

The background features a dark blue gradient with a series of curved, glowing lines that create a sense of depth and movement. On the right side, there is a grid-like pattern of light blue lines that recedes into the distance, suggesting a digital or architectural space.

MANDATORY INITIAL DISCOVERY PILOT PROJECT

JUDICIAL CONFERENCE APPROVED AT 2016 MEETING

- Standing Rules Committee
- Civil Rules Committee
- CACM

CHIEF JUSTICE ROBERTS' COMMENTS AND SUPPORT

- In his 2016 year-end report, the Chief Justice commented on the December 2015 revisions of the civil rules, which “emphasize the judge’s role in early and effective case management.”
- He then added that “[t]his year, we will take a step further and ask district judges to participate in pilot programs to test several promising case management techniques aimed at reducing the costs of discovery.”
- There are two active pilot projects:
 - Expedited Procedures (“Rocket Docket” in which our district is not participating); and
 - Mandatory Initial Discovery (this pilot)

GOAL BEHIND PILOT PROJECTS

- Are there ways to make improvements in pretrial case management in civil cases that will promote the just, speedy and inexpensive resolution of cases?
- Effective use of 2015 amendments.
- Study of pilot results by FJC and rules committees for potential new rules.

MANDATORY ROBUST INITIAL DISCLOSURES

Reduce costs, burden,
and delay in civil
litigation.



CASES EXCLUDED FROM PILOT

- Required in all civil cases other than those exempted – MDL, Private Securities Litigation Reform Act (“PSLRA”), Patent cases, and Rule 26(a)(1)(B) cases
- Rule 26(a)(1)(B): (i) an action for **review on an administrative record**; (ii) a forfeiture action *in rem* arising from a federal statute; (iii) a petition for **habeas corpus** or any other proceeding to challenge a criminal conviction or sentence; (iv) **prisoner pro se cases**; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to **enforce an arbitration award**

Highlights of Mandatory Robust Initial Disclosures

- Court-ordered discovery that must be exchanged before the commencement of broader discovery in the case pursuant to Rules 33, 34, 35, and 36
- The mandatory initial disclosures supersede the initial disclosures otherwise required by Rule 26(a)(1)
- The parties may not opt out of the requirement to make the disclosures

Highlights

- The disclosures include both favorable and unfavorable information that is relevant to the parties' claims and defenses
- Parties must file a notice of service of their initial response (but not the actual response)
- The Court will discuss the mandatory initial disclosures with the parties during the case management conference
- Pilot Courts will vigorously enforce the mandatory disclosures (but not unreasonably so)

ANSWERS

- Parties must file answers even if they intend to file a motion to dismiss UNLESS:
 - The Court defers the time **for good cause** while it considers a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, or absolute or qualified immunity of a public official.
- If the Court extends the time to answer, the time to serve the mandatory initial disclosures is measured from that day.

Rule 26(f) Conference

- Parties must discuss the mandatory initial discovery responses at the Rule 26(f) conference and seek to resolve disagreements
- The parties must include a description of their discussions, including resolved and unresolved disagreements or other discovery issues, in their Rule 26(f) report to the Court

CONSENT CASES

- All Magistrate Judges are participating in the pilot
- If your case is assigned to a District Court judge who is not participating and you consent to the Magistrate Judge:
 - YOUR CASE WILL BE COME PART OF THE PILOT IF YOU HAVE NOT ANSWERED THE COMPLAINT

Information Required to be Disclosed:

- State the names and, if known, the addresses and telephone numbers of all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.
- State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

Information Required to be Disclosed

- List the documents, ESI, tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them.

Information Required to be Disclosed

- A statement of the facts relevant to each claim or defense raised by a party, and the legal theories upon which each is based.
- A computation of each category of damages claimed by a party, and a description of the documents or other evidentiary material on which it is based. A party may produce the documents or other evidentiary materials with its response, instead of describing them.
- The identity and description of any insurance or other agreement under which an insurance business, person or entity may be liable to satisfy all or part of a possible judgment in the action. A party may produce a copy of the agreement with its response instead of describing it.

TIMING OF DISCLOSURES

- No later than 30 days after response to complaint, counterclaim, crossclaim or third party complaint.
- A 30 day extension is warranted if the parties jointly certify that they are seeking to settle the case and have a good faith belief that it will settle within 30 days of the due date for responses.
- No initial discovery if the Court approves a written stipulation by the parties that no discovery will be conducted in the case.

ESI

- *Duty to Confer.* When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:
 - i. requirements and limits on the preservation, disclosure, and production of ESI;
 - ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review; and
 - iii. the form in which the ESI will be produced.

ESI

- Unless the Court orders otherwise, a party must produce the ESI within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form.
- 70 days after responsive pleading – “unless the court orders otherwise”

SUPPLEMENTATION

- Continuing duty to supplement
- Supplement no later than 30 days after information is discovered or revealed to the party
- Final Supplementation: Court Deadline
- If no deadline, then 60 days before the final pretrial conference
- If no deadline and no final pretrial conference, 90 days before trial

KEEP IN MIND

- Other Discovery Rules Still Apply
- Mandatory Initial Discovery Goes First
- Judges Still Have Discretion
- It's a PILOT – trying to see what works
- Periodic local meetings to evaluate/reevaluate
- Collection and sharing of information between pilot districts over three-year pilot period

ARIZONA

- Survey from the Arizona Bar showed that by a two-to-one ratio, practitioners preferred litigating in state court over federal court.
Why?

- The rules, particularly the disclosure rules
- Faster and Less Costly

FJC Website for Lawyers

- www.fjc.gov:
<https://www.fjc.gov/content/321837/mandatory-initial-discovery-pilot-project-overview>
- Videos
- Check List
- User's Manual
- Northern District Website Link

QUESTIONS

