the case

The judge in the case was too ridged in this case and did not allow the lawyers to professionally discover the case with flexibility. The discovery order and the court's management

of the case made this a most unpleasant experience for the lawyers.

The Mandatory Initial Discovery was abused in this case and caused unnecessary expenses to be incurred and should not apply to cases where a motion to dismiss has been filed.

The MIDP nearly made this case impossible to settle because of the added costs. It only settled because my client agreed to overpay in settlement.

The plaintiff in this case was pro per, so the results of this case are likely atypical.

The problem with the MIDP is it requires an answer and MIDR even while a motion to dismiss for failure to state a valid claim is pending. This unnecessarily forced great expense.

The process is just so foreign. It would make more sense if they just amended Rule 26 (and if the requirements just mirrored state court, which does have slightly higher initial discovery requirements).

The program is unnecessarily time and cost heavy in the initial 60 days and is skewed toward forcing settlement that is based on cost, not substantive issues. In the four cases I have had under this program, the requirements strongly favored plaintiff in that defendant would be required to incur unrealistically high costs for compliance with the MID even if plaintiff's case was frivolous.

The rules should be clarified to prevent the abuse by the plaintiff's attorney, based on his claim that serving his client's MIDP responses allowed him to initiate discovery with the lawsuit, all to force an unjust settlement, which he did until he was suspended from the practice of law. The rules should say that completion of MIDP responses is a necessary but NOT sufficient condition on initiating discovery.

There should be CLE Credit provided for watching the Judges' panel on the MIDP program - it was excellent. I have had to encourage/persuade opposing counsel to live up to the requirements in the program though but the explicit text of the Order helps.

This case was unique because Plaintiff requested a mandatory injunction. So everything moved quickly, but it was not related to disclosures.

This case was unique given that Plaintiff was Pro Per.

This program is very similar to the disclosure requirements in Arizona state courts.

This was a case brought by a serial plaintiff. Costs were disproportionate on Defendant for frivolous litigation. Intent is good, but process needs refinement for type of case.

This was a small case and the mandatory discovery really didn't have much of an impact.

This was one of two cases involving \*\*\*. Both were dismissed early on, and the case is pending in state court, so my answers are not too valuable.

We already have mandatory discovery in state court and so the MIDP is already familiar.

We did not get passed initial motion practice, so initially discovery was not extensive. In addition, we were already debating discovery issues in a sister case in the State Court.

We filed a motion to dismiss for failure to state a claim and failure to complete service. However, because of the MIDP, the motions were not decided and the Defendants were obligated to prematurely provide disclosure of documents. We feel

strongly that the basis for the motions to dismiss were valid and would have dismissed the case. Due to the obligation to comply with the MIDP, Defendants made the disclosures and Plaintiff's bargaining position was enhanced. A settlement was reached to avoid increased expenses, but the MIDP unnecessarily created many of those expenses. There needs to be a compromise when a motion is filed to stay the MIDP until the motions on the pleadings are resolved. This same issue has come up in multiple cases.

We never got that far in the litigation as we settled, but the threat of mandatory discovery and federal court rules/costs helped expedite settlement.

We were required to disclose and engage in discovery even though our motion to dismiss was granted six months after fully briefed.

You should offer CLE for the on-line video panel discussion available on the court's website. It is excellent and everyone should watch.



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## District of Arizona

### Question Two

#### Responses to “Please provide any comments you have about the district’s mandatory initial discovery pilot program.”

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##### Plaintiff Attorney Comments

An unnecessary burden that is a waste of time

As a general proposition, I believe it ought to be automatically delayed in the event a Rule 12 motion is filed. Otherwise, it’s a needless expenditure of time and money.

Everything went smoothly

Fine with me

I am inclined to believe that the program is beneficial and should be continued.

I do not like the MIDP—this is based on my experience in other federal court cases. It does not materially advance the litigation.

I don’t believe that it is helpful. It increases fees that affect an early settlement.

I have never participated in it. My cases involve challenges under the Administrative Procedure Act or similar statutes. No discovery takes places. Instead the case is decided based on the agency’s administrative record.

I like it with one MAJOR exception: To require MIDP disclosure before an answer is filed (when a Rule 12 Motion is pending) is nonsensical and unhelpful. Many cases are filed that are frivolous or do not belong in that court. In those instances, the MIDP does nothing but compound costs unnecessarily. There is no purpose. The court’s stated reason (to get a larger sample size of how the MIDP affects cases) is illogical. Frivolous and non-meritorious cases often have extremely short lives regardless of the MIDP. So the increased sample size will inaccurately skew shorter by requiring MIDP before an answer is filed. If that pre-answer MIDP policy continues, I would vehemently oppose MIDP. Other than that, I think it’s great.

I think it is useful and should clear calendars quicker.

I think the pilot program has a lot of potential to achieve its goals. I have only litigated a handful of cases under the MIDP

so far, and I have not noticed any change to Defendants behavior. It adds a substantial amount of time to Plaintiff’s burden, and much of it is duplicative with the R. 16/26(f) order many judges require. Its overall effect is to multiple Plaintiff’s attorney time. I already had a long standing practice of providing everything R. 26(a)(1) required, and the MIDP report together with the attorney conference report has substantially increased the time spent on this task to make it meaningful, while the Defendants still embargo information & documents. I believe that Defendants still abuse the protective order process to withhold information, produce documents in a cumbersome form despite agreement otherwise.

In my experience MIDP responses submitted by the parties are rarely substantial

Ineffective because the court did not require the other side to comply

It’s a great program and should become standard procedure in civil cases, just need more guidance about what is expected in the disclosures. It’s not a hardship whatsoever because we have been doing mandatory disclosures in Arizona State Court for 20 years.

It’s a good idea.

Make it clear to all parties that they should be disclosing clearly relevant documents as part of MIDP responses. For example in a wage and hour case employers should disclosing records regarding wages paid and hours worked.

No real experience with it yet. This case settled as quickly as it began.

Overall, I think the mandatory initial discovery pilot program will assist in cases moving quicker as long as the courts ensure the parties comply with the disclosure requirements.

Sanctions should be automatic for Defendants who refuse to produce insurance policy information required already under Rule 26(a)

Satisfied

The case was decided at such an early stage I lack experience to opine

The program in my opinion puts a lot of requirements and causes much stress on attorneys – even where the merits of the case on the other side are frivolous.

