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Initial Disclosures: The Past, Present, and Future of Discovery

Brittany K.T. Kauffman

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**INITIAL DISCLOSURES:
THE PAST, PRESENT, AND FUTURE OF DISCOVERY**

*Brittany K.T. Kauffman**

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I. INTRODUCTION

The concept of initial disclosures was first introduced in the United States in the late 1970s and 1980s as a way to address the concerns of the day with regard to the adversarial character of civil discovery. The broad-ranging discovery that had been the hallmark of the new Federal Rules of Civil Procedure in 1938 was now seen as undermining the higher purpose of achieving the promises of the Federal Rules of Civil Procedure and Rule 1—the “just, speedy, and inexpensive determination of every action.”¹ As Judge William W. Schwarzer concluded, looking back at the original intent of the framers of the Federal Rules, “that vision has become clouded and the framers’ purpose is largely unfulfilled.”² Even in 1989, he concluded that discovery, “originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens.”³ His proposal, as well as that of Judge Wayne D. Brazil,⁴ was to “examine the adversary process in the context of the contemporary litigation environment.”⁵ He poignantly noted that the process “must be viewed, not as a philosophical abstraction, but as a response to societal needs.”⁶

These comments are even more apt today. The discovery process has only expanded in terms of breadth and cost. Lawyers often get sidetracked from the merits of the case as they strive to win each procedural battle for their client, whether the cost is proportional to the case or not. Amendments to the Federal Rules of Civil Procedure have continued at a consistent pace since the 1980s, with a focus on controlling the growing discovery machine through rules intended to ensure proportional discovery and increased judicial case management.⁷ Judge Brazil’s and Judge Schwarzer’s proposals, and their philosophical underpinnings, formed the basis for amendments in the early 1990s that included initial disclosures as a key discovery mechanism.

Initial disclosures were incorporated into the Federal Rules of Civil Procedure through the amendments that went into effect on December 1,

1. See generally Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1301 (1978); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 715 (1989).

2. Schwarzer, *supra* note 1, at 703.

3. *Id.*

4. Brazil, *supra* note 1, at 1348.

5. Schwarzer, *supra* note 1, at 705.

6. *Id.*

7. See generally Hon. Rebecca Love Kourlis & Brittany K.T. Kauffman, *Rule Reform, Case Management, and Culture Change: Making the Case for Real and Lasting Reform*, 24 KAN. J.L. & PUB. POL’Y 493, 494-99 (2015).

1993. The 1993 revisions “evoked more vigorous opposition than any rule revision ever promulgated by the Supreme Court of the United States [at that time], save the single exception of the Federal Rules of Evidence.”⁸ Much of that criticism was directed at the initial disclosure amendments. The adopted provisions provided for disclosure of documents “that are relevant to disputed facts alleged with particularity in the pleadings.”⁹ Then, as today, the initial disclosures pertained to the information then reasonably available to the party. The Advisory Committee on Civil Rules (Advisory Committee) included an opt-out provision in the 1993 initial disclosure amendments that resulted in a patchwork of implementation around the country.

The Advisory Committee formed a discovery subcommittee in the mid-1990s to consider further amendments. The Advisory Committee’s efforts were informed by empirical research that suggested that some form of mandatory disclosure was in place in a majority of the districts, that attorneys who had practiced disclosure were highly satisfied with it, and that the fear of satellite litigation with respect to disclosure was unfounded. Nevertheless, the main theme and goal of the resulting 2000 amendments, which narrowed the scope of initial disclosures to those documents the disclosing party “may use to support its claims or defenses,”¹⁰ was restoring uniformity in discovery practice across the country. The chair of the Advisory Committee summed up the process as follows:

The beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.¹¹

Despite these early challenges, since 2000, there has been a growing movement in support of initial disclosures as a way to address the growing cost and delay of civil litigation—and, in particular, discovery. There has been a growing consensus that the current adversary process takes too long and costs too much—and with that growing consensus, a parallel commitment to reform. In terms of initial disclosures, the “diluted

8. Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 295 (Sept. 1994).

9. FED. R. CIV. P. 26(a)(1)(B) (1993).

10. FED. R. CIV. P. 26(a)(1)(A) advisory committee’s note to 2000 amendment.

11. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to the Hon. Alicemarie H. Stotler, Chair, Comm. on Rules of Practice and Procedure 7 (May 18, 1998) [hereinafter Memorandum to the Hon. Alicemarie H. Stotler].

disclosure rule” from 2000 remains in the Federal Rules of Civil Procedure. Nevertheless, there are pilot projects and efforts at the state and federal level that suggest a renewed focus on and support for initial disclosures. In fact, while there remain challenges, the current landscape suggests that a strong disclosure rule may be a necessary reform—particularly for certain case types—in order to ensure that the civil justice system meets the needs of a “just, speedy, and inexpensive” process in the future. While a system of broad and efficient initial disclosures at both the state and federal levels may well be the answer to the challenges that have plagued our system for at least 50 years, we are not quite there yet. The lessons of the 1993 and 2000 amendments illustrate that rule reforms alone cannot change a national legal culture. What is needed are intermediary steps—pilot projects, innovation and adoption at the state level, and a growing body of empirical data—to move our system in the direction of early mandatory disclosures followed by tailored discovery and an adversarial process focused on the merits of the case rather than “hiding the ball.”

II. THE PAST: THE HISTORY OF INITIAL DISCLOSURES

“Those who cannot remember the past are condemned to repeat it.”¹²

There is much to be learned about the future of discovery—and in particular the role of initial disclosures—by first looking back at the history of disclosures, including the original intent behind their introduction and successes and failures along the way.

A. *The Origins of Initial Disclosures*

In December 1974, Judge Marvin E. Frankel delivered the 31st Annual Benjamin N. Cardozo Lecture in New York.¹³ His theme was that the “adversary system rates truth too low among the values that institutions of justice are meant to serve.”¹⁴

We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. Sometimes, less guardedly, we say it is ‘best calculated to getting out all of the fact. . . .’ That the adversary technique is useful within limits none will doubt.

12. GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (Scribner’s 1905).

13. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1031 (1975).

14. *Id.* at 1032.

