

## APPENDIX C

# The Pathway Approach: Draft Rules and Examples of Rules from Around the Country

# Introduction

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This summary includes a draft set of rules for the Streamlined Pathway, which were developed by the CJI Rules/Litigation Subcommittee, and additional examples of rules from around the country for both the General and Complex Pathways.<sup>1</sup> Just as there is no one-size-fits-all approach to civil litigation, the CCJ Committee does not recommend one set of recommended rules for each pathway. Different states will have unique landscapes, cultures, and needs. At the same time, there are benefits to uniformity across the country, particularly for more complex cases. For this reason, we recognize the hard work and input that has resulted in the 2015 amendments to the Federal Rules of Civil Procedure,<sup>2</sup> which emphasize cooperation, proportionality, and early and active case management. Many state rule schemes mirror the federal rules, and we support state courts following the federal example,<sup>3</sup> particularly for cases in the General and Complex Pathways. Specific processes and procedures for each of the pathways are also specified in the Recommendations themselves.

# Draft Rules for the Streamlined Pathway

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The following Streamlined Pathway Rules were drafted with the goal of creating a more just, speedy, and inexpensive process for the large number of cases in the state court system that would benefit from a more streamlined process. The draft rules seek to reduce the cost of litigation and time to disposition for these civil cases. These rules recognize that cases, identified by case attributes or case type, should be classified according to their needs.

The rules below are draft rules for consideration by courts as they implement a Streamlined Pathway. Many states around the country have implemented similar short, summary, or expedited procedures, and the rules vary around the country to fit the particular needs of the jurisdictions.<sup>4</sup> The Rules/Litigation Subcommittee reviewed and examined the work of short and expedited litigation programs from around the country that produced favorable outcomes. The following rules reflect the Subcommittee's extensive discussions and consensus as to the best and most workable collection assembled from many states.

## RULE 1: ASSIGNMENT OF CIVIL ACTIONS TO THE STREAMLINED PATHWAY.

- a. Definition.** A “streamlined case” is an action in which the litigants would likely be best served by a streamlined process with minimal judicial management and without the entire range of pretrial processes.
- b. Assignment to the Streamlined Pathway**
  - i. Court Assignment.** In the first instance, the court shall assign those cases determined to be appropriate for the streamlined pathway. In deciding whether an action is an appropriate case as defined in subsection (a), the court shall consider these attributes:
    1. A limited number of parties;
    2. Simple issues related to liability and damages;
    3. Few, if any, anticipated pretrial motions;
    4. Little need for extensive discovery;
    5. Few witnesses; and
    6. Minimal documentary evidence.

**ii. Presumptive Designation.** An action is presumptively (but not conclusively) assigned to the streamlined pathway if it involves one or more of the following types of claims as the principal cause of action:

1. Automobile Tort;
2. Intentional Tort;
3. Premises Liability;
4. Tort-Other;
5. Insurance coverage claims arising out of claims listed above in subparts (1) through (4);
6. Buyer Plaintiff;
7. Seller Plaintiff (Debt Collection);
8. Contract Other; and
9. Appeals from Small Claims Decisions.

**iii. Voluntary Assignment.** Civil actions will be assigned to the streamlined pathway where the parties voluntarily agree to be included in the pathway and have designated the case as streamlined at the time of filing, or by filing a joint stipulation with the court.

## RULE 2: REASSIGNMENT FROM THE STREAMLINED PATHWAY

**a. Initial Motion for Reassignment from the Streamlined Pathway.** A party objecting to the assignment of a matter to the streamlined pathway shall serve and file a motion setting forth the reasons that the matter should be assigned to a different pathway. The motion shall be served and filed no later than 30 days after the filing of the answer to the complaint.

**b. Subsequent Motion for Reassignment from the Streamlined Pathway.** After the time for bringing a motion under subsection (c) has expired, but no later than the date for completion of discovery, a party may by motion request that the case be reassigned to another pathway for good cause including a specific showing of changed circumstances.

**c. Grounds for Reassignment.** Motions to reassign the case from the Streamlined Pathway shall be considered on the following grounds, and such other bases as may be established to the satisfaction of the Court:

- i. The existence of or need to join multiple additional parties; multiple claims and/or defenses;
- ii. Complex theories of liability, damage, or the need for substantial equitable relief.
- iii. A demonstrable need for discovery beyond that reasonably available pursuant to these rules.
- iv. Other factors that demonstrate assignment of the case to the Streamlined Pathway affects a party's right to a fair and just resolution of the case.