### **Defendant Attorney Comments**

Although it was not an issue in this case, in other cases, I do not believe that it has reduced the number of requests for production or interrogatories that are served on my client. Additionally, although my client provides full and robust MIDP responses, it has not been my experience that plaintiffs comply with the MIDP order. Most simply refer me to the complaint, and few produce documents with the MIDP responses. The MIDP has not alleviated the discovery burdens, but merely front-loaded them, and resulted in discovery rabbit holes about documents that are not relevant, and that my client does not intend to rely on.

As long time Arizonan practitioner, I was happy to see the Federal Court follow suit with what we have been doing in AZ State Court for 30 years

Because of significant delays in getting ruling on motions the expedited discovery program was not of value in our case.

Consider a final rule on mandatory initial discovery that does not require disclosure until after 12(b) motions are ruled on.

I believe it is a bad idea.

I believe the program is working well and generally as intended, as revised to postpone answers if a Rule 12 motion is filed.

I do not like it. I think it provides less information and makes discovery process more challenging given the time constraints imposed in Federal Court.

I like it and think it should be incorporated into the rules of civil procedure for all civil cases.

I think it is great. Would be more effective if the Rule 26f conference was not dispensed with, but rather the court at the hearing reinforced the seriousness of compliance with it

I think the mandatory initial discovery pilot program is a bit too rigid. For cases likely to settle, such as ours, I think it is in the interests of both the court and the parties to allow the parties to pursue settlement without incurring unnecessary discovery expenses.

I think the MIDP is a waste of time in most cases. We need to allow for additional time to serve MIDP so parties can work on dismissing improper Defendants or resolving dispositive motions

I was admitted pro has vice in this case, I did not have the opportunity to participate the discovery pilot project, but I believe the initial disclosure requirement will be of great benefit for the parties, the attorneys and the Court.

It made no impact on what I was already doing in providing disclosure statements.

It was fine

It works well in some cases and not well in others.

Makes no sense, even on paper. MIDP has added unnecessary waste of time and expense to civil litigation in the District. It improved slightly with amendments relating to pending MTDs. Also might make some since if limits were placed on discovery in exchange for MIDP. Apparently, that is discretionary and most divisions decline to limit written discovery if one side objects. Real problem is the inordinate amount of time it take to get even simple rulings from Court. If the Judicial Branch were serious about speeding the process, it would look to the real problem, rather than try to micro-manage the litigants

Mandatory discovery should not start until Motions to Dismiss have been resolved.

My firm represents corrections and detention defendants in Section 1983 claims. We have found that the expense and burden associated with the Mandatory Initial Pilot Project (“MIDP”) has the opposite effect of its stated purpose. Specifically, it dissuades our defendant clients from possible early settlement given how entrenched in the discovery process the parties are at very early stages of litigation. Moreover, in light of the fact that plaintiffs can simply wait to have documentation provided to them rather than engage in discovery, we have found that plaintiffs are not as inclined to settle a case at an early stage. The time limitation to disclose all “relevant” evidence within thirty days of uncovering the same is extremely prohibitive, particularly for a defendant, who typically controls a majority of the evidence in most cases. Moreover, requiring both defense counsel and their clients to investigate, gather, review, organize, and produce all “relevant” evidence within such a restrictive time limit imposes a heavy and costly burden, one that is almost always one-sided. The lack of definitive parameters concerning “relevance” also creates unnecessary discovery channels, and broadens the entire scope of discovery and has significantly increased our clients’ costs. Further, whether “relevant

evidence” encompasses impeachment evidence remains undefined by the MIDP. This determination is even more vexing because judges have expressed different opinions on the issue. Practically speaking, it is almost impossible to ascertain all of the impeachment evidence a party intends to use at the time of trial prior to the discovery deadline, and thus this requirement is problematic and could lead to unfair advantages at trial. Moreover, requiring that the parties disclose impeachment evidence under the MIDP goes against F.R.C.P. 26(a)(1) and 26(a)(3), which specifically exempts from disclosure evidence that would be used solely for impeachment

Not effective as most Plaintiffs’ attorneys fail to provide any more information than under Rule 26(a) but significant cost to defendant

On balance, initial discovery under the MIDPP seems calculated to making discovery more efficient. But I have had little experience with it and that with a Pro Per, which I think diluted its effects. I think my view would be more helpful to you after I’ve gone through it a few times.

Positive experience from my other D of AZ cases were MIDP was exchanged.

See earlier comments

Staff was helpful when we inquired as to MIDP requirements for this case.

Terrible overall experience.

The disclosure of expert information was too soon relative to fact discovery.

The program is a bad idea and should be abandoned.

There should probably be more opportunities to suspend the order when dealing with pro per litigants.

Think it is a waste of attorney time and client resources

This case was closed so long ago that I have little memory of how the disclosures affected the case.

While the program results in the parties receiving more discovery early in the case, it tends to increase fees and costs early in the case. This tends to have a chilling effect on settlement efforts. In employment cases, the program puts more of a burden on defendant employers early in cases.



## Northern District of Illinois

### Question One

Responses to “Please provide any additional comments you have regarding the initial discovery in the above-named case.”

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#### Plaintiff Attorney Comments

After litigating numerous 1983 cases that have mostly concluded by settlement, I conclude that MIDP discovery is usually a waste of time. It ultimately impacts the discovery process no faster than the 26(a)(1) process. I think it is of very limited use, at best, in these cases. Even when there is complicated *Monell* discovery, I can think of no MIDP case where it made a difference. It is just a tiresome hassle for me and my opposing counsel to complete.

Case settled rather quickly.

Case settled while mandatory disclosures were in process but before either side had completed disclosures

Defendant company hid its documents, held back its key documents, including employee handbooks, and did not provide any full or fair disclosure, and unduly delayed producing key documents, and then filed a motion to compel arbitration, while hiding its key contrary documents. Plaintiff, on the other hand, was placed at a severe disadvantage because she produced all her documents up front. The defendant usurped the discovery process by hiding its key documents, despite repeated Plaintiff's repeated requests up front to disclose pertinent employee handbooks. These initial disclosure rules work if there is are cooperative counsel, acting in good faith, but when, as here, the defendant's/ company's counsel delays for months and then, only after Plaintiff is forced to spend several months “pulling teeth” and repeated informal requests, does the Defendant produce key documents which it, in effect, hid, the process does not work and, indeed, works to the disadvantage of the litigants and sanctions the miscarriage of any “justice.” See Rule 1, Fed. R. Civ. P., stating that the civil procedure rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Defendant was very late with disclosures and provided the minimum. Initial discovery had no impact on the case

Defendant's MIDP disclosures were bare bones and did not include any actual documents, which is par for the course, in my experience.