That it is ‘best’ we should all doubt if we were able to be objective about the question. Despite our untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. We know that most countries of the world seek justice by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.¹⁵

Judge Frankel, having argued that as a profession we are too committed to contentiousness as a goal itself and too little devoted to the truth, proposed modifying the adversary ideal and making truth the paramount objective. He suggested that one of the areas worthy of study was “our elaborate struggles over discovery.”¹⁶

Shortly thereafter, in 1978, Judge Wayne D. Brazil responded to Judge Frankel’s “disturbing and fundamental questions about the adversary character of American litigation” with his own critique and proposals for change.¹⁷ Brazil eschewed the discovery reforms of the day, calling for something more significant:

The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution. Because these difficulties and burdens are an inevitable consequence of adversary relationships and competitive economic pressures, they cannot be removed by the kind of limited, nonstructural discovery reforms that have been made in the past and are once again under consideration. To come to terms with these problems will require an assault on their sources; effective reform consequently must include institutional changes that will curtail substantially the impact of adversary forces in the pretrial stage of litigation.¹⁸

Importantly, Judge Brazil highlighted the tension, which continues today, between the traditional adversary model of litigation and the intent behind the modern Federal Rules of Civil Procedure.

Judge William W. Schwarzer similarly called out the growing gap between the traditional adversarial ideal and the litigation process as set forth in the rules.

15. *Id.* at 1036 (internal citations omitted).

16. *Id.* at 1054.

17. Brazil, *supra* note 1, at 1296. While Judge Brazil was a professor at the time of his article, he went on to serve for 25 years as a magistrate judge for the U.S. District Court for the Northern District of California. *Id.*

18. *Id.* at 1296-97.

The manner in which litigation is conducted is frequently wholly at odds with the spirit and the purpose of the rules. This is not so much because of abuse or misconduct, which are troublesome but not pervasive. More often it is because lawyers training in and committed to a system governed by the adversary process are not conditioned to function effectively in the pretrial environment envisioned by the federal rules.¹⁹

Their proposal for addressing this growing tension—a proposal that was embraced and put into reality by the Advisory Committee with the 1993 amendments—was a rule that would require prompt disclosure of all material documents and information by both parties at the beginning of every action, followed by supplemental and more tailored discovery as needed.

B. 1993 Amendments

The major purpose of the 1993 initial disclosure amendments was to “accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information.”²⁰ The rule was based on the experience of district courts that had previously required disclosures through local rules, court-approved standard interrogatories, or standing orders. The Advisory Committee noted that where jurisdictions had mandatory disclosures, litigants saved both time and expense, particularly if they met and conferred about the disclosures before engaging in further discovery.²¹

The proposed amendments were initially published in August 1991.²² Hundreds of written comments were received and reviewed by the Advisory Committee, and public hearings were held in November 1991 and February 1992. There were approximately 300 comments and 70 witnesses at the hearings, which was a strong response at the time but nothing compared to the over 2,000 comments received during the most recent public comment period for the rule amendments that went into effect in 2015.²³ In May 1992, the Advisory Committee unanimously recommended that the proposed amendments be adopted. The U.S.

19. Schwarzer, *supra* note 1, at 705.

20. Memorandum to the Hon. Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice and Procedure 64 (May 1, 1992) (draft Comm. Notes to Rule 26).

21. *Id.* at 64-65.

22. See Comm. on Rules of Practice and Procedure of the Judicial Conf. of the United States, Proposed Amendments of Federal Rules of Civil Procedure, *reprinted in* 137 F.R.D. 53 (1991).

23. See Terry Carter, *The Latest Discovery Mission: Judges Set to Debate Changes That Would Make New Federal Rules Mandatory*, 85-SEP A.B.A. J. 20 (1999).

Judicial Conference approved the amendments and forwarded them to the Supreme Court for consideration.

The products liability defense group, along with others, petitioned the Supreme Court, asking it to refuse to promulgate Rule 26(a)(1).²⁴ The Supreme Court did not publicly respond to the petition and did not hold a hearing on the issues. Nor did the Supreme Court block passage of the amendments. Nevertheless, the proposed initial disclosure scheme drew significant criticism from Justice Antonin Scalia, who issued a dissenting statement along with Justices David Souter and Clarence Thomas. Scalia called the changes “radical” and “potentially disastrous and certainly premature.”²⁵ Scalia argued the initial disclosure requirement was inconsistent with the adversarial model of litigation in the United States.

Once they made it to Congress, the amendments faced additional lobbying efforts. The House of Representatives “gutted the disclosure requirement in the Civil Rules Amendments Act of 1993 (H.R. 2814)” and voted to veto the amendments, but the Senate took no action on the bill, and the amendments as drafted by the Advisory Committee went into effect on December 1, 1993.²⁶ Following Congress’s non-veto of the amendments, the American Bar Association distributed a memo asserting “that while a skirmish was lost in Congress the battle itself still raged.”²⁷ “The veto war could be won on the federal district court level, the memo said, by lobbying each district court to employ the opt-out provisions of amended Rule 26.”²⁸

Despite this very public opposition, there was also support in favor of the proposals. For example, the Federal Judicial Center (FJC) forcefully urged adoption.²⁹ In addition, “[t]he group that studied the proposal longest and hardest was the large committee of the American College of Trial Lawyers, which almost unanimously approved Rule 26 in the form in which it was sent to the Court as a reasonably crafted measure.”³⁰

24. See Carrington, *supra* note 8, at 307.

25. See John C. Koski, *Mandatory Disclosure: The New Rule That’s Meant to Simplify Litigation Could Do Just the Opposite*, 80-FEB A.B.A. J. 85, 86 (1994).

26. See *id.* For more on the bills that were introduced in opposition to the amendments, and the last minute wrangling in the Senate, see Carrington, *supra* note 8, at 307.

27. Eric K. Yamamoto & Joseph L. Dwight, IV, *Procedural Politics and Federal Rule 26: Opting-Out of “Mandatory” Disclosure*, 16 U. HAW. L. REV. 167, 199 (1994).

28. *Id.*

29. See *id.* at 168.

30. Carrington, *supra* note 8, at 308. Attachment B to the Memorandum to the Hon. Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice and Procedure 64 (May 1, 1992).