Motions to reassign must be brought promptly, but in no event later than the completion of discovery as set forth in Rule 1(d).

**d. Court's Continuing Power.** Nothing in this section shall affect the court's inherent authority to decide on its own that a civil action previously determined to be appropriate for the streamlined pathway should be reassigned to another pathway.

# RULE 3: MANDATORY DISCLOSURES AND ADDITIONAL DISCOVERY

**a. Mandatory Disclosures.** Each party shall make disclosures of the following information without the need for a specific request or Order of the Court. Disclosures shall be served by the Plaintiff on Defendant not later than 45 days from filing of the Complaint. The Defendant's Mandatory Disclosures shall be served on the Plaintiff not later than 30 days from filing of the Defendant's response to the Plaintiff's Complaint. These disclosures are subject to principles of proportionality in connection with the requirements of the claims and defenses asserted in the case.

- i.** A statement summarizing each contention in support of every claim or defense and a brief statement of the facts upon which the contentions are based.
- ii.** The name, address, and telephone number of each individual likely to have discoverable information—along with the subjects of that information and any statement from such individual— that the disclosing party may use to support its claims or defenses. However, no party shall be required to furnish any statement (written or taped) protected by the attorney/client privilege or work-product rule.
- iii.** A copy—or description, by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.
- iv.** If a claim for damages is being made, a description of the precise damages being sought by the party and the method for calculation of damages. If the party has any

liability insurance coverage providing coverage for the claims being made by another party, the name of the insurance company, the limits of coverage, and the existence of any issue that could affect the availability of coverage.

- v.** Any offers of stipulation of any fact that is relevant to any claim or defense in the matter.
- vi.** An estimate of the number of trial days that it will take to complete trial of the matter.

Failure to disclose or inadequate disclosure of the above may result in sanctions, including but not limited to monetary sanctions, issue preclusion, claim preclusion and/or negative inference instructions.

**b. Discovery Methods and Limits.** Case-specific discovery is permitted in accordance with these rules, subject further to all existing applicable rules and statutes governing discovery. Limits on discovery in Streamlined Cases are as set forth herein. All discovery shall be complete 30 days before trial. Methods of discovery are pursuant to existing rules and procedures.

- i.** Discovery is not permitted to be served, absent agreement, before a party has received mandatory disclosures from the opposing party; if not received, until the deadline for opposing parties' disclosures has passed.
- ii.** Interrogatories, not exceeding 10, are expressly permitted. Further interrogatories may be propounded by agreement or Order of the Court.
- iii.** Requests for the production of documents, not exceeding 10, are expressly permitted. Further document production requests may occur by agreement or Order of the Court.

#### iv. Depositions

1. There is no limitation on the number of parties which may be deposed.
2. Non-party depositions, not exceeding 2, are permitted. Additional depositions may be conducted by agreement of the parties or further Order of the Court.
3. Non-party depositions shall be under oath and recorded. Such non-party depositions shall be used at trial in lieu of further testimony from the witness.
4. Depositions shall not exceed 6 hours in length.
5. Objections to deposition testimony shall be made in accordance with existing rules.

#### v. Expert Discovery

1. Expert disclosures are required in the following order and timing, subject to further agreement by the parties. Plaintiff's expert disclosures shall be served not later than 90 days from filing the Complaint. Defendant's expert disclosures shall be served not later than 120 days from filing of the Complaint.
2. In no event shall expert disclosure or non-disclosure issues delay the date set for trial.
3. Expert opinions shall be exchanged through reports which minimally address the requirements stated below. The cost incurred for preparing the report required herein shall be born by the party retaining the expert. Parties may, by agreement, permit discovery depositions of expert witnesses by such terms as the parties may agree.
4. Expert witnesses shall disclose their qualifications, a list of matters in which they have provided opinions disclosed in litigation for the past 4 years, the

bases of their opinions in the case in which they are presently finding their opinions, the facts upon which they rely, literature, standards, rules or activities within the realm of their expertise upon which their opinions are based, the basis of their fees and other charges to the party who retained them; the amount of their total compensation charged to the retaining party through the time of completion of their expert report; and the basis and amount they would charge for deposition and trial testimony.

5. Parties are encouraged to stipulate to the foundation and format of their expert disclosures.
6. Rebuttal experts shall be identified and disclosures made to the opposing party not later than 20 days from receipt of the report they are retained to rebut.