Defendant's MIDP's provided virtually no information, and the only document produced related to insurance coverage. The parties also had to serve 26a1 disclosures, so the MIDP's did not add anything to the process.

Defendant's reluctance to produce documents directly led to settlement.

Defendants are not producing any documents as part of their disclosures, especially in TCPA litigation

Defendants did not take seriously their obligations under the MDIP. As a result, there were no time savings.

Defendants were allowed to question their employees about the Complaint litigated without the notice or participation of Plaintiff's Counsel

Despite the requirements of the disclosures demanded by both sides in the Model Pilot Program, Defendant's flout the Rules. There are no ramifications for a failing to make the proper disclosures, such as appropriate sanctions. Frankly, that would at least provide a fear factor in making a strategic decision by the defense to ignore the requirements dictated pursuant to the Model Pilot Program. In this case, I wrote consecutive, exhaustive F.R.C.P. 37 letters, and included the failings of proper disclosure under the Model Pilot Program. The case settled through private mediation within two weeks of the F.R.C.P. 37 letters being sent to counsel for the defense from my office.

Don't see how it was any different than 26a1 in actual effect

Due to the bankruptcy filing, the full extent and benefit of the discovery process was not available in this case. This is not a fair example.

I feel the opposing party did not adequately and in good faith identify the documents responsive to some of the MIDP requests. Rather, it stated that they were contained within tens of thousands of pages of documents produced, leaving me to review all those documents to identify the relatively few responsive ones. Although the case was resolved before this problem was formally raised with the Court, in this respect the MIDP mechanism did not work well for me.

I would agree that MIDP is more beneficial than Rule 26 Initial Disclosures

It is too minimal and toothless to be an improvement over R 26(a)(1)

It should be done in all cases—the discovery process is enormously expensive and tedious and this helps alleviate some of those issues.

It would be helpful to expand the classifications of cases exempt from the MIDP program, as ERISA delinquency cases typically do not require extensive discovery beyond basic payroll information. The MIDP disclosures require plaintiffs to produce substantially more records than they ordinarily would have, and records that are ultimately not relevant to resolution of the case.

Limited need for discovery.

MID's are generally useless make work.

MIDP process and deadlines associated with it make it difficult for Plaintiffs as they constantly need more follow up in a short timeframe

My adversary was particularly ethical and cooperative. This is not always the case with defense attorneys. There was insurance, which also made case easier to settle.

No discovery exchanged because settlement was reached before case progressed to that stage.

Other district courts should adopt the policy

Parties just end up responding to MIDP and then re-issuing discovery that includes MIDP issues. Objecting on that basis is not practical so we answer both.

Please note that this case was settled shortly after MIDPP disclosures were tendered.

The case settled before mandatory discovery was required. As such, the mandatory discovery had no impact on the case.

The concern I have is how the Discovery program integrates with the standard court rules. Does the discovery program supersede the rules or compliment them?

The effectiveness of MIDP will be found in larger cases where the volume of discovery would be greater. In small to modest cases, the MIDP does not have nearly the effect and at times in those small to modest cases, the MIDP in fact seems to create more work—at least in my employment cases (FLSA)

The increased expense of MIDP, and particularly for ESI, was significant. It ended up causing me client problems (client was upset with the cost of ESI and document review) that might have been somewhat lower under traditional discovery. My opponent also did not do things correctly the first time through, so MIDP resulted in inequity in expense and follow up.

The judge seemed confused by the mandatory requirements and did not control discovery.

The Mandate Disclosures are well worded and since they are from the Court, it's hard for parties to parse words or say things like: I don't understand, or object for vagueness, that's GOOD.

The mandatory disclosure rules do not effectively reduce the gamesmanship played during discovery. Stipulation of facts and documents must increase to reduce time for resolution of a case.

The mandatory disclosures are used as a sword when bringing motions to compel. Further, it is very annoying to have to be forced to work together with the other side because it's time consuming and childish, and if the two sides happen to not get along (which was not the situation in my case), it would be a very arduous and painful process.

The MIDP are an ineffective measure as defendants ignore them, or provide the rote nothing reflecting the non-answers of the Answer, and almost never provide a single document, and the Judges do not seem to enforce the proper implementation of the rule. I have not bothered to file a MTC as the rule does not seem to have any enforcement method, and the rule slows cases down, as defendants will use it as another hurdle/excuse for delay

The MIDP does not help alleviate discovery burdens. Instead, it adds to them as it basically just splits discovery into 2 phases

The parties began making progress on settlement after the initial discovery but before engaging in significant additional discovery. As a result, the initial discovery did not have a large impact one way or the other on the remaining discovery.

The parties do not take the MIDP seriously enough

The procedures would work well if parties actually followed them. In some cases, I have had defendants flaunt the rules and discovery actually has taken longer because of them. I do think the rules are a great idea but that there has to be stricter enforcement and consequences for violating them. I had a defendant wait over a year to produce any emails

which the rules required it to produce at the outset of the case and the defendant suffered no consequences and my client expended tens of thousands of dollars on discovery compliance. Too many lawyers for large corporations realize that there is no consequence for delaying and withholding discovery for prolonged periods. Most lawyers I deal with fortunately don't engage in such tactics.

The program seems to get the parties moving with discovery early in the case.

There is no immediate protective order which can be entered for documents pursuant to mandatory discovery so it still delays things if you need a protective order.

This case was resolved pursuant to an inspection of the property and the referral to a settlement conference. However, the initial discovery disclosures likely did expedite the parties' resolution.

This is the Worst. Program. Ever. Delayed my issuance of subpoenas to non-parties. And we issued the same document requests and interrogatories that we would have issued were we not compelled to follow this crazy process. Only difference is that we had to wait months until we were able to take control of our own case!

This was a Railway Labor Act case. The parties are very familiar, and exchanged all information prior to the case being filed. There was no discovery.

This was an administrative review case (where there already had been a trial) along with a civil right claim. My opponent insisted the mandatory discovery applied here even though there had already been discovery at the administrative level. So the mandatory discovery was a complete waste of time and money.