1. Purpose and Scope of the 1993 Amendments

In terms of scope, the 1993 initial disclosures provided that the parties, without awaiting a discovery request, must provide several categories of discovery. As to documents, the parties were required to initially disclose “a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party *that are relevant to disputed facts alleged with particularity in the pleadings.*”³¹ The rule went on to provide:

A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.³²

Thus, as the Advisory Committee recognized in the Committee Notes to Rule 26, the requirement for disclosure of documents “applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.”³³

The Committee Notes explained further:

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner—should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence.

. . . .

The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of

31. FED. R. CIV. P. 26(a)(1)(B) (emphasis added).

32. FED. R. CIV. P. 26(a)(1).

33. Summary of the Report to the Judicial Conf. Comm. on the Rules of Practice and Procedure App. E at 96 (Sept. 1992).

investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after the filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has an inadequate disclosure.³⁴

2. The “Opt-Out” Provision and Adoption of the 1993 Amendments

A key feature of the 1993 initial disclosure amendments was the language that permitted each court by local rule or order to exempt all cases, or categories of cases, from some of the rules’ requirements.³⁵ The rule also permitted the parties to stipulate out of some of the requirements. Thus, by order the court could eliminate the provisions or modify the disclosure requirements in a particular case. Likewise, unless precluded by order or local rule, the parties could stipulate to the elimination or modification of the requirements in their case.³⁶ This authorization for local variation was included in large part because of the Civil Justice Reform Act of 1990 (CJRA), “which implicitly direct[ed] districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation.”³⁷ The purpose of the CJRA was to create “laboratories for litigation reform in most federal districts, though they could opt out. The idea was for the bench, the bar, and the public to percolate ideas so that the best might be adopted systemwide.”³⁸

The result of this opt-out language was a patchwork of implementation of the 1993 initial disclosure amendments. As one commentator characterized it in 1994, “confusion and national dis-

34. *Id.* at 98-99 (internal citations omitted).

35. Rule 26(a)(1) applied “[e]xcept to the extent otherwise stipulated or directed by order or local rule.” FED. R. CIV. P. 26(a)(1).

36. Memorandum to the Hon. Robert E. Keeton, *supra* note 30, at 65.

37. *Id.*

38. Carter, *supra* note 23, at 20.

uniformity mark the present state of Federal Rule 26 and mandatory disclosure.”³⁹

As a result of the inconsistency in the adoption of the 1993 initial disclosure provisions, the FJC compiled reports, starting on March 1, 1994, and continuing thereafter, noting implementation of the disclosure provisions in the district courts around the country.⁴⁰ As of 1997, there were 49 district courts where the rules were in effect (7 of which were in effect with significant revision), and 45 where the rules were not implemented (but 4 where initial disclosures were substantially provided for by CJRA provisions, 18 where a judge may order disclosure in specific cases, and 1 in effect for limited case types).⁴¹

In addition, the FJC commissioned a nationwide study to look at the effects of mandatory disclosures on litigation and to see if the predictions had come true.⁴² The findings were generally positive:

- For those who did report an effect, attorneys were more likely to say initial disclosures decreased their client’s overall litigation expenses, the time from filing to disposition, the amount of discovery, and the number of discovery disputes. They were also more likely to report that initial disclosures increased overall procedural fairness, fairness of outcome, and prospects for settlement.⁴³
- Although mandatory disclosures did not eliminate the need for additional discovery, the FJC’s study found areas where discovery proceeded more efficiently as a result of the initial disclosures: 43% reported the amount of discovery requests decreased; 36% reported an increase in settlement discussions, and only 6% reported a decrease; and 33% reported a decrease in disputes related to discovery, compared to 5% reporting an increase.⁴⁴
- In general, attorneys’ views on the effectiveness of initial disclosures did not differ between plaintiffs’ lawyers and defendants’ lawyers. Likewise, there was not a significant

39. Yamamoto & Dwight, *supra* note 27, at 199.

40. See, e.g., Donna Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts’ Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Mar. 28, 1997) (the fourth report to be issued).

41. *Id.*

42. See Thomas E. Willging, Donna Stienstra, & John Shapard, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525 (1998).

43. *Id.* at 562.

44. *Id.* at 563.

difference of opinion by type of case litigated or the importance of nonmonetary issues.⁴⁵

The RAND Institute for Civil Justice conducted its own private study on the effects of mandatory disclosure. It conducted a docket analysis of 5,000 cases filed before and after the rule, surveyed 2,000 attorneys, and reviewed the time sheets of attorneys in 1,000 cases.⁴⁶ The study did not find evidence that the mandatory disclosures gave rise to the explosion of litigation that was predicted.

- In general, the study found no statistically significant difference in the lawyers' hours in cases with disclosures versus no disclosures. There was one exception: in jurisdictions requiring "early mandatory disclosures of information bearing on both sides of the dispute," attorneys' work hours were significantly lower.⁴⁷
- No statistically significant change in time to disposition.⁴⁸
- A system of mandatory disclosure corresponded to lower attorney satisfaction, but for cases where attorneys reported actual early disclosure of information, they reported "significantly higher satisfaction than attorneys from other cases."⁴⁹

Thus, despite the uproar at the time of adoption, the real issue post-implementation was with the inconsistency in adoption of the initial disclosure provisions around the country. As a commentator on one side of the aisle remarked in 1994, one year after promulgation:

Shrill claims that Rule 26 would abrogate the adversary system have begun to diminish in frequency and volume as lawyers have recognized that the obligation to disclose is not fundamentally different from the obligation to respond to interrogatories, and can actually serve to enhance the ability of advocates to play a useful role in the managerial judge's task of scheduling discovery.⁵⁰

C. 2000 Amendments

In 1996, the Advisory Committee undertook a review of the 1993 amendments to determine whether additional changes should be made.

45. *Id.*

46. See James S. Kakalik et al., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 48-51 (reprinted in 39 B.C.L. REV. 613) (1998).

47. *Id.* at 48-49.

48. *Id.* at 51.

49. *Id.*

50. Carrington, *supra* note 8, at 309.

The CJRA had ended by its own terms in 1997. Thus, a main theme and goal of the package of amendments that followed was restoring uniformity in discovery practice.⁵¹ In 2000, amendments were passed that revised the Rule 26 initial disclosure provisions.

