Introduction to the Mandatory Initial Discovery Pilot (Video Transcript)[1]

Federal Judicial Center

with Honorable Paul Grimm, District of Maryland

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NARRATOR: Hello, I am Judge Paul Grimm, from the District of Maryland, and I chair the Pilot Projects Working Group of the Civil Rules Advisory Committee.

At its meeting in September of 2016, the Judicial Conference of the United States approved a pilot program to test procedures requiring mandatory initial discovery before the commencement of party-directed discovery in civil cases. This pilot will be implemented in a number of volunteer courts.

Rule 1 of the Federal Rules of Civil Procedure requires the court and the parties to employ the rules "to secure the just, speedy, and inexpensive determination" of every case.

Discovery costs have long been recognized as one of the primary sources of civil litigation expense, and the discovery process often complicates and prolongs civil litigation.

The Mandatory Initial Discovery Pilot has been designed to test whether early substantial disclosure of information can reduce litigation costs and shorten the time for case resolution consistent with the goals of Rule 1.

These objectives are advanced when the parties are better able to make an early assessment of the strengths and weaknesses of their positions. That early assessment will assist the court and the parties in developing a case-management plan and a scheduling order that reflect the particular circumstances of the case and may facilitate early resolution of matters before the parties are forced to incur additional discovery-related costs and expense, including legal fees. The goal of the Mandatory Initial Discovery Pilot—like Rule 1—is to promote justice, reduce costs, and expedite the fair resolution of claims.

We have produced this explanatory video for those of you who sit on or practice before one of the courts that will be implementing the Mandatory Initial Discovery Pilot, which we will refer to in this presentation as the MID Pilot. This video is one of several efforts by the Judicial Conference and the Federal Judicial Center to explain the requirements of the MID Pilot and the

1. This is a transcript of a video available at www.fjc.gov/content/321101/midpp-introduction-video.

details of how it will work. The Federal Judicial Center will also provide written materials, and they will be available on a website that can be accessed by judges and lawyers, as well as a second video that will provide tips and suggestions from judges and attorneys who have worked under similar rules in the state courts.

We will start today's presentation by describing the mandatory initial discovery that parties are required to provide. Then we'll outline the responsibilities of the parties and the judges for complying with and administering the MID Pilot. The details of these requirements are spelled out in the Standing Order, the Users' Manual, and other materials that will be provided to you.

The MID Pilot will apply to all civil cases in the volunteer courts, subject to certain specific exemptions. We will talk more about these exemptions later in this presentation.

Mandatory initial discovery in the pilot courts expands upon the Rule 26(a)(1) initial disclosures that parties are already familiar with and exchange in many cases. But to further the goals underlying Rule 1, mandatory initial discovery responses must include information relevant to each party's claims or defenses, even if unfavorable, rather than only information that a party intends to use to support its claims or defenses. These mandatory initial discovery responses must be completed before party-initiated discovery may commence under Rules 30 through 36 and Rule 45. Parties in the pilot courts will be required to participate in the mandatory initial discovery.

To start our discussion of the MID Pilot, let me describe in more detail the information that parties must provide under the Standing Order.

First, the parties must state the names and, if known, the addresses and telephone numbers, of all persons who they believe are likely to have discoverable information relevant to any party's claims or defenses, and must provide a fair description of the nature of the information each such person is believed to possess. Parties must provide this information, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses.

Second, parties must state the names and, if known, the addresses and telephone numbers of all persons who they believe have given written or recorded statements relevant to any party's claims or defenses. Unless a party is asserting that a particular statement is subject to a privilege or work-product protection under applicable law, it must attach a copy of any responsive written or recorded statement in its possession, custody, or control. If a statement is not in its possession, custody or control, the party must state the name and, if known, the address and telephone number of each person who the party believes has custody of a copy of each such statement.

Third, parties must list the documents, electronically stored information—sometimes called ESI—tangible things, land or other property that they know exist, whether or not in their possession, custody or control, that they believe

may be relevant to any party's claims or defenses. Now if the volume of these materials makes listing them individually impracticable, parties may group similar documents or ESI by category and describe those categories with particularity. Parties may elect to produce documents and tangible things in their possession, custody, or control with their response or make them available for inspection on the date of the response instead of listing them. Parties must produce hard copy documents as they are kept in the usual course of business. For documents or ESI that are not in a party's possession, custody, or control, the names and, if known, the addresses and telephone numbers of the custodians of those materials should be included in the party's response. There are other specific rules regarding the production of ESI that we will go into later.

Fourth, parties must state the facts relevant to and the legal theories upon which each of their claims or defenses is based. Parties must also provide a computation of each category of damages that they are claiming and a description of the documents or other evidentiary material on which each damages category is based, including materials bearing on the nature and extent of any injuries suffered. Here again, a party may produce the documents or other evidentiary materials with its responses instead of describing them.

Fifth, a party must specifically identify and describe 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. Again, a party may produce a copy of the agreement instead of describing it.

If a party's mandatory initial discovery responses are deficient, an opposing party may request a more detailed or thorough response. In addition, to the extent authorized by the Rules and the court's Rule 16 scheduling order, a party may serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items set forth in the mandatory initial discovery responses if those items have not already been produced. Now if the court orders further discovery, a party may also enter onto designated land or other property identified or described.

