

# Mandatory Initial Discovery Users' Manual for the District of Arizona



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### **A. Introduction**

1. The Judicial Conference of the United States has authorized a Mandatory Initial Discovery Pilot (MIDP) project to test the use of robust mandatory initial discovery as a means of reducing cost and delay in civil litigation. Various District Courts, including this one, have agreed to participate in the MIDP. The MIDP will begin on May 1, 2017, and will run for a period of three years.
2. The MIDP can be described in a nutshell as follows:
  - (a) The MIDP requires responses to mandatory initial discovery in all civil cases other than those exempted by General Order 17-08 – the order that implements the MIDP.
  - (b) The mandatory discovery is framed as court-ordered discovery that must be responded to before the commencement of broader discovery under Rules 26, 30, 31, 33, 34, 35, 36.
  - (c) The mandatory initial discovery replaces the initial disclosures otherwise required by Rule 26(a)(1).
  - (d) The parties may not opt out of the requirement to provide the mandatory discovery responses.
  - (e) The requirement to provide mandatory initial discovery responses includes both favorable and unfavorable information that is relevant to the claims and defenses in the case. This includes claims and defenses asserted by all parties to the litigation, and a responding party must provide relevant information regardless of whether it intends to use the information in presenting its claims or defenses.
  - (f) Parties must file with the Court a Notice of Service of their initial responses and later supplements, but not the responses or supplements themselves. If there is an unresolved dispute regarding the responses, parties must provide the Court with the responses or supplements at issue to enable the Court to resolve the dispute;
  - (g) The Court will discuss the mandatory initial discovery with the parties during the case management conference under Rule 16(b)(2), and resolve any disputes regarding compliance with the required discovery; and
  - (h) MIDP courts will vigorously enforce the requirement to provide mandatory initial discovery responses through the imposition of sanctions if appropriate under the Federal Rules of Civil Procedure.

These features will be described in more detail below, with commentary designed to improve understanding of the MIDP's requirements and to anticipate and address issues that may confront participating courts and parties.

**B. Scope of the Mandatory Initial Discovery Pilot**

1. Mandatory initial discovery responses are required for all cases other than (a) those exempted from initial disclosures by Rule 26(a)(1)(B); (b) cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation; and (c) actions under the Private Securities Litigation Reform Act (“PSLRA”).

*Comments: The value of the MIDP as a means of reducing cost and delay depends significantly on its application across a wide range of federal civil litigation. Consequently, few exceptions to its application have been allowed.*

2. Mandatory initial discovery responses may be excused or deferred in two circumstances. First, no responses are required if the Court approves a written stipulation by the parties that no discovery will be conducted in the case. Second, responses may be deferred once, for 30 days, if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good-faith belief that the dispute will be resolved within 30 days of the due date for their responses.

*Comments: The MIDP is designed to have very few exceptions. Courts should not excuse parties from their obligation to provide timely discovery responses under the MIDP.*

**C. Key Features of the MIDP**

1. The MIDP has the following key features:
  - (a) It is implemented by General Order 17-08, which requires the parties to provide the mandatory discovery responses before initiating any further discovery.
  - (b) The responses must be based on information reasonably available to the parties as of the time they are made, and must be timely supplemented as additional relevant information becomes available.
  - (c) Responses to the mandatory initial discovery must be signed under oath by the parties, certifying that they are complete and correct as of the time they are made based on the parties’ knowledge, information, and belief formed after reasonable inquiry. If a party is represented by counsel, its attorney must also sign the responses, thereby making the certifications required by Rule 26(g).
  - (d) Responses to the mandatory initial discovery must disclose both favorable and unfavorable information that is relevant to the claims and defenses in the case, regardless of whether a party intends to use the information when presenting its claims or defenses. Where a party limits its response to mandatory discovery on the basis of privilege or work product, a privilege log is required unless the Court orders otherwise. Further, if a party objects to providing relevant information, including an objection that providing the

required information would involve disproportionate expense or burden, it must provide particularized information regarding the nature of the objection and its basis, and fairly describe the information being withheld.

Comments:

*1. The General Order is framed as court-ordered discovery that is designed to accelerate the disclosure of relevant information that would be produced later in the litigation in response to traditional discovery requests. The requirement that all responses include information relevant to the claims and defenses in the case, rather than being limited to information the party intends to use in support of its claims or defenses, is a significant change from Rule 26(a). Both lawyers and their clients may instinctively react negatively to it. However, responses to traditional discovery requests under Rules 26, 30, 31, 33, 34, and 36 are not limited to information that the responding party may use to support a claim or defense, and neither is it permissible to object to this mandatory initial discovery on the ground that it is harmful rather than helpful to the responding party.*