The authorization in Rule 26(a)(1) for local rules that opted out of the initial disclosure requirements was eliminated. In addition, the scope of the disclosure obligation was substantially reduced, applying to documents the disclosing party “may use to support its claims or defenses.”⁵² The Advisory Committee tied the scope to the exclusion provisions of Rule 37(c)(1), with the focus “on ensuring that anything a party may want to use in the proceeding will be promptly revealed to the other side.”⁵³ The 2000 amendments further eliminated the reference to matters pleaded with particularity and exempted eight categories of proceedings from the disclosure requirements altogether. Finally, a party who does not believe disclosure is appropriate in the case can state the objection in the Rule 26(f) report to the court. The timing of disclosures was also altered in conjunction with the Rule 26(f) timing changes.

Despite this narrowed scope, the language in the rule related to the reasonable availability of documents was not changed, providing that a party must make its initial disclosures “based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.”⁵⁴

The comments from Judge Paul Niemeyer, then Chair of the Advisory Committee, illustrate the backdrop against which the amendments were made: “It’s been a very difficult political problem [among the district judges], and I’m trying to get some of their support. And I’m having a lot of difficulty.”⁵⁵ Judge Niemeyer went on to explain further:

Set against this course is the concern that local variations should not be endured any longer than necessary. Remembering the controversy that

51. See generally Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 2001 FED. CTS. L. REV. 1 (2001).

52. FED. R. CIV. P. 26(a)(1)(A) advisory committee’s note to 2000 amendment.

53. Marcus, *supra* note 51, at 11.

54. FED. R. CIV. P. 26(a)(1) (2000). This language remains substantially the same today. See FED. R. CIV. P. 26(a)(1)(E) (“A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.”).

55. Carter, *supra* note 23, at 20.

swirled around Rule 26(a)(1)—and particularly remembering that it became effective only because Congress ran out of time to reject it—the Committee concluded that it is better to propose a less controversial rule for national uniformity. . . . Whatever the best long-term accommodation of these competing arguments may be, the better answer for the time being is clear. Initial disclosure remains highly controversial. The adversary system should not yet be qualified by disclosure to the extent of forcing the more sophisticated litigant to disclose even the mere identity of witnesses and documents that a less sophisticated litigant may not manage to uncover by discovery.⁵⁶

Thus, the main driver of the 2000 amendments was achieving national uniformity. While there were judges and some members of the bar that opposed eliminating the opt-out power, the vast majority of the organized bar and commenting attorneys and professors supported restoring uniformity.⁵⁷

III. THE PRESENT

Setting aside the fact that initial disclosures were significantly limited in their scope in 2000, the steady and growing momentum of civil justice reform—and in particular the focus on discovery reform—has continued. This effort has culminated in significant rule reforms at the federal level in December 2015,⁵⁸ and a set of state court recommendations endorsed by the Conference of Chief Justices in July 2016, which call for transformative reforms in our state courts.⁵⁹ While the concept of broad initial disclosures has been put on hold in terms of the Federal Rules of Civil Procedure, initial disclosures have played an important role in the undercurrent of both state and federal reform.

In 2007, IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—and the American College of Trial Lawyers (ACTL) Task Force on Discovery engaged in a joint project to examine the role of discovery in the United States and to set forth a series of recommendations for reform.⁶⁰ While the project originally

56. Memorandum to the Hon. Alicemarie H. Stotler, *supra* note 11, at 7.

57. *See id.* at 65.

58. Letter from Hon. John Roberts to Hon. John Boehner (Apr. 29, 2015) (transmitting amendments to the Federal Rules of Civil Procedure as adopted by the Supreme Court).

59. *See* CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE (2017) [hereinafter CALL TO ACTION].

60. *See* Inst. for the Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers Task Force on Discovery and Civil Just., *Final Report on the Joint Project of the American College of Trial*

focused on discovery, the scope of the project expanded to look at the civil justice system, more broadly examining the cost and delay undermining the goals of a “just, speedy, and inexpensive” resolution in every case. One of the key recommendations from the IAALS/ACTL Task Force’s 2009 Final Report was that “[p]roportionality should be the most important principle applied to all discovery.”⁶¹

The Final Report went on to urge a shift in the current approach to discovery. First, “[s]hortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defenses.”⁶² After those initial disclosures, only limited additional discovery should be permitted.⁶³ The Task Force recognized that this was a “radical proposal,” as well as their “most significant proposal.”⁶⁴ But the goal was to challenge the current practice of “broad, open-ended and ever-expanding discovery” that has become a hallmark of modern civil discovery practice.⁶⁵ The goal was to change the default from unlimited discovery, which has contributed to the cost and delay in our system, to a system of proportional discovery tied to the claims actually at issue.

In 2010, the call for reform was taken up by the Advisory Committee, which hosted a Conference on Civil Litigation at Duke University Law School (Duke Conference) focused on evaluating the current state of civil litigation in the federal courts.⁶⁶ The conference included over 200 participants with diverse views and expertise, and extensive papers and empirical studies preceded the conference.⁶⁷ The consensus from the conference was that the system did not need major restructuring, but that “the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management.”⁶⁸ The initial disclosure

Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, 268 F.R.D 407 (2009).

61. *Id.* at 415.

62. *Id.* at 416.

63. *Id.* at 417.

64. *Id.*

65. *Id.*

66. Memorandum to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure from Judge David G. Campbell, Chair, Advisory Comm. on Federal Rules of Civil Procedure (June 14, 2014) (App. B to September 2014 Rules Submission).

67. *Id.* at Rules App. B-2.

68. *Id.*

obligations were a subject of discussion at the conference, with a variety of reactions but not a clear consensus on initial disclosures.⁶⁹

In 2015, IAALS and the ACTL Task Force—recognizing that significant reforms and empirical research had happened since the 2009 Final Report—revised its original set of principles with the goal of furthering the dialogue and calling for further civil justice reform.⁷⁰ One of the most significant changes from the 2009 Final Report to the 2015 Report on Progress and Promise was the proposal to broaden initial disclosures to make them truly effective.⁷¹ The 2015 Report recommended that “[s]hortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations.”⁷² Thus, the ACTL Task Force proposed to broaden the current federal initial disclosures in two ways: to require actual production rather than mere description of documents by categories and location, and to require production “of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations.”⁷³ The goal of such a proposal is to “encourage the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.”⁷⁴

69. Report to the Chief Justice of the United States on the 2010 Conf. on Civil Litigation Submitted by the Judicial Conf. Advisory Comm. on Civil Rules and the Comm. on Rules of Practice and Procedure 9 (2010).