#### c. Discovery Motions

- i. **Meet and Confer Requirement.** Prior to any motion to compel discovery, the party seeking the discovery and the party from whom responses are being sought must, by and through their counsel (or a self-represented litigant if unrepresented by counsel), confer in an attempt to resolve the dispute.
- ii. **Expedited Process for Resolution of Discovery Disputes.** If the dispute is not resolved after meet and confer, the party seeking the discovery shall contact the court and schedule a telephone conference with the court. No later than 5 days prior to the date of the conference, each party shall serve and file with the court a letter not exceeding 2 pages in length setting forth the party's position on the discovery dispute and providing copies of the disputed discovery. The court, in its discretion, may allow additional argument at the telephone conference. The Court shall promptly rule on the discovery dispute.

## RULE 4: DISPOSITIVE MOTIONS AND NON-DISPOSITIVE MOTIONS

- a. Dispositive Motions.** Dispositive Motions such as Summary Judgment, Motions to Dismiss, or other relief sought by motion which adjudicates the entirety or any portion of a party's claim or defense are permitted. Dispositive Motions shall be filed and served in accordance with existing rules, and concluded in every respect except for the Court's decision on the motion 30 days before trial.
- b. Non-Dispositive Motions.** Non-Dispositive Motions (excluding discovery motions as set forth in Rule 3(c), including but not limited to amendment of pleadings, joinder of additional parties, and any other motion seeking relief from the court which does not adjudicate as a final matter any aspect of any party's claims or defenses, shall be brought at the earliest practicable date. Motions which affect the pleadings shall be served and filed not later than 30 days from the last pleading served by an opponent.
- c. Timing of Motion Practice.** All motion practice of any kind shall be served, filed, and if argued to the Court, concluded in every respect except for the Court's decision on the motion 30 days before trial.

## RULE 5: ALTERNATIVE DISPUTE RESOLUTION

- a. ADR Not Required.** Notwithstanding any rule to the contrary, ADR is not required for cases assigned to the Streamlined Pathway.
- b. Timing of ADR.** Parties may by agreement engage in any form of ADR, but such ADR must be completed 30 days before trial.

## RULE 6: TRIAL

- a. Calendaring Case for Trial.** The Court shall set cases assigned to the Streamlined Pathway for trial to be held not later than 180 days from filing of the Defendant's response to the Plaintiff's Complaint, and in no event more than 240 days from the filing of the Plaintiff's Complaint.
- b. Jury Size.** Cases assigned to the Streamlined Pathway shall be tried to a jury of 6 people, unless the right to a jury is waived by both parties.
- c. Voir Dire.** Voir dire shall be conducted initially by the Court, with the opportunity for such reasonable examination of potential jurors by the parties.
- d. Witness Lists.** Witness lists shall be exchanged at least 14 days before trial.
- e. Exhibit Lists.** Exhibit lists shall be exchanged at least 14 days before trial.
  - i.** Parties are under an obligation to make exhibits available for examination and/or copying not later than 7 days before trial.
  - ii.** Parties shall provide objections with particularity to any exhibit listed by the opposing party 5 days before trial, and thereafter file their exhibit list and objection to the opposing parties' exhibits not later than 3 days before the trial.
- f. Pretrial Agreements.** The parties are expected in advance of trial to:
  - i.** Agree on foundation for exhibits and such other documentary evidence, including but not limited to business and medical records that customarily would require the testimony of a records custodian. In the absence of agreement, objection(s) with reasons therefor shall be specified in writing.

- ii. Discuss and agree on a means of submitting expert opinion to the fact finder without the need to call the expert at trial.
- iii. Enter such factual stipulations as may be reasonably possible, and from such stipulations prepare a jury instruction that will meaningfully inform the jurors of the facts agreed to by the parties.
- iv. Prepare a joint set of jury instructions and verdict form. In the event the parties cannot agree on the final instructions and/or verdict form, a list of all instructions, including the instructions and verdict forms to which there has not been agreement, shall be submitted to the court. Instructions and the verdict form(s) are to be filed 3 days before trial.
- v. Parties shall designate and counter designate testimony of witnesses whose depositions are to be used at trial. Such designations and counter designations, including all objections thereto, shall be filed with the Court 3 days before trial.
- vi. Exchange motions *in limine* at least 7 days before trial. Any motions *in limine* which cannot be agreed to following their exchange shall be filed with the Court.