*The MIDP is premised on the idea that the goals of Rule 1 are promoted through the early sharing of information that normally would be provided only through more costly party-initiated discovery. Parties will be able to better evaluate the strengths and weaknesses of their positions. Early case assessment, perhaps with the assistance of a neutral mediator, may lead to early resolution of matters before incurring additional legal fees.*

*It is expected that there may be uncertainty in some cases over identification of information that is relevant and helpful to an opposing party's claim or defenses, or relevant and unhelpful to a producing party's claim or defenses. Mandatory initial discovery is no different in this respect than responses to party-initiated discovery. The Court and the parties should have a meaningful discussion to minimize such uncertainty, and to obtain the Court's assistance where appropriate to eliminate later sanctions demands because of a failure to comply with the mandatory initial discovery obligations. The goal is to promote justice, reduce costs, and increase speed in the fair resolution of claims, not create disputes over compliance with the mandatory discovery obligations. Communication with the Court and cooperation among counsel are essential and expected.*

*In addition, the MIDP was designed and adopted in part as a result of experience in States and the Canadian judicial system that have successfully required substantial mandatory disclosures. It has been reported that lawyers and their clients manage this obligation faithfully,*

*at first because of the consequences of failing to do so and eventually because of a change in culture among litigation practitioners.*

*2. The requirement of a privilege log is drawn from Rule 26(b)(5), but the General Order allows the parties to “agree otherwise.” In certain cases, such as those in which voluminous ESI must be produced in an accelerated fashion pursuant to the General Order, creation of a privilege log may become more onerous if it must be completed within the same timetable as production of the information itself. The General Order allows the parties to negotiate a different timetable for the exchange of privilege logs, and to reach other agreements to reduce the work required to assemble the logs such as excluding certain categories of documents or identifying the basis of objections by category of documents. If the parties are unable to agree, the Court retains discretion to order a different timetable or other mechanisms for reducing burden.*

*3. Because mandatory initial discovery responses are required by a court order, parties may wonder whether objections to the discovery are permitted. The answer is yes. Objections may be stated on the same basis and subject to the same limitations as objections to party-initiated discovery requests, but the General Order makes clear that conclusory, boilerplate objections are not proper. Particularized information regarding the nature of the objection and its legal basis must be provided. In addition, a “fair description” of what is being withheld must be provided. A “fair description” is one that provides sufficient information for the party receiving the responses to understand the categories of information being withheld and to enable an informed decision about whether to take further steps to compel production of the information notwithstanding the objection.*

- (e) To maximize the effectiveness of mandatory initial discovery, responses must address all the claims or defenses that will be raised by the parties. Accordingly, parties must file answers, counterclaims, crossclaims and replies within the time required by the rules of procedure. If the Court does not grant the motion to dismiss, it will set the time to answer, counterclaim, crossclaim, or reply, and the time for responding to the mandatory disclosures will be measured from that date unless the Court sets an earlier date. If the Court does not set a time, Rule 12(a)(4) will control.
- (f) Mandatory initial discovery responses must be made within the following deadlines: (i) a party seeking affirmative relief must serve its responses within 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third party complaint; and (ii) a party filing a responsive pleading (whether or not it includes a claim for affirmative relief) must serve its mandatory initial discovery responses

within 30 days after filing its responsive pleading. There are two exceptions to this requirement. First, no mandatory initial discovery responses are required if the Court approves a written stipulation by the parties that no discovery will be conducted in the case. Second, mandatory initial discovery responses may be deferred one time, for 30 days, if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the date when their responses are due.

*Comments: There may be instances in which a party is required to serve more than one set of mandatory discovery responses. For example, a plaintiff must serve responses within 30 days after the filing of the first pleading filed in response to its complaint. If additional defendants are later joined or file later answers, the plaintiff will be required to serve a supplemental response based on issues raised by the later-filed answers.*

- (g) Judges should monitor the parties' mandatory initial discovery responses and act promptly to resolve any disputes. The General Order requires the parties to file a Notice of Service of their initial responses and later supplements, but not to file the responses themselves, unless there is an unresolved dispute that the Court must resolve. If there is such an unresolved dispute, parties must provide the Court with the responses, objections, and any other information needed by the Court to resolve the dispute.