Because of the nature of electronically stored information, the Standing Order includes specific rules that apply to it, which I will now explain.

When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to the disclosure and production of that material. These include requirements and limits on the preservation, disclosure, and production of the ESI, appropriate methods for conducting ESI searches, including custodians and search terms, or the use of computer search methodology such as technology-assisted review. Parties should also discuss and attempt to reach agreement on the form in which ESI will be produced. If the parties are unable to resolve any dispute regarding 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 with the court. Any joint

motion must include the parties' positions and the certification of counsel pursuant to Rule 26(g) or your court's local rules. A 26(g) certification means that a response is complete and correct as of the time that it is made, is consistent with the rules and existing law, not interposed for any improper purpose, and neither unreasonable nor unduly burdensome or expensive.

Unless the court orders otherwise, a party must produce ESI within forty days after serving its initial response. Absent good cause, no party needs to 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.

The requirements of mandatory initial discovery under the Standing Order are stringent, and the exemptions and exceptions are purposely narrow. It has been structured that way to truly test the benefits of substantial initial disclosures and to eliminate the incentive to file meritless, dilatory motions in order to avoid prompt compliance.

Responses to mandatory initial discovery requests must be based upon the information then reasonably available, and a party is not excused from providing its responses because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response.

All responses under the MID Pilot must be signed by the party under oath and are subject to counsel's or the responding party's certification under Rule 26(g) that the responses are complete and correct as of the time they are made, based on that party's knowledge, information, and belief formed after a reasonable inquiry.

If a party limits the scope of its responses on the basis of privilege or work-product protection, it must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its responses on the basis of any other objection, including an objection that providing the required information would involve disproportionate expense or burden, considering the needs of the case, it must explain with particularity the nature of the objection and its legal basis, and it must provide a fair description of the information it is withholding. Parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C), even if they have filed or intend to file a motion to dismiss, or other preliminary motion. But the court may defer those submissions 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. In any of these cases, the time to answer, counterclaim, crossclaim, or reply shall be set by the court in its

order deciding the motion, and the time to serve responses to the mandatory initial discovery for a party seeking affirmative relief shall be measured from that date. Now if the court fails to designate such a time, the obligation shall be measured from the date established in Rule 12(a)(4).

A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than thirty days after the first pleading filed in response to its complaint, counterclaim, crossclaim, or third party claim.

A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than thirty days after it files its responsive pleading.

However, initial discovery responses are not required if the court approves a written stipulation by the parties that no discovery will be conducted in the case. Also, initial discovery responses may be deferred—one time, for thirty 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 thirty days of the due date for their responses.

Parties should remember that the duty to provide mandatory initial discovery set forth in the Standing Order is a continuing duty and each party must serve supplemental responses when new or additional information is discovered or revealed.

A party must serve supplemental responses in a timely manner, but no later than thirty days after the additional information is discovered or revealed to the party. The court will usually set a deadline for supplementation of responses in its Rule 16(b) scheduling order. Full and complete supplementation must occur by that deadline. If the court does not set a deadline for final supplementation of the MID responses, the deadline shall be ninety days before trial. However, if new information is revealed in a written discovery response or deposition in a manner that reasonably informs the parties of the information, the information need not be presented in a supplemental response.

When they meet for the Rule 26(f) conference, parties should discuss the mandatory initial discovery responses. The parties should discuss any limitations that a party has made or intends to make to its responses, and they should attempt to resolve any disagreements on the scope of discovery.

Unless the court orders otherwise, initial responses and later supplements will not be filed with the court. But the parties will file a notice of service of their initial responses and later supplements. When the parties file their Rule 26(f) report with the court describing their discovery planning conference, they must include a description of their discussions concerning the mandatory initial discovery responses. That report should describe the resolution of any limitations invoked by either party in its response as well as any unresolved limitations or other discovery issues.

The parties will attach to the report the initial and supplemental responses and any other discovery requests, objections, and responses that are the subject of a dispute or involved in any unresolved limitations on discovery issues.

Two final points should be made. First, producing information under the Standing Order does not constitute an admission that the information is relevant, authentic, or admissible. Second, the sanctions listed in Rule 37(c)(1) may apply to deficient mandatory discovery responses required by the Standing Order.

The Federal Judicial Center will study the effects of this pilot program. Key markers will be added to the courts' electronic filing system that will assist with that study. We believe the study will produce reliable and valuable information about the effects of early substantial disclosures.

In states that have adopted mandatory initial disclosures similar to those required by the MID Pilot and Standing Order, the experience has been that the lawyers and their clients manage these obligations faithfully. Certainly, they comply because of the consequences of failing to do so. But eventually compliance becomes ingrained among the practitioners. And the cultural change in the perspectives of attorneys, clients, and the courts may be required before the MID Pilot can achieve its potential, but it is not a change beyond the capability of those who participate in federal civil litigation, as the experience in these other jurisdictions has demonstrated.

Thank you for participating in this pilot program. We believe it will produce valuable information on possible ways to achieve the objectives of Rule 1: "the just, speedy, and inexpensive determination of every action."