This was an ERISA claim for benefits, in which we generally have limited discovery due to extensive pre-litigation claim review, making the MIDP not helpful, but imposing more work on the parties and attorneys.

Very effective for FLSA case

Wasn't really helpful or necessary in our case

We had been assigned a very smart District Court Judge and a very good Magistrate Judge who was excellent at getting the parties to communicate and get the case resolved. The Initial Mandatory Discovery Disclosures had nothing to do with helping resolve this case. It was the assigned Judge and Magistrate that made the difference.

We had no discovery disputes. My opposing counsel was very professional

WE ONLY COMPLETED THE MANDATORY INITIAL DISCOVERY BEFORE CASE SETTLED

We still had to make specific discovery requests to obtain the necessary documentation

While Defendant served MID, no documents were produced and no substantive information was produced. Information obtained was no more than is usually furnished with R26(a) (1) disclosures

With ESI—usually there needs to be a meet and confer with search terms, custodians, etc. MIDP is helpful to identify relevant people but not really ESI. As long as Judges do not assume MIDP is complete discovery ... there is not a problem. Problem arises when discovery is cut short or unrealistic time frame because of MIDP in some cases. It's a helpful starting point but not complete by any means

### **Defendant Attorney Comments**

Disagree because I didn't notice any significant difference from pre-MIDPP initial disclosures.

1) They asymmetrically create burdens for corporate defendants in consumer cases. 2) Judge \*\*\*\* refusal to grant routine motions for extensions of time to respond to initial pleadings, even when agreed, is unfair to my clients. He cites the pilot program to justify the refusal, which is not supported by the text. 3) The requests themselves were poorly drafted (e.g., overbroad on their face), so I have to object to them, which causes Plaintiff's to continue issuing their own discovery.

Because of the nature of the case, it settled quickly. Plaintiff's counsel was dilatory in complying with discovery, but did eventually.

Because the MIDP expedited exchange of information, case settled before protracted discovery could commence.

Case settled very quickly so it is difficult to judge the impact of the MIDP discovery.

Case was resolved by court order prior to any discovery being required under rule

Disagree with having to conduct discovery in any case where a case dispositive motion to dismiss as to a party has been filed. I believe the program is otherwise productive, but requiring discovery where a motion to dismiss would get

my client out of the case if successful is not a good use of resources.

Don't think it has had the intended impact and would recommend getting rid of it.

From my perspective, the program has some very significant flaws. Foremost, the program presents a considerable tactical advantage to plaintiffs. Before filing suit, a plaintiff could essentially take as much time as it needs to prepare for the expedited discovery obligations, whereas a defendant has essentially no flexibility from the 70 day window to produce ESI. In certain cases, those obligations simply will not be physically possible to meet. Further, as interpreted in this case, the program was read to divest the Court with its otherwise inherent ability under Rule 16 to set pleading deadlines and further to require participation by any served defendant, including those who had not yet even appeared or otherwise were yet required to answer. In this case, a joint motion by both sides to extend the pleading deadline of defendant was denied based upon the MIDP. The result forced both sides to expend fees and resources that otherwise might not have been incurred without any noticeable impact on settlement, as the parties had already been discussing a potential resolution. From my perspective, the program is also problematic in that it is not uniformly applied across the country, let alone even in this District. It does not seem fair.

From the defense side, all possible disclosure of information available in the first 30 days of the case were made. Plaintiff was not satisfied with the disclosures and attempted to argue that the initial disclosures were not adequate. However, documents were produced to plaintiff much earlier in the process than they otherwise would have been.

I am generally not in favor of the mandatory disclosure program

I answered neutral on most of the "Exchange of initial discovery ..." questions because (a) the opposing party did not comply with mandatory discovery, and (b) it appears that he allowed the case to be DWPD with no reinstatement soon thereafter.

I believe that this is a useful experiment, but I do believe that the burden falls unevenly on the defendant in the kind of cases I typically litigate—that is, employment cases. In such cases, almost all of the discovery is in the possession of the defendant, and plaintiffs seldom produce any discovery of any real material use, other than their deposition testimony.

I do not normally practice in Illinois but found this program to be extremely favorable to plaintiffs who usually have little

or no documents. The burden is, therefore, almost entirely shifted to the defendants at great expense.

I find it highly unfair to Defendants. Mandatory initial discovery allows the Plaintiff to conduct a fishing expedition and "form" his case/"facts" around the documents produced. That is what happened in this case.

I rather like the MIDP disclosure process- it makes the written discovery less onerous later on as you've already put together your responses. While I did not encounter this issue with one individual defendant in this case, I have several cases where I represent multiple (e.g. 25) individual defendant officers. The issue I've had there is the "certification" when representing multiple individual defendants, as I am gathering municipal documentation that the officers may not know the extent or even existence of certain types of documentation that is being produced. So for them to certify to the completeness of these disclosures under oath seems onerous. Perhaps the certification should be limited to the corporate or municipal entities procuring and producing the documents, as opposed to any individual named as a party.

In an FLSA case, the mandatory initial obligations are one sided in that the plaintiff has very little to produce but the burden to the defendant can be substantial and disproportionate to the rest of the matter.

In employment cases, the MIDPP benefits plaintiffs and disfavors defendants.

In this proposed class action, our client was named only on a theory of vicarious liability, and it did not have significant information to provide. So, the burden here was not great. However, in some class cases, the initial discovery may require extensive production, or defendant would face contentions of lack of compliance. Overall, the initial discovery requests do not appear well suited to proposed class actions.

Informal discussions by counsel of record were very helpful in the resolution of the case

It is unnecessary and increases the burden and cost on parties to litigate without any corresponding benefits.

It was only due to Magistrate Judge that the invalidity of Plaintiffs claim was exposed

It's duplicative of Rule 26(a)(1) and yet Courts require both (mandatory disclosures under Pilot Project and Rule 26(a)(1) disclosures)

MID did not help. It created more discovery requests, time and money.

MIDP does little to advance cases. It often is a road block to standard discovery. Plaintiff's take months, maybe years to file their case. Defendants then get hammered with MIDP requirements that if not met Plaintiffs use as leverage to stall Discovery.

MIDPP shifts the expense and burden to defendants in employment cases, and is not efficient or effective.

My case was defending against a pro-se defendant – not sure why it ended up in the pilot. An attorney was assigned and it worked ok then.