All matters which are to be filed with the Court as a result of the requirements set forth in Rule 6(f) (i-vi) shall be filed with the Court at least 3 days before trial.

## RULE 7: RECORD OF PROCEEDINGS, VERDICT, AND JUDGMENT

- a. The record for Streamlined Pathway trials shall be prepared in the same manner as other civil trials.
- b. Judgment shall be entered upon the verdict by the Court in the same manner as other civil cases.

# Examples of Rules for the Complex Pathway

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There are many examples of business, complex, and commercial courts around the country, including long-standing programs and recently implemented pilot programs. The American Bar Association's Business and Corporate Litigation: Business Courts Subcommittee has created a useful list of Business, Commercial, and Complex Court links available [here](#). Below, we have included a few examples where the rules exemplify many of the recommendations for the Complex Pathway.

## DELAWARE COURT OF CHANCERY

The Delaware Court of Chancery has a long and rich history adjudicating disputes involving Delaware's numerous corporations and other business entities. Delaware has not merged its courts of law and equity. Thus, the Court of Chancery is a court of equity with litigation primarily consisting of corporate matters, trusts, estates, and other fiduciary matters, as well as disputes involving the purchase and sale of land, questions of title to real estate, and commercial and contractual matters in general. Thus, the court has unique experience and expertise handling business actions, which is reflected in the Court of Chancery's Rules. Highlights of the Court of Chancery Rules include expedited hearings that respond to the needs of business litigants for prompt decisions that do not

unnecessarily disrupt routine business operations. The Rules also provide guidelines for the preservation of ESI, guidelines regarding the collection and production of documents in discovery, and the goal of decisions within 90 days from the date of the last written submission, absent expedition.

## DELAWARE COMPLEX COMMERCIAL LITIGATION DIVISION

The Delaware Superior Court Complex Commercial Litigation Division ("CCLD") was created in 2010 to adjudicate specific categories of complex business disputes, including cases with an amount in controversy of at least one million dollars. Along with the Delaware Court of Chancery, the CCLD offers another option for the resolution of complex business disputes in Delaware. The CCLD seeks to address the concerns of business litigants, who want a predictable procedure with prompt resolution and reasonable control over the costs of discovery, including e-discovery. CCLD cases remain with a single judge and include early active case management, early mandatory disclosures, and firm pretrial and prompt trial dates. The CCLD has chosen to characterize its procedures as guidelines that the litigants can adopt or modify by their own agreements.

## 2015 CALIFORNIA RULES OF COURT

California has a set of complex case rules that apply in cases that are designated as complex. A “complex case” is “an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.” The rules provide for a single judge, with judicial management to begin early and be applied continuously and actively. The Users’ Manual recognizes the benefits of phased discovery where that is more efficient, as well as informal conferences with the court to address discovery disputes, along with many other recommendations for reducing the cost and delay of complex cases, recognizing that the “main job in complex is to simplify.”<sup>5</sup>

## MINNESOTA COMPLEX CASE PROGRAM

In 2013, Minnesota implemented the Complex Case Program (“CCP”) based on the recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force. The purposes of Minnesota’s CPP are “to promote effective and efficient judicial management of complex cases in the district courts, avoid unnecessary burdens on the court, keep costs reasonable for the litigants and to promote effective decision making by the court, the parties and counsel.” The program includes early and consistent judicial management, mandatory disclosures, assignment to a single judge, firm trial dates, and an emphasis on education and training for both judges and staff. The rule also specifies that judicial assignment should include consideration of “the needs of the court, the judge’s ability, interest, training, experience (including experience with complex cases), and willingness to participate in educational programs related to the management of complex cases.”

# Examples of Rules for the General Pathway

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As the recommendations note, the General Pathway provides the right amount of process for cases that aren't simple, but also aren't complex. Equally important, the general pathway is not another route to "litigation as we know it." Just as rules for the Streamlined and Complex Pathway should be developed with thought to the specific needs of cases assigned to those pathways, intentionality is also necessary with regard to right sizing the General Pathway. Recommendation 6 includes numerous recommendations for the General Pathway, and we offer multiple examples below of rules around the country that put these recommendations into practice. Those practices include robust and meaningful early case management conferences, proportional discovery, mandatory disclosures and tailored additional discovery, and use of an expedited discovery process. The example rules highlighted below provide useful examples of rule schemes that incorporate these principles.