*Comments: The success of the MIDP depends significantly on early and active case management by the Court. One key component of the Court's case management role is to avoid delays that could result from disagreements not resolved by the parties. The parties are required to discuss their responses to the mandatory discovery at the initial meeting of counsel under Rule 26(f), including any objections they have stated or intend to state, and to attempt in good faith to resolve those objections. Unresolved objections should become a key topic for discussion with the Court at the initial case management conference under Rule 16(b). Ideally, the Court will resolve those objections at the case management conference; if the Court is unable to do that because additional information or briefing is essential, it should still resolve the disputes on an expedited basis.*

- (h) The General Order imposes on the parties a continuing duty of disclosure, and mandatory initial discovery responses must be supplemented when new or additional information is discovered or revealed. Supplemental responses must be served in a timely manner, but not later than 30 days after the information is discovered or revealed to the party. A supplemental response is not required if, after general discovery begins, new information

is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information. The Court should normally set a deadline for final supplementation in its Rule 16(b) case management order, and full and complete supplementation must occur by that deadline. If the Court does not set such a deadline, full and complete supplementation must occur by the deadline for fact discovery set by the Court. If a party fails to make or supplement a mandatory initial discovery response, the party may not use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the Court determines that such use would be appropriate under Rule 37(b)(2). Under Rule 37(b)(2), the Court may order other sanctions in addition to or instead of excluding evidence, as discussed more fully below.

*Comments:* Some courts do not hold a single “final pretrial conference” but may instead conduct a series of conferences. Courts that follow such a practice should set a specific date for final supplementation, with the goal of ensuring that it occurs in time for the parties to use the supplemental information in preparing the joint pretrial order.

*There may be instances in which, after the deadline for final supplementation, new or additional information is discovered or revealed that would have required supplementation if the information had come to light before the deadline. A party who wishes to make the supplementation because the new information is helpful to that party may serve the supplemental response after the deadline and, absent agreement by all parties, must seek leave of court to use the information. A party who discovers information after the deadline for final supplementation that may be helpful to an opposing party should serve a supplemental response pertaining to that information. The opposing party may at its election be allowed to use the information to support or oppose a motion, at a hearing, or at trial, without further action by the Court. Courts should remember that the effectiveness of the MIDP will depend significantly on the willingness of judges to impose real consequences on parties who fail to comply with their mandatory discovery obligations.*

- (i) The parties are expected to discuss mandatory initial discovery when they meet and confer as required by Rule 26(f). During the conference, they must seek to resolve any disagreements over the scope of discovery. The parties should include in their Rule 26(f) report to the Court a summary of their discussions, describe the resolution of any disagreements, and identify any unresolved disputes or other discovery issues. During the Rule 16(b) scheduling conference the Court should resolve any disputes regarding the mandatory initial discovery responses. Judges participating in the MIDP should also make themselves available for prompt resolution of discovery

disputes. It is recommended that the MIDP judges require the parties to contact the Court for a pre-motion conference as provided by Rule 16(b)(3)(B)(v) before filing discovery motions.

*Comments: As explained previously, prompt resolution of disputes over the mandatory initial discovery responses is essential to the success of the MIDP. A party's unresolved objections that exist as of the time of the initial pretrial conference under Rule 16(b) should be resolved at the conference. Disputes that arise thereafter should also be resolved promptly, as should discovery disputes that arise outside the mandatory discovery process. The pre-motion conference referred under Rule 16(b)(3)(B) is only one of the ways in which expense and delay can be avoided. Many disputes can be resolved without briefing at pre-motion phone conferences, and even when briefing is required, the Court should consider limiting written argument to short letters or focused briefs.*

**D. Information Required by Mandatory Initial Discovery**

The General Order identifies the responses the parties are required to provide under the MIDP. They include:

1. The identity of persons likely to have discoverable information relevant to any party's claims or defenses, their contact information, and a fair description of the nature of the information they possess.
2. The names, and contact information, of all persons believed to have given written or recorded statements relevant to any party's claims or defenses. Unless a party asserts privilege or work product protection against this disclosure (the details of which should be disclosed adequately in a privilege log, unless the parties agree or the Court orders otherwise), a copy of each disclosed statement should be attached if it is in the party's possession, custody, or control. If not, then the responding party should state the name and, if known, the address and telephone number of each person believed to have custody of a copy.
3. A list of the documents, electronically stored information ("ESI"), tangible things, land, or other property known by each party to exist that is relevant to any party's claims or defenses. This information is required regardless of whether the documents or ESI are in the possession, custody, or control of the responding party. When the volume of such materials makes it impracticable to list them individually, the responding party may list similar documents or ESI by categories, describing each category with particularity. If the information required is not in the responding party's possession, custody, or control, the response should state the names and addresses, if known, of the person having possession, custody, or control. A party that has possession, custody, or control of the documents, ESI, or tangible things required to be identified by this mandatory disclosure may elect to produce it with



their response, or to make it available for inspection on the date of the response, instead of listing them. Production of ESI will occur as required by paragraph (C)(2) of the General Order. MIDP judges should take care to ensure that the descriptions are sufficiently detailed to be meaningful, and that when production or inspection is elected in lieu of description, it actually can take place beginning on the date of the response, and not at some indefinite time in the future.

4. A statement of the facts relevant to each claim or defense raised by the responding party, and the legal theories upon which each is based.
5. A computation of each category of damages claimed by the responding party, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. A party may produce the documents or other evidentiary materials with its response instead of describing them.
6. The identify and a particularized description of any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action, or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. A party may produce a copy of the agreement with its response instead of describing it.