Other side still propounded discovery that duplicated what was provided and what was provided were things we all ask regardless.

Our Client was brought into the case later, after quite a bit of written discovery had been completed.

Parties need discovery extensions, which are not liberally granted.

Plaintiff did not participate in MIDPP

Plaintiff fell ill and decided to abandon her case while she pursued treatment

Plaintiff's counsel essentially send the exact same set of disclosures in all the cases which defeats the purpose of the MIDPP and flooded our side with irrelevant documents that we still had to sift through to make sure nothing new was added

Quickly went to settlement

The attorney who handled discovery has since left the firm

The mandatory discovery essentially resulted in our client having to respond to written discovery requests twice. We did not receive the information from the plaintiff that we likely should have received. The burden on the plaintiff is far less onerous and most plaintiff's counsel do not take seriously their obligations to provide fulsome information about mitigation, etc.

The MID process should not begin until all dispositive motions are concluded. A lot of time and effort and money was expended in this case unnecessarily because this matter was resolved at a motion to dismiss. I work for a governmental agency so the money that was wasted here was taxpayer dollars. But if it was two private entities as the parties to the suit then my client in this situation would have had to pay probably \$80-\$100k in legal fees for the discovery process that should not have even taken place because it was

resolved on a motion to dismiss. That is a lot of money to a smaller employer who would have to defend a baseless suit like this one during a MID process.

The MIDP becomes overly burdensome at the outset on defendant employers who have the bulk of business records to provide in the typical employment dispute.

The MIDP procedure is a waste of time and does not produce the desired outcomes, as set forth in the standing order.

The one-size fits all does not work well and the tight deadlines increase the expense of the case. Also, requiring ESI discovery so early tends to undermine Rule 26(f)'s goal of any type of agreed ESI discovery process, like agreed search terms.

The plaintiff was a pro-se consumer whose complaint was facially invalid and was subject to a motion to dismiss. Discovery ought to have been stayed pending the outcome of the motion based upon the allegations present in the complaint

The program is certainly a good idea, however in my practice area it tends to be mostly unnecessary as we work with the same counsel very frequently and all parties know what should and shouldn't be produced in a given case. However, for litigation outside of this realm I believe that it will be a great program.

The survey questions do not apply: opposing party did not comply with MIDPP so the correct answer to these questions is N/A

The timing of having to file an answer and initial discovery per the MIDPP is not reasonable and convoluted

There should be a stay in discovery and filing of an Answer if there is a pending Motion to Dismiss

This case was a 12 b 6 motion so the discovery requirements were an additional and costly burden on the defendant, which was wholly unnecessary

This case was not a great example, since both sides already had exchanged a great deal of information and were negotiating prior to the litigation being filed.

This process does not work for consumer finance cases in general, or class actions specifically. The Defendant has all of the discovery—the Plaintiff provides virtually nothing—and the Defendant is under an unfair time constraint. This process may work for simple cases, but not complex ones.



This was a pension fund collection case and the discovery is usually driven by the audit and the documents produced during the audit. I would exempt these cases from the mandatory initial disclosures.

Too burdensome for frivolous cases. This case never should have been filed and was ripe for dismissal or summary judgment

We filed a MTD, which was never decided because under the MIDP protocol, we answered and nearly completed discovery without a decision, and finally settled. This matter would have been resolved sooner and with less expense if we had waited until a decision on the MTD before answering/completing discovery.

We filed substantive Motion to Dismiss that was never ruled on, but we had to engage in initial discovery in Class Action. That puts all the burden on defendants. This is unfair and gives Plaintiffs a clear advantage.

We had to exchange initial disclosures while the motion to dismiss was pending. This drove up the costs of litigation. Our client spent more money than it would have spent as a result of the pilot program.

While the program provides for earlier discovery, the burdens are increased because you are doing discovery twice. The pilot program timetable for mandatory e discovery was not realistic nor were rules clearly defined. In the rush to meet the timetables, there was not enough meet and conferring and agreeing on search terms and custodians— each side did their own thing and fought about it later. Hard to even agree on search terms with opponents early in the case. Also hard to know what they have and trust them in early meet and confers during pilot program. Defendants are at huge disadvantage because Plaintiff before filing knows what they have discovery wise and has done due diligence and can intelligently meet and confer on discovery parameters. Defendant is busy trying to prepare MTD and learn legal issues and basic facts, but now has to be prepared to meet and confer in an educated way to assess if opponent is robustly producing during mandatory e-discovery prior to issuing any discovery requests.

While well-intentioned, so far my experience is that the program has front-loaded discovery costs in a fashion that expenses were incurred that might not have been had discovery proceeded in the ordinary course under the FRCP.

Worked pretty well to force each side to round up their responsive documents before receiving discovery requests—a plus all around

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## Northern District of Illinois

### Question Two

#### Responses to “Please provide any comments you have about the district’s mandatory initial discovery pilot program.”

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##### Plaintiff Attorney Comments

As an experienced attorney who has witnessed decades of discovery gamesmanship, I strongly support this program.

Defendants typically do not provide any substantive information in their disclosures and enforcement usually requires normal written discovery to take place first

Every judge who participates in this program should be compelled to litigate under it. Absolutely horrible.

Fair requirement of the parties; allows for initial discovery prior to first status, which is extremely helpful when litigating against the US Government

For ERISA Fringe Benefit Delinquency Matters, MIDP unnecessarily increases amount of fees incurred by the parties; many of the judges are willing to allow the parties to discuss settlement before complying. Most of these type of matters are resolved by settlement and keeping fees and costs to a minimum is beneficial to a timely resolution

Good program as full disclosure occurs soon.

Horrible—was not followed by the Judge—we needed the mandatory disclosures to respond to the motion to dismiss

I am not a fan based upon previous cases. Costly and unfair to cases which may otherwise be quickly resolved.

I am not in favor of the program as it is often not required for cases I am in and becomes burdensome to address.

I believe it is good intentioned but a bit too onerous in its breadth particularly with respect to stating relevant facts and legal theories (B.4) and the time of production of ESI (C.2.c). A party wishing to defer providing discovery (see A.3) should be required to file a motion or provide some notification well in advance of the due date for the disclosures.

I didn't get the opportunity to participate in it, but it looks like a good idea.

I don't find it very useful as most attorneys get this material rather quickly in the cases.