A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Id.

70. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE, REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE (Apr. 2014) [hereinafter REPORT ON PROGRESS AND PROMISE].

71. *Id.* at 19.

72. *Id.* The recommendation goes on to note that “[t]he parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.”

73. *Id.*

74. *Id.*

A. *Case-specific Disclosures*

At the 2010 Duke Conference, there was a wide range of attendees who supported the idea of case-type-specific “pattern discovery.”⁷⁵ The goal of this type of discovery would be to set forth a set of articulated initial disclosure of information and documents that would be produced by each side for a specific case type.⁷⁶ There was also a consensus that employment cases, which are “regularly litigated and that present recurring issues,” would be a good area for experimentation with the concept of case-type-specific disclosures.⁷⁷

Following the Duke Conference, and in response to the interest in case-specific disclosures, Judge Lee Rosenthal convened a nationwide committee of employment lawyers, facilitated by IAALS and led by Judge John Koeltl, to develop a set of disclosures that could be pilot-tested by federal judges around the country. The committee was comprised of a balanced group of highly experienced attorneys from across the country with expertise in employment law. The committee met in person on numerous occasions to develop the list of documents and information to be automatically disclosed to the other party. IAALS facilitated the meetings and the development of the protocols, with the ultimate goal of achieving a more efficient process for those cases alleging adverse employment actions. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Employment Protocols) were published in November 2011, with the intent that they be implemented by individual United States District Court judges. The protocols “create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action.”⁷⁸ The Employment Protocols list a specific set of documents and information that must be provided automatically by both sides within 30 days of the

75. Memorandum to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Comm. 10 (May 17, 2010).

76. Similarly, “pre-action protocols” have been developed in the United Kingdom for specific practice areas, detailing the conduct and steps expected of the parties prior to commencing proceedings, including the exchange of specific information. *See, e.g.*, Practice Direction—Pre-Conduct and Protocols (updated Feb. 17, 2017), http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#3.1 [<https://perma.cc/PK7Q-YNPS>]. Pre-Action Protocols are available for specific case types at <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol> [<https://perma.cc/TV5V-JVUW>].

77. Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action, FED. JUD. CTR., at 1 (Nov. 2011), http://iaals.du.edu/sites/default/files/documents/publications/federal_employment_protocols_pilot_project.pdf [<https://perma.cc/B2UH-N7RJ>].

78. *Id.* at 2.

defendant's responsive pleading or motion, and they supersede the parties' obligations to make initial disclosures pursuant to Rule 26(a)(1). "The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery."⁷⁹

The Employment Protocols are currently being utilized by over 70 individual federal district court judges around the country, including Arizona, California, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern.⁸⁰ Two jurisdictions, the District of Connecticut⁸¹ and the District of Oregon,⁸² have adopted the protocols district-wide. The FJC evaluated the pilot project in 2015 and found that the average number of discovery motions filed in the pilot cases was half the number filed in non-pilot cases. In addition, motions to dismiss and motions for summary judgment were both less likely to be filed in pilot cases.⁸³ This research is consistent with the experiences on the ground. Judge Lee Rosenthal and Judge John Koeltl have both received positive feedback from their colleagues who use the protocols, attributing this "to how easy it is to screen eligible cases and issue the order as well as the reduction in combat over document requests."⁸⁴

Inspired by the success of the Employment Protocols, IAALS has facilitated the development of a second set of discovery protocols for Fair Labor Standards Act (FLSA) cases. As with the Employment Protocols, they were developed by a balanced group of attorneys who brought to the project their extensive experience regarding FLSA matters. IAALS once again facilitated the development of the protocols, along with the support of Judge Lee Rosenthal and Judge John Koeltl. The FLSA Protocols similarly include initial discovery specific to individual FLSA cases not filed as collective actions, to be exchanged early in the life of the case.

79. *Id.* at 4.

80. Emery G. Lee & Jason A. Cantone, FED. JUD. CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 3 (2015) [hereinafter, Lee & Cantone, REPORT ON PILOT PROJECT]. *See also* Memorandum to Judicial Conf. Advisory Comm. on Civil Rules from Emery G. Lee & Jason A. Cantone, Pattern Discovery in Employment Cases Pilot Project (Oct. 26, 2016).

81. *See* U.S. District Court District of Connecticut, Notice Regarding Initial Discovery Protocols for Certain Employment Cases (2013), <http://ctd.uscourts.gov/sites/default/files/forms/discoveryProtoc.pdf> [<https://perma.cc/4BV3-L39K>].

82. *See* D. Or. R. 26-7.

83. Lee & Cantone, REPORT ON PILOT PROJECT, *supra* note 80, at 1.

84. Laura McNabb, *Pilot Project Reduces Delay and Cost in Federal Litigation*, 41 LITIG. 3 (Spring 2015).

Like the Employment Protocols, the FLSA Protocols were well received by the Advisory Committee and, with the Committee's support, are being published by the FJC with the goal that judges will implement the protocols in individual cases nationwide.⁸⁵

B. *Federal Pilot Projects*

The Advisory Committee has recently developed two pilot projects focused on reducing cost and delay—one focused on expedited procedures⁸⁶ and the other on initial disclosures. In 2017, the Advisory Committee formally launched the Mandatory Initial Discovery Pilot Project (MIDP). The MIDP project harkens back to the 1993 amendments, going beyond what the parties “may use” to require robust mandatory initial discovery of facts *relevant to the parties' claims and defenses, whether favorable or unfavorable*. The project requires disclosure of this information without prompting by formal discovery requests. Judge David Campbell of Arizona, who led the subcommittee that developed the pilot project, noted “that the purpose of pilot projects is to advance improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventuresome to adopt all at once in the national rules.”⁸⁷ The project was drawn from the experiences of initial disclosure in the state courts and Canada, where the collective feedback was that “[p]eople who work under these disclosure systems like them better than the Federal Rules of Civil Procedure.”⁸⁸

The District of Arizona was the first to participate in the three-year pilot project, launching the pilot, which became effective on May 1, 2017.⁸⁹ The United States District Court for the Northern District of Illinois has also implemented the pilot project, effective June 1, 2017.⁹⁰ The Advisory Committee hopes to get several more jurisdictions on board, with the goal of 100% participation—or at least the vast majority

85. Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded As Collective Actions, FED. JUD. CTR. (Jan. 2018), https://www.fjc.gov/sites/default/files/materials/12/Initial_Discovery_Protocols_FLSA_Jan_2018.pdf [<https://perma.cc/A27J-D2N9>].