## ARIZONA

In 1940, the Arizona Supreme Court became the first state to promulgate a procedural system replicating the federal rules. Then, in the early 1990s, when citizen feedback called for reform, the Arizona Supreme Court and the State Bar of Arizona amended

the rules, under the guidance of then-Chief Justice Thomas Zlaket, introducing comprehensive pretrial conferences, extensive disclosures, and presumptive limits on discovery.

In Superior Court, the parties are required to make full, mutual, and simultaneous disclosures of all relevant information—including electronically stored information—known by a party to exist whether or not in a party's possession, custody, or control. The parties have a continuing duty to supplement the disclosures. The rules contain additional discovery limits, including a presumptive limit of one expert per side per issue. Depositions in Superior Court are presumptively limited to four hours, and only certain individuals may be deposed automatically.

## NEW HAMPSHIRE

In 2010, New Hampshire launched the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project in two counties, and eventually extending to four. Because of the positive feedback regarding the PAD Project, in 2013, New Hampshire made the pilot project rules applicable statewide. New Hampshire has since revised its Rules of Civil Procedure for all civil cases to fully incorporate the pilot project rules. The rules require automatic disclosures, including

a duty to supplement. New Hampshire specifically includes discovery of electronically stored information, recognizing that all such discovery requests shall be “made in proportion to the significance of the issues in dispute.”

## COLORADO

In 2011, the Colorado Supreme Court created the Colorado Civil Access Pilot Project, which applied generally to “business actions” in specific judicial districts in the state. In 2015, following the pilot project—and after a robust evaluation—the Colorado Supreme adopted changes to the Colorado Rules of Civil Procedure. The amendments are substantial and incorporate the best of CAPP, while also incorporating the proposed changes to the Federal Rules of Civil Procedure that went into effect in December, 2015. Rule 1 requires that the rules be “liberally construed, administered, and employed by the courts and the parties to secure the just, speedy, and inexpensive determination of every action.” The rules include significant provisions regarding case management, including that the parties submit a proposed Case Management Order that addresses numerous issues, including an evaluation of proportionality factors. The court must hold a robust case management conference, attended by lead counsel. The rules incorporate proportionality into the scope of discovery along with a list of factors to consider. The rules also require robust initial disclosures of relevant information, “whether or not supportive of the disclosing party’s claims or defenses.”

## MINNESOTA

The Minnesota Supreme Court amended its Rules of Civil Procedure and the General Rules of Practice for the District Courts in 2013, adopting many of the recommendations of the Minnesota Civil Justice Reform Task Force. The rules incorporate proportionality, first by its incorporation into Rule 1, recognizing that proportionality is not just required in discovery, but throughout the court process. Proportionality is

also incorporated into the scope of discovery, along with a series of factors for consideration in applying proportionality. The rules include automatic disclosures, and require that the parties hold a discovery conference and develop a discovery plan. Minnesota also has an expedited, informal process for resolving non-dispositive motions, through letters to the courts, followed by a telephone conference with the judge.

## UTAH

Utah implemented statewide rule changes in 2011 with a focus on proportional discovery. The rules include comprehensive initial disclosures, a requirement that discovery be proportional, and tiered discovery based on amount in controversy. Expert discovery is limited to either a four-hour deposition or a report that limits the expert’s testimony at trial. The Utah Rules also include an expedited process for resolving discovery disputes. A statement of discovery issues, not exceeding four pages, is filed with the court, at which time the opposing party also has an opportunity to file such a statement with the court. The court must promptly decide the issues on the pleadings and papers, conduct a telephonic conference with the parties, or order additional briefing.

# Notes

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1. Acknowledgement: This Appendix was principally authored by Brittany Kauffman, JD (Director, Rule One Initiative, IAALS) with generous contributions from Judge Jerome Abrams (CJI Committee member).
2. On December 1, 2015, *significant amendments to the Federal Rules of Civil Procedure* were submitted to Congress by the U.S. Supreme Court. They focused on achieving cooperation, proportionality, and early active judicial case management.
3. Colorado adopted changes to the Colorado Rules of Civil Procedure, effective July 1, 2015, that incorporate aspects of the Colorado Civil Access Pilot Project while also mirroring the 2015 federal rule amendments. See *Rule Change 2015(05) Colorado Rules of Civil Procedure*.
4. See, e.g., *BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A SUMMARY OF THE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS AROUND THE COUNTRY (2016)*.
5. *Complex Litigation — Users’ Manual, Super. Ct. of Calif., Cty. San Francisco, Dept. 304 (Judge Curtis E. A. Karnow)*.