I don't have any experience with the program yet as we were not required to follow it in this case.

I have compiled with the MIDP in a number of cases now and find it to be more work, but not necessarily more productive or efficient

I have had cases where a defendant did not produce relevant material in the MIDP production, I moved for sanctions, and though an order compelling production was entered no sanction was entered.

I hope it is not continued after the pilot period

I practice trademark law and this program does not fit well.

I prefer 26(a). Paragraph B(3) is burdensome and creates unnecessary work in many cases.

I served in this case only as local counsel for plaintiff. My participation was limited to the local counsel designation. Plaintiff's lead counsel would be in a better position to answer these questions.

I strongly favor this process - there needs to be more detailed directive regarding documents and electronic materials

I think it expedites discovery and forces both sides to be diligent early on in the litigation.

I think it is helpful. Gives an early look into the evidence and the Defendant's position

I think mandatory initial discovery is a good idea as long as everyone keeps in mind that the litigants may not have all of the information as soon as the case is filed.

I think the mandatory disclosures are a success. I am involved in many bars and overall feel your approach is an improvement over Rule 26 standing alone. Good work and good luck with the program.

I think the MIDP has good goals but unnecessarily makes litigation more expensive earlier in the case, and therefore tends to make parties steel themselves after having invested significantly in the litigation.

I think the program is just adding expense, and not improving discovery at all. We rarely get any real information with the MIDP disclosures, and when it is provided it is the same info we would have received in 26a1 disclosures. However it is required automatically much earlier in the game, even if the case is on a settlement track or there is an MTD being briefed. This just adds costs for both parties.

I think there should be some threshold application for it instead of a blanket requirement for all cases filed, regardless of nature of the claims.

In general, I am in favor of the program, but it is difficult to resolve the tension on whether a motion to dismiss should stay discovery. Leaving it in the discretion of the district court judge appears to be the best approach.

In general, it appears to move cases along more quickly.

It does not make things faster. It does not help get to the heart of the issues. Initial discovery is initial discovery. It's from the initial discovery that you realize what important discovery items you really need and really need to hone in and the judges seem reluctant to go beyond the initial disclosures. So I don't think it's an effective program.

It has been a very helpful process early in the litigation. Contributes to productivity and focus of later discovery.

It is a burden to the small practitioner

It is a failure. Defense Counsel are uniformly asserting that MIDP trumps mandatory FRCP 13/19 Investigations and that Plaintiff is barred from third person non party investigatory subpoena. \*\*\* Judge \*\*\*\* is invited to use him as an example of what the MIDP does NOT mean as supported by ABA 34.

It is a good policy that will help speed cases through litigation

It is painful, unnecessary, and inflexible. Does not enhance the process.

It is salutary in purpose and intentions, but is often manipulated by defense attorneys to continue delays and evasive document production. The MID does not obviate the necessity to file Rule 34 requests and interrogatories. I often must remind defendants to produce their insurance policies and the plaintiff's complete personnel file. MID helps somewhat. Mandatory settlement conferences, like Judge \*\*\*\* conducted in every case, helps expedite settlements.

It makes the parties put up or shut up about their claims or defenses.

It might work in normal cases, but not when there was a 500 page administrative trial transcript already in existence.

It only works is the parties want it to work. In my experience, private corporate defendants take it seriously while the City of Chicago, a municipal corporation, does not.

It requires plaintiff to gather and provide too much information too early in the lawsuit. As a government Plaintiff, this is too burdensome.

It should be helpful in expediting discovery

It was a summary judgment immigration matter. The record was provided by DHS. No issues

It was not applicable in this case.

It's not taken seriously enough ... particularly by defendants ... much like Rule 26 disclosures ....

It's not well suited for most claims arising under 29 U.S.C. 1132(a)(1)(B)

It's useless and burdensome, particularly in cases where the primary relief sought is injunctive or declaratory.

It's useless make work.

Judges need more discretion (and should exercise that discretion) to limit mandatory discovery where it will be voluminous and costly

Mandatory initial discovery provides no benefit to the litigants.

Mandatory Initial Discovery should be tailored differently for different types of cases. For example, FLSA wage and hour cases typically zero in on a few discreet categories of business records, and these records should be explicitly named and required for initial disclosures. We continue to engage in discovery combat over the production of these records notwithstanding the MIDP Standing Order.

Much better than 26(a)(1).

My case work is typically ERISA collections. I find that it adds expense to the case. It doesn't add documents early on because the more specific records need to be requested and Defendants I filed suit against do not provide them without being asked—typically more than once.

My concerns in this case were less about MIDP and more about settlement in that we requested tax information which was never provided. This disadvantaged us in settlement negotiations.



My experience with the program has generally been quite negative. Defendants I have worked with don't take the obligations seriously, so it just delays the process of serving formal discovery requests without obtaining information up front. Additionally, whenever you update discovery responses, you have to update both the interrogatories and the mandatory initial disclosures, which seems like a waste of time.

Not really applicable to this case, which settled within 30 days of filing. But Judge \*\*\*\* was fantastic.

Often duplicative of written discovery requests

One potential recommendation would be to stay discovery and answer until motions to dismiss are decided

Overall a good idea—but there are exceptions ....

Parties aren't following it. Judges aren't consistently enforcing it.

See previous comment. I believe MIDP can be effective, but it also can be abused and I have to conclude that it was abused, to some extent, in this case.

Since the case settle fairly quickly after filing, the parties did not have a chance to engage in the process.

The Defendant still seemed to delay discovery and was not held to deadlines in discovery.

The exception to MIDP allowing for immunity-based defenses to be a basis to seek to stay discovery is not at all helpful. These cases are just as complex, if not more complex, as cases where immunity is not a defense and MIDP disclosures would have helped the settlement discussions in this case.

The initial discovery pilot program has decreased the number of discovery motions that were done in other cases that I've been involved.

The mandatory initial discovery is a must and very necessary to increase judicial efficiency and provide fair due process before any hasty compromise resulting from case

The mandatory initial discovery program makes little sense and does not help early resolution of cases. It drives up costs and takes energy at the initial stages of a matter that would be better spent on other efforts, e.g. settlement, motion practice, etc. Other districts where I practice have no problem with just the Federal Rules of Civil Procedure, as some judges in the Northern District only use the FRCP and have not signed onto the program. It would be best for the

court to put the mandatory initial discovery program on the scrap heap where it belongs.