86. See Expedited Procedures Pilot Project: Overview, FED. JUD. CTR., <https://www.fjc.gov/content/320247/expedited-procedures-pilot-project-overview> [<https://perma.cc/RD3F-XCB6>].

87. Advisory Comm. on Civil Rules, Agenda Book 73 (Nov. 3-4, 2016).

88. *Id.*

89. General Order 17-08, *In re: Mandatory Initial Discovery Pilot Project in the District of Arizona* (as amended Oct. 13, 2017), <http://www.azd.uscourts.gov/sites/default/files/general-orders/17-08.pdf> [<https://perma.cc/XQ4D-TGW6>].

90. General Order 17-0005, (N. D. Ill. Apr. 27, 2017), https://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Standing%20Order.pdf [<https://perma.cc/VB25-36WU>].

of the judges in the district participating—for purposes of evaluation and culture change.⁹¹

The initial discovery is implemented through a standing order in each participating court, which makes participation mandatory, excepting out those cases exempt from initial disclosures under Rule 26(a)(1)(B)—cases under the Private Securities Litigation Reform Act (PLSRA), patent cases governed by local rule, and multidistrict litigation cases.⁹² The Standing Order explains the parties' obligations under the pilot project and sets forth the initial discovery requests to which the parties must respond. While the pilot project has the effect of early mandatory initial disclosures, the Standing Order implements the requests as a set of mandatory initial discovery requests from the court, addressed to all parties, with a requirement that parties respond similarly to discovery requests under Rules 33 and 34.⁹³

Under the MIDP, the parties are required to disclose both favorable and unfavorable information that is relevant to their claims and defenses, regardless of whether they intend to use the information. This is broader than, and supersedes, the current Rule 26(a)(1) initial disclosures. Moreover, unlike the initial disclosures under Rule 26(a)(1), the parties are not able to opt out of the MIDP discovery. In addition, the parties must file a notice of service of their initial responses and later supplements to the court so that the court can monitor compliance.

Recognizing the importance of how such a pilot is implemented, and the need for buy-in, the Advisory Committee developed a number of resources with the help of the FJC to support the successful implementation of the pilot projects. These resources included a User's Manual, a checklist that itemizes the requirements under the MIDP for participating judges and attorneys, and a set of videos that introduce the pilots and speak to their purpose.⁹⁴

91. See Advisory Comm. On Civil Rules, Agenda Book, *supra* note 87, at 77-78.

92. See, e.g., Standing Order Regarding Mandatory Initial Discovery Pilot Project, *In re: Mandatory Initial Discovery Pilot Program in the Northern District of Illinois*, <https://www.fjc.gov/sites/default/files/2017/MIDPP%20IllinoisNorthernStandingOrder.pdf> [<https://perma.cc/3KLE-5LAE>].

93. See Advisory Comm. on Civil Rules Agenda Book, *supra* note 87, at 77.

94. See generally Mandatory Initial Discovery Pilot Project: Overview, FED. JUD. CTR., <https://www.fjc.gov/content/321837/mandatory-initial-discovery-pilot-project-overview> (last visited Oct. 16, 2017) [<https://perma.cc/CW9F-GSBR>].

C. *State by State Implementation*

While many think of initial disclosures as a federal discovery tool, there is significant use of initial disclosures at the state level as well. Comprehensive initial disclosures have existed for decades in Arizona,⁹⁵ Colorado,⁹⁶ Alaska,⁹⁷ and Nevada,⁹⁸ but they have also been adopted more recently in a number of other jurisdictions, including Iowa,⁹⁹ Minnesota,¹⁰⁰ New Hampshire,¹⁰¹ Oklahoma,¹⁰² Utah,¹⁰³ and Wyoming.¹⁰⁴ In addition to the states where they have been adopted more comprehensively, initial disclosures have also been adopted in more limited ways: by case type,¹⁰⁵ based on amount in controversy,¹⁰⁶ or in the commercial courts.¹⁰⁷

Looking more closely at the state rules, there is a split between those that generally follow the current approach set out in the Federal Rules of Civil Procedure (including disclosure of documents and information the party “may use to support its claims or defenses”¹⁰⁸) and those that have implemented broader initial disclosures similar to the language in the 1993 amendments (providing for disclosure where “relevant to disputed facts alleged with particularity in the pleadings”¹⁰⁹). Of the ten states with comprehensive initial disclosure schemes, six states follow the current

95. ARIZ. R. CIV. P. 26.1.

96. COLO. R. CIV. P. 26(a)(1).

97. ALASKA R. CIV. P. 26.

98. NEV. R. CIV. P. 16.1.

99. IOWA R. CIV. P. 1.500(1).

100. MINN. R. CIV. P. 26.01(a).

101. N.H. R. CIV. P. 22.

102. OKLA. STAT. 12, §12-3226(2) (2014).

103. UTAH R. CIV. P. 26(a).

104. WYO. R. CIV. P. 26(a)(1).

105. KY. R. CIV. P. 93.04.

106. ILL. SUP. CT. R. 222 (applicable to cases not exceeding \$50,000).

107. *See, e.g.*, Delaware Complex Commercial Litigation Division (CCLD), <https://courts.delaware.gov/superior/complex.aspx> [<https://perma.cc/V575-9KB4>]; Handbook, Indiana Commercial Court Discovery Guidelines, at 22 (last modified June 10, 2016), <http://www.in.gov/judiciary/iocs/files/comm-ct-handbook.pdf> [<https://perma.cc/4HJZ-PJPB>].

