Eastern District

III. Discovery Pilot Project May Cause Federal Rule Changes

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The bench and the bar continue their historic battle with the ever-growing tsunami of civil discovery. In 2009, the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System published a white paper that recommended that the notice pleading requirement of the federal court system should be abolished; instead, they recommended a return to "fact pleading" as a means to reduce discovery. In 2015, there were substantial changes to the Federal Rules of Civil Procedure to reduce the time and effort spent on discovery. The latest official efforts are two court ordered mandatory pilot projects created by the Judicial Conference of the United States which were recently put in place in the Northern District of Illinois and the District of Arizona. This column discusses the program adopted by the Northern District. I am licensed in Illinois and a certified trial counsel in the Northern District.

The mandatory initial discovery pilot project (MIDP) took effect in the Northern District on June 1, pursuant to a standing order and a discovery user's manual. Pursuant to the plan, all parties to civil litigation in the Northern District (there are some limited exemptions) must make mandatory disclosures before initiating any further discovery. These are significant changes to current federal civil procedure, which possibly could become required procedure depending upon the results of this pilot project.

The project was approved by the Judicial Conference of the United States in September 2016. The drafters of the project state the MIDP was designed, "in part as a result of the experience in states and the Canadian judicial system that have successfully required substantial mandatory disclosures."

The highlights of the MIDP are:

• Court ordered discovery that must be exchanged before the commencement of broader discovery pursuant to Rules 33, 34, 35, and 36.

• The disclosures must include both favorable and unfavorable information including the identity of persons likely to have information that is relevant to any parties' claims and defenses, regardless of whether the party intends to utilize them in its case. This includes claims and defenses asserted by all parties to the litigation.

This is a significant change from the requirement of Rule 26 (a), which limits required disclosure to information the party intends to use in support of its claims or defenses. The court notes in the commentary in the discovery user's manual that "both lawyers and clients may instinctively react negatively to this provision ... however responses to traditional discovery 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 it is not permissible to object to this mandatory initial discovery on the grounds that it is harmful rather than helpful to the responding party."

• Mandatory initial disclosures supersede the initial disclosures otherwise required by Rule 26 (a) (1).

• The parties cannot mutually agree to opt out of the program.

• Mandatory initial discovery responses must be filed within the following deadlines:

—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, counter claim, crossclaim, or third-party complaint;

—A party filing a responsive pleading (whether or not it includes a claim for relief) must serve its mandatory initial discovery responses within 30 days of its responsive pleading.

There are very specific categories of information that the Standing Order requests, including the names and addresses of all persons who are likely to have information to any parties claims or defenses, the names and addresses of all persons who have given written or recorded statements, extensive specific requirements regarding Electronic Stored Information (ESI), legal theories upon which claims or defenses are based, and the identity of any insurance agreement that may be involved. The Standing Order states that the parties are under a continuing duty to make these disclosures and each party must serve supplemental responses when new or additional information is discovered or revealed.

The standing order is directed to all parties in civil litigation in the Northern District of Illinois, with very few categories of litigation exempted. The parties are required to provide mandatory initial discovery responses before initiating any further discovery. Every party must provide the information called for in the order without the need for any request by an opposing party. After all the mandatory responses have been supplied, attorneys may proceed with further discovery under the Rules of Civil Procedure, and pursuant to a case management order by the court.

Each party's response must be based upon information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case, because it challenges the sufficiency of another party's response, or another party has not provided a response.

The discovery user's manual states that 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, thus very few categories of litigation are exempted. The court will permit disclosures to be deferred for one 30-day period if the parties jointly certify they are jointly working to settle their dispute and have a good faith belief that their dispute will be resolved within 30 days.

Where a party limits response on the basis of privilege or work product, a privilege log is required. If a party objects to providing relevant information on objection that it 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 withheld.

In the commentary included in the discovery user's manual, the court said, "The MIDP is premised on the idea that the goals of Rule 1 of the Rules of Civil Procedure are promoted through the early sharing of information that normally would be provided only through more costly party-initiated discovery. ... Early case assessment, perhaps with the assistance of a neutral mediator, may lead to early resolution of matters before incurring additional legal fees." The language promoting the use of mediators may be pleasing to practicing mediators, but perhaps not so for the parties involved.

The court's order states that production of information under the order does not constitute an admission that the information is relevant, authentic or admissible.

Early responses of attorneys in the Northern District are somewhat mixed. Judges involved in administering the program, were reluctant to comment at this early stage. Several federal district court judges administering the program, suggested to parties in cases filed just before June 1, that they submit voluntarily to the program. This suggestion was declined en masse by attorneys for those parties. Some practitioners felt that the court should have consulted the bar for a more reasonable time table, as the crucial time for evaluating a settlement possibility will vary with each case. One litigator thought there should have been a staged discovery program as exists in the Southern District of New York. Several attorneys thought there would be problems with ESI. One said, there are very few times when an attorney could say his disclosure of ESI was complete. There was a general consensus that the program favored plaintiffs, and attorneys pointed out that a plaintiff firm issued a news release praising the program as eliminating roadblocks. There were comments that the program made it difficult for lawyers handling class action cases.

Illinois Circuit Court Judge Thomas Mulroy, president of the Chicago Bar Association, said that although his expertise is in state court practice, discovery was always a problem, and he was wholeheartedly in favor of the mandatory aspect of the program. He felt the trial judges could make adjustments for individual cases. Former District Court Chief Judge James Holderman said, "Over 80 percent of civil cases in federal court settle. This project requires the parties to be prepared to put information on the table early in the process. The earlier this occurs, the sooner the cases settle, or are ready for trial." The Northern District of Illinois has always been a harbinger of change; this project bears watching.

In closing, it is necessary to make the following comment. This effort to produce more federal civil discovery is heroic compared to the skimpy effort to increase discovery in the federal criminal cases, which has not been expanded in any great extent since the prosecution of Al Capone. Rob Carey, co-author of the ABA book "Federal Criminal Discovery," said, "The bench and bar, have not given the rules of discovery for criminal cases the attention they deserve. We need to apply the bitter lessons learned from wrongful convictions, and promote the use of realistic procedures and modern technology to make sure that criminal defendants get the same level of justice as civil litigants." •

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