A party receiving the list described in paragraph 3 of the General Order, the description of materials identified in paragraph 5, or a description of agreements referred to in paragraph 6, may request from the responding party a more detailed or thorough response if it believes the responses are deficient. MIDP judges called on to resolve disputes regarding the sufficiency of a response to the mandatory discovery requests should take care to ensure that responses are sufficiently detailed to be meaningful, are complete and unevasive, but should not require a level of particularity that would impose on the responding party disproportionate burden or expense, considering the needs of the case.

*Comments: The information required in paragraph 1 above, as well as the descriptions of relevant documents discussed in paragraphs 3 and 5 and the statement of relevant facts required in paragraph 4, must all provide sufficient detail to be meaningful and must not be evasive or incomplete. At the same time, the disclosures need not be so detailed that they would impose on the responding party disproportionate burden or expense, considering the needs of the case. There is no formula for deciding where the line must be drawn. Rules 1 and 26(b)(1) provide the Court and the parties with the performance standard, but the facts unique to each case will control the scope of the disclosures. Parties that follow the “Golden Rule” should have no difficulty making reasonableness determinations that are consistent with Rule 1 and Rule 26(b)(1) and the aims of the MIDP.*

*A party also may serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent that they have not already been produced in a mandatory discovery response, or to enter onto designated land or other property identified or described.*

*Production of information under the General Order does not constitute an admission that the information is relevant, authentic, or admissible.*

E. **Requirement for Disclosure of Hard-Copy Documents and ESI:** The production of hard-copy documents and ESI required by mandatory initial discovery can present challenging issues for the parties. The General Order seeks to minimize those issues by providing specific guidance to the Court and the parties.

1. Hard-copy documents must be produced as they are kept in a party's usual course of business.
2. Disclosure of ESI:
  - (a) *Duty to Confer:* When a mandatory initial discovery response reveals the existence of ESI, the parties must promptly confer and attempt to reach agreement relating to its disclosure and production. This includes: requirements and limits on the preservation, disclosure, and production of ESI; the appropriate means to search for ESI, including identification of the custodians from whom production will be obtained; search terms to be used, or other use of technology or computer assisted review; and the form in which ESI will be produced.
  - (b) *Resolution of Disputes:* If the parties are unable to resolve any dispute regarding the disclosure of ESI, and seek resolution from the Court, they must present the dispute in a single joint motion, or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g). The Court should decide the dispute promptly to avoid delay in the timely completion of the mandatory discovery.
  - (c) *Production of ESI:* Unless the Court orders otherwise, a party must produce ESI identified under paragraph (B)(3) of the General Order within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

F. **Sanctions for Failure to Comply.**

If parties fail to comply with their mandatory discovery obligations, the Court may impose sanctions. Rule 37(b)(2) provides the most relevant sanctions provision. It specifies sanctions that may be imposed “For Not Obeying a Discovery Order” – in this case, the General Order. Rule 37(b)(2) provides a range of possible sanctions, but the most relevant when a party attempts to use evidence it did not disclose in its mandatory discovery responses will be Rule 37(b)(2)(A)(ii), which authorizes the Court to prohibit the disobedient party from using the evidence it failed to disclose. When a party failed to disclose unfavorable information and the opposing party was required to incur litigation costs to obtain it, the Court may impose those costs on the disobedient party under Rule 37(b)(2)(C). Rule 37(b)(2) provides more severe sanctions when a party’s failure to comply with the General Order is particularly egregious.

MIDP judges should tailor the sanctions to fit the offense, with the intent of encouraging future good faith compliance with the General Order and the MIDP. The experience in States that have adopted robust initial disclosure requirements has shown that diligent enforcement by judges is the key to achieving the goals of the MIDP – the reduction of unnecessary delay and expense during discovery, and promoting the just, speedy and inexpensive resolution of civil disputes.

G. **Final Instructions for MIDP Judges:**

1. MIDP judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the General Order, resolve any disputes, and set a date for full and complete supplementation of responses. It is difficult to overestimate the importance of this initial case management meeting with the parties. It enables the MIDP judge to set the tone for the rest of the case, impress upon the parties the importance of compliance with the mandatory initial discovery obligations, and clearly establish that the MIDP judge intends to enforce those obligations vigorously.
2. MIDP judges should make themselves available for prompt resolution of disputes regarding the mandatory initial discovery and other discovery. They are encouraged to require the parties to contact the Court for a pre-motion conference, as provided by Rule 16(b)(3)(B)(v), before filing discovery motions, and to resolve any disputes during that conference if possible. If discovery motions are necessary, they should be focused, briefed quickly (usually on a schedule set by the Court during the pre-motion conference), and resolved promptly.