108. FED. R. CIV. P. 26(a)(1)(A) advisory committee’s note to 2000 amendment.

109. FED. R. CIV. P. 26(a)(1)(B) (1993) (emphasis added).

federal approach, including Iowa,¹¹⁰ Minnesota,¹¹¹ New Hampshire,¹¹² Oklahoma,¹¹³ Utah,¹¹⁴ and Wyoming.¹¹⁵ Four states have broader language similar to the 1993 amendments, requiring disclosure of that which is relevant (Alaska,¹¹⁶ Arizona,¹¹⁷ Colorado,¹¹⁸ and Nevada¹¹⁹).

The MIDP in particular looked to the experiences and empirical research from the states to support the development of the pilot project. As part of its ACTL Task Force recommendations, IAALS did an

110. IOWA R. CIV. P. 1.500(1) (“[A] party must . . . provide to other parties: . . . 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, unless the use would be solely for impeachment.”).

111. MINN. R. CIV. P. 26.01(a) (“[A] party must . . . provide to other parties: . . . 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, unless the use would be solely for impeachment.”).

112. N.H. R. CIV. P. 22 (“[A] party must . . . provide to other parties: . . . all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment.”).

113. OKLA. STAT. 12, §12-3226(2) (2014) (“[A] party . . . shall provide to other parties a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.”).

114. UTAH R. CIV. P. 26(a)(a)(1) (“[A] party shall . . . serve on the other parties: a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5).”).

115. WYO. R. CIV. P. 26(a)(1) (“[A] a party must . . . provide to the other parties . . . 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, unless the use would be solely for impeachment.”).

116. ALASKA R. CIV. P. 26(a)(1)(D) (“[A] party shall . . . provide to other parties: a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings.”).

117. ARIZ. R. CIV. P. 26.1(a)(9) (“[E]ach party must disclose . . . the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action.”).

118. COLO. R. CIV. P. 26(a)(1)(B) (“[A] party shall . . . provide to other parties the following information . . . all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the claims and defenses of any party,” noting under Rule 26(a)(1) that the information must be disclosed “whether or not supportive of the disclosing party’s claims or defenses.”).

119. NEV. R. CIV. P. 16.1(a)(1)(C) (“[A] party must . . . provide to other parties: . . . all documents, data compilations, and tangible things that are in the possession, custody or control of the party and which are discoverable under Rule 26(b).”); *see also* NEV. R. CIV. P. 26(b)(1) (defining the scope of discovery as “any matter, not privileged, which is relevant to the subject matter involved in the pending action.”).

empirical study of civil litigation in Arizona state court, including an evaluation of Arizona's broad initial disclosure regime.¹²⁰ As noted above, in Arizona's superior court, the parties are required to make full, mutual, and simultaneous disclosures at the beginning of the case, with an ongoing duty to supplement as new information is obtained.¹²¹ The survey of Arizona's bench and bar found that those attorneys and judges with federal and state experience preferred Arizona's state-court extensive disclosures requirements—including the timing, content, and scope—at a higher rate than the current federal rule.¹²² Survey respondents reported that the broader disclosure scheme revealed pertinent facts early in the case and facilitated agreement on the scope and timing of discovery.¹²³ The respondents were split on whether disclosures reduce discovery volume and discovery time.¹²⁴ Addressing some of the concerns that are raised regarding disclosures, the respondents did not believe that the disclosures require too much early investment, result in satellite litigation, or increase the cost of litigation.¹²⁵

The survey reflects a continuing challenge of adherence to the rule, with only one-third responding that litigants “often” or “almost always” adhere to the initial time limit for disclosures.¹²⁶ Just under half reported that litigants “often” or “almost always” adhere to the content and scope of required disclosures.¹²⁷ The respondents also highlighted that judges do not enforce the rules effectively or consistently.¹²⁸ Thus, even at the state level where judges and lawyers prefer the broad disclosures, IAALS' 2010 study noted issues with adherence and enforcement.

The National Center for State Courts (NCSC) recently evaluated Utah's 2011 discovery rule amendments, which included the adoption of initial disclosures.¹²⁹ As part of its state-wide rule amendments, Utah implemented a three-tiered approach to discovery: (1) actions claiming

120. INST. FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE (2010) [hereinafter INST. FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., ARIZONA SURVEY].

121. ARIZ. R. CIV. P. 26.1(a).

122. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ARIZONA SURVEY, *supra* note 120, at 21.

123. *Id.* at 19.

124. *Id.*

125. *Id.* at 19-20.

126. *Id.* at 23.

127. *Id.*

128. *Id.* at 23-26.

129. Paula Hannaford-Agor & Cynthia G. Lee, NAT'L CTR. ST. CTS., UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS, FINAL REPORT (2015) [hereinafter Hannaford-Agor & Lee, UTAH].

\$50,000 or less are limited to 3 deposition hours, 0 interrogatories, 5 requests for production, 5 requests for admission, and 120 days to complete discovery; (2) actions claiming more than \$50,000 and less than \$300,000 or non-monetary relief are limited to 15 deposition hours, 10 interrogatories, 10 requests for production, 10 requests for admission, and 180 days to complete discovery; and (3) actions claiming more than \$300,000 are limited to 30 deposition hours, 20 interrogatories, 20 requests for production, 20 requests for admission, and 210 days to complete discovery.¹³⁰

One of the important takeaways from the study related to initial disclosures was the conclusion that “the Rule 26 revisions, particularly the expanded automatic disclosure requirements, are providing litigants with sufficient information about the evidence to engage in more productive settlement negotiations.”¹³¹ In terms of compliance, attorneys representing plaintiffs were significantly less likely to report that opposing counsel complied with the automatic disclosure requirements, and this difference was particularly notable for Tier 1 cases. “This may be related to the large proportion of self-represented defendants in Tier 1 debt collection cases who may not have been fully aware of or understood the automatic disclosure requirements.”¹³² “On the other hand, plaintiff attorneys were significantly more likely than defendant attorneys to report that discovery was completed more quickly and that the costs of discovery were lower due to the Rule 26 restrictions.”¹³³ In comparison, 50.6% of respondents agreed or strongly agreed that the opposing party complied with the automatic disclosure provisions in Tier 3.¹³⁴

D. State Experimentation and Recommendations for Reform

Initial disclosures are not the norm, even in state courts, and like the federal courts, there are states where experimentation has occurred in terms of pilot projects and case-specific initial disclosures.