The MIDP are an ineffective measure as defendants ignore them, or provide the rout nothing reflecting the non-answers of the Answer, and almost never provide a single document, and the Judges do not seem to enforce the proper implementation of the rule. I have not bothered to file a MTC as the rule does not seem to have any enforcement method, and the rule slows cases down, as defendants will use it as another hurdle/excuse for delay

The MIDP program is a good idea in theory but, in practice and on balance, it creates unnecessary work on both sides. Many, indeed most, cases settle. With some unfortunate exceptions, counsel on each side usually provides the information/discovery necessary to effect settlement. It seems that, by and in large, the same disputes that arise in regular discovery arise in the MIDP - and cause counsel and the parties to expend resources unnecessarily, because such disputes would normally be held in abeyance pending productive settlement talks.

The process is not decreasing costs or increasing the speed at which key documents are produced.

Defendants still routinely fail to produce actual documents with their MIDP disclosures, and provide minimal information on witnesses. The requirement to state your facts and legal theories is also just creating work that does not advance the case.

The process makes a great deal of sense, but it does provide a burden on the litigants before they are at issue. I believe that the burden outweighs the benefit. I would recommend a similar program once the parties are at issue (i.e. after an answer is filed). It does not make sense to me to require discovery before an answer is filed to a complaint.

The program is well suited to personal injury and simple contract actions to define issues and aid pretrial resolution.

The standing order MIDPP required Defendants to answer the complaint even if there was a pending 12b6 motion as long as there was no pending motion to dismiss for immunity or jurisdiction. That order was not applied to the defendants in my case, however. Later, the district amended the order to not require the defendants to answer while there's a pending 12b6 motion.

Very helpful for smaller, simpler cases.

We did not utilize it in this case.

We were local counsel in this case, so it was not a good sample for your survey. Overall as plaintiff lawyer I applaud this new program

We would have followed protocols if case had proceeded

### Defendant Attorney Comments

I find that the mandatory disclosures, as bright as they are, generally disfavor the premises liability defendant. It was often times surveillance footage of the event itself which when disclosed of front forms the basis of the plaintiffs' testimony. And more equitable approach is found where the plaintive has to commit to an account of the event before seeing the video.

A well-managed pretrial order process would be more efficient than is the MIDP's procedures.

Although not used in this case, seems redundant to Rule 26 and puts unnecessary additional burden on parties.

Because we were able to quickly resolve this case, the mandatory initial discovery pilot program had no impact. If we had been unable to quickly resolve the case, I expect that the MIDPP would have increased the parties' efforts and costs with no discernable benefit.

Compliance is expensive and labor-intensive.

Compliance unnecessarily increases costs of ESI discovery.

Does not accomplish anything the programs sets out to do. Having a giant list of potential witnesses without any idea of who will actually testify at trial is extremely unproductive.

FDCPA cases should be carved out of the requirement.

Fortunately, the requirement that the complaint must be answered has been done away with, as it required us in past cases to file a motion for judgment on the pleadings rather than a Rule 12(b)(6) motion to dismiss. Also, district courts have been cognizant that the mandatory discovery program frequently is inconsistent with the way ERISA cases are adjudicated (i.e., with little to no discovery based on the administrative record). Otherwise, my experience with the program has been negative in the ERISA area, because the disclosures increase litigation costs with no benefit to the litigation. Also, in most of my ERISA cases where we have been required to comply with the program, the plaintiff was late in complying and simply copied the defendant's disclosures. I encourage courts to be open to excusing compliance in ERISA cases.

From a defense perspective, most of our clients want to get through discovery (not just mandatory initial discovery) before considering settlement, mediation, etc. When this is the case, mandatory initial discovery does not seem to resolve the case any more quickly.

Good idea that needs to be more flexible in certain cases. Glad it was amended to account for motions to dismiss.

Having the clients sign the MIDPP verification forms only increases the costs.

I am not convinced that the discovery rules under the pilot program promote efficiency or reduce costs.

I appreciate that the court revised the MIDP as it ran up fees and costs for cases (such as this one) when early settlement is accomplished. I still do not see the benefits of the MIDP program and believe that the standard Rule 26 disclosures are the only disclosures to be made prior to formal discovery.

I believe it is generally too burdensome, particularly on defendants in complex commercial cases, and would support it being discontinued.

I believe that flexibility is important to the program relative to the timelines.

I believe that it is unduly burdensome in situations where a defendant is filing a motion to dismiss all claims. It can allow a plaintiff to collect a ransom for filing a frivolous case so as to avoid the cost of the burdensome discovery, as would have been the case here if the judge had required us to participate.

I believe the program benefits Plaintiffs more than it does Defendants, and for that reason find it to be a bit unfair.

I do believe the program is helpful in getting the parties to focus on the core issues in the case, and in lessening the time and expense of discovery generally

I do not find it useful. It is too pro forma and only delays genuine discovery.

I do not yet have sufficient experience with the pilot program to compare and contrast it with prior practice in this district.

I don't believe that mandatory initial discovery facilitates case resolution (early or otherwise). But serves only to add unnecessarily to the costs of litigation.

I exclusively practice in this court and the MIDP project has not changed anything about how I conduct discovery or how opponents respond to discovery. We should return to the old procedures that all other district courts in this country follow.

I feel stricter adherence to discovery deadlines (absent good cause for extensions) and more oversight (more frequent status hearings) would be more effective in pushing simpler cases to early and efficient resolution. Many NDIL judges are already very good at this. MIDP often does not fit larger/more complex cases and is a significant burden on parties with voluminous files/ESI.

I generally think the program is a good idea. However, when implemented and enforced where there is dispositive motion practice, it adds a cost (sometimes significant) to the parties that would not otherwise incurred if the motion is granted.

I have used in other cases. Discovery is still necessary because the automatic disclosures are not sufficient.

I like the program

I love it. It holds people's feet to the fire. There are circumstances, though, where it should be stayed and usually the Judge agrees. I am also a big fan of it because prior to the pilot, we agonized over objections. PP takes that away, because it's just relevant to a claim or defense, whether or helpful or harmful, should be provided. It doesn't make us worry so much about disclosures that hurt us ("volunteering information") because we just have to produce the documents.

I primarily handle patent infringement matters so I do not have experience with the Court's MIDP.

I strongly dislike. Electronic discovery is very expensive and time consuming, and I think it is important for the parties to be given time to give it a thoughtful approach. The quickness of the MPID creates problems for litigants, even those that are prepared.

I support the program but the magistrate judges need to be trained to help the parties comply, and be willing to grants motion to compel when there is no compliance. This is particularly true with ESI. I have one case where a magistrate judge held three hearings before filing entering an order requiring production of ESI, but then modified the order on bogus claims of burden. The program is only as good as the judges who enforce it. Because I have had no success in convincing a judge to enforce the provisions it has had no meaningful positive impact on my practice - which is frustrating because the concept behind early disclosure is both practical and positive. I hope the Court will continue to work on training and enforcement, as I do believe early disclosure could improve early settlement potential and diminish the overall need for protracted litigation.

I think it is a good idea, but having to answer a complaint and file a motion to dismiss is nonsense and defeat the purpose of reducing costs.

I think it is grossly unfair to defendants to require the costs and burdens of collecting and producing documents before a viable claim or complaint has been sustained.

I think it unnecessarily drives up defendant employer's costs at the outset, and as such is prejudicial to defendant employers.

I think it's a good idea in many ways, but I'm skeptical that recalcitrant parties will be forced by the Court to fully comply.

I think it's a good program overall and has facilitated discovery in other case we're involved in much faster.

I think the MID are actually more difficult- as it is harder to determine who to depose, in addition, I have not noticed a reduction in the amount of discovery completed because of MID.

I was pleased to learn amendment to standing order no longer requiring Answer if pre-Answer motion filed pursuant to Rule 12(b).

I'm happy to see that the NDIL moved away from requiring answers simultaneously with 12(b)(6) motions.

In more complex cases the mandatory discovery program may help assist in narrowing issues, but in smaller less complex cases the initial cost of responding to the discovery requirements increased the cost to clients that may have hampered settlement.

It does not appear fully effective or useful in cases brought under 29 U.S.C. Section 1132(a)(1)(B), which have their own rules pertaining to discovery (or rather the lack thereof)

It gives unfair advantage to Plaintiffs—especially those without legitimate claims. It places a higher burden and expense on Defendants

It is a good program but this particular case would have been fine without it.

It is not helpful and results in unnecessary burdens and expenses on defendants, particularly when a motion to dismiss is filed.

It is not workable in the class action context. There is an extraordinary burden on the employer and very little burden on the plaintiff

It remains ineffective because Plaintiff counsels produce almost nothing of substance because Plaintiff counsels expect to engage in the same costly discovery process the MIDP was intended to help control.

It seems like a good idea.

It would be helpful to clarify that ERISA benefit claim cases are not subject to the MIDP so as to not require seeking an exemption on a case by case basis.

It's worthwhile, but doesn't have make any earthshattering difference regarding case progress or volume of discovery.

MIDPP works as intended. However, opposing counsel often times asks for the same discovery in subsequent written discovery.

Not a fan. Just adds another layer of discovery and something to fight over. The EDI time frames are unrealistic in the vast majority of cases. Full discovery progresses after MIDP disclosures so what's the point.

Not effective. Costly. Not well received by clients

Not helpful in most cases

Only concern with the program was the former requirement that answers be filed simultaneously as 12(b) motions (which did not apply to this case, where qualified immunity was involved). With the amendment to remove that requirement, no complaints.

Please reconsider at least until valid Motions to Dismiss are decided.

Please see my last comment on my only issue in representing multiple individual officers, where I am putting together municipal or corporate documentation (and many times that entity may be separately represented), and the certification requirement as to individuals who may not be in a position to truly certify the responses. It seems the certification requirement should be that of the corporate or municipal entity only. I do like the program and it has helped us focus cases earlier than the conventional manner. Thank you.

Provides too much leverage to plaintiffs who file weak cases.

Rule 26 is sufficient

See above. The pilot should be discontinued.

See my comments in: \*\*\*

See previous response

Sometimes the program is a square peg in a round hole. Sending out discovery when the parties are actively settling is a problem.

THE BASIC PROBLEM WITH DISCOVERY IS IT IS VERY TIME CONSUMING AND LEADS TO EXORBITANT CLAIMS FOR ATTORNEYS FEES, DISCOVERY SHOULD BE TAILORED TO WHAT IS ACTUALLY NEEDED FOR THE PARTICULAR CASE RATHER THAN USE A SHOTGUN APPROACH, WHICH IS VERY BURDENSOME FOR THE CLIENT, AND MOST OF THE DISCOVERY REQUESTED IS IRRELEVANT TO THE ACTUAL ISSUES IN THE CASE.

The hardest provision is the requirement to answer while a motion to dismiss is pending. It is unfair to require an individual to answer a pleading (which can be later used against the party) where the claims are barred as a matter of law and it requires even more work and expense for the defendant. Most litigants ignore the rule to limit discovery after the initial disclosures to items not already produced and issue discovery before initial disclosures are due. I do not mind doing the initial disclosures though because it is all information we must produce anyway and it may keep the other litigants from arguing its relevancy.

The mandatory initial discovery program is very onerous, and favors plaintiffs as they generally have little or no ESI. I am not in favor of it.

The MIDP seems totally unnecessary and cumbersome. FRCP already has mandatory disclosures. I was happy to see the change that excepting MIDP where a motion to dismiss was to be filed.

The program is expensive and burdensome; it does not eliminate any discovery burdens.

The project provides laudatory structure to discovery in certain types of cases in which there is unlikely to be much legitimate dispute about the scope of discovery (but nonetheless might be delay and discovery disputes that waste the court's and parties' time). However, for complex cases or cases that present non-routine discovery issues, it is important that the court continue to recognize flexibility in removing or exempting appropriate cases from the pilot program.

The revised version is an improvement

Very good idea—provides parties with good initial information that they can communicate to their clients early in the litigation

We had no chance to participate in the program for this case due to early settlement

We were required to file an answer when we requested an extension, which was a total waste of time. We eventually filed a motion to dismiss which was granted. We should not have been required to respond to such a frivolous lawsuit.

While it did not have to be done for this case, I think the MIDP is unnecessary, incredibly burdensome and expensive.

While the program has its merits, a “one size fits all” approach in any case just does not work. I, for one, am not a fan of the MIDPP

Yes, it was helpful. The district court judge was very efficient.

You should keep this to simple, run-of-the-mill cases.

## The Federal Judicial Center

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