The Massachusetts Business Litigation Session (BLS) instituted a pilot project in December 2009 to address the increasing burden and cost of civil pretrial discovery, particularly electronic discovery. The project was influenced by the recommendations of IAALS and the ACTL Task Force and included the guiding principle of “limited discovery

130. UTAH R. CIV. P. 26(c)(3).

131. *Id.* at iv.

132. *Id.* at 36-38

133. *Id.* at 38.

134. *Id.*

proportionally tied to the magnitude of the claims actually at issue.”¹³⁵ The pilot project included initial disclosures of “all reasonably available non-privileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defenses,” with the timing to be set by the court and an ongoing duty to supplement.¹³⁶ The evaluation of the pilot project in 2012 was very positive, with most survey respondents concluding that the pilot was “much better” or “somewhat better” than other BLS cases in terms of timeliness and cost-effectiveness of discovery, the timeliness of case events, and the cost-effectiveness of case resolution.¹³⁷ A full 80% of respondents found the BLS pilot “provided a much better or somewhat better overall experience than a non-BLS session.”¹³⁸

Utah has taken initial disclosures one step further and incorporated case-specific disclosures into its rules of civil procedure. Rule 26.1 includes disclosures in domestic relations actions, Rule 26.2 includes disclosures for personal injury actions, and Rule 26.3 includes disclosures for unlawful detainer actions.¹³⁹ Like the Employment Protocols and the FLSA Protocols, the Utah rules include specific disclosures relevant to the specific case types. The Utah rules provide that the additional documents and information must be provided in addition to, rather than as a substitute for, the parties’ Rule 26(a) disclosures.¹⁴⁰

While this experimentation and innovation is critical, uniformity is still an important goal, both at the state and federal level.¹⁴¹ As Professor Glenn Koppel pointed out in 2005, states have an opportunity to come together and “leverage their new assertiveness into an authentic and sustainable leadership role in civil procedure reform that is responsive to the needs of state courts.”¹⁴² Ten years later, this is exactly what the Conference of Chief Justices (CCJ) has done by establishing a committee to develop recommendations for civil justice reform on a national level.

Based on the experiences and empirical research from the state courts, the recent recommendations for transforming the civil justice

135. Introduction to BLS Pilot Project 1 (2009), <http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf> [<https://perma.cc/E97U-3B2S>].

136. *Id.* at 2.

137. See SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT, FINAL REPORT ON THE 2012 ATTORNEY SURVEY 2 (Dec. 2012).

138. *Id.*

139. UTAH R. CIV. P. 26.1, 26.2, & 26.3.

140. See, e.g., UTAH R. CIV. P. 26.2.

141. See generally, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1175 (2005).

142. *Id.*

system in state courts from the CCJ and Conference of State Court Administrators (COSCA) support the implementation of initial disclosures. CCJ created the Civil Justice Improvements Committee in 2013 and charged it with looking at the experiences and research from the state courts to develop a set of recommendations to transform the state courts to meet the challenges—and opportunities—of the 21st Century. The Committee’s final recommendations, which were endorsed by CCJ and COSCA in July 2016, embrace the role of initial disclosures in streamlining the discovery process.¹⁴³ Similar to Utah, the report recommends a pathway approach to ensure rightsized case management and a process proportional to the needs of the case.¹⁴⁴ “Mandatory disclosures provide an important opportunity in streamlined cases to focus the parties and discovery early in the case. With robust, meaningful initial disclosures, the parties can then decide what additional discovery, if any, is necessary.”¹⁴⁵ The recommendations include mandatory initial disclosures for the general and complex pathways as well, recognizing that proportional discovery, initial disclosures, and tailored additional discovery are essential for keeping the cases on track.¹⁴⁶

As Chief Justice Thomas Balmer of Oregon, the Chair of the Committee, has noted:

This is a call to action for state court leaders across the country. Our courts need to resolve disputes fairly—but also at lower cost and with less delay. The support of the Conference of Chief Justices is vital, and now we turn to working with judicial leaders to implement these proven recommendations.¹⁴⁷

States around the country are launching into their own civil justice reform initiatives as a result of the recommendations and call to action. The result will likely be a significant incorporation of initial disclosures into the discovery scheme at the state level.

IV. THE FUTURE

There is a general consensus in our civil justice system that cost and delay are limiting access to the courts and that discovery is one of the

143. CALL TO ACTION, *supra* note 59, at 22.

144. *Id.* at 19.

145. *Id.* at 22.

146. *Id.* at 27.

147. Press Release, Nat’l Ctr. St. Cts., Conference of Chief Justices Endorses Report on Civil Justice Improvements (Aug. 3, 2016).

primary causes of this cost and delay.¹⁴⁸ There is also a consensus that the current federal initial disclosure scheme is not living up to its intended goals. Based on several recent national studies, attorneys nationwide generally do not believe that the current Rule 26(a)(1) initial disclosures reduce discovery,¹⁴⁹ nor do they believe this requirement saves their clients money.¹⁵⁰ High percentages also report that additional discovery is required after initial disclosures.¹⁵¹ As one commentator has argued, because the current Rule 26(a)(1) can be satisfied with a statement describing discoverable documents by category and location, without actual production, the current disclosure scheme serves “as an entrée into an expensive discovery process” rather than a means of early exchange of information followed by focused discovery.¹⁵²

This contrasts with the results of the Arizona experience, referenced above, where there was a consensus that the initial disclosure scheme reveals pertinent facts early in the case and does not increase satellite litigation. It also contrasts with the experimentation that is happening around the country, such as case-specific disclosures, where there have been very positive outcomes. This research confirms that there is still an opportunity for reform, particularly for broadening the scope and adoption of initial disclosures.

A. *The Changing Legal Landscape*

The concept of initial disclosures was first introduced to address the concerns of excessive adversarial-ness in our system, with the goal of focusing the parties and the system on finding the truth and resolving the disputes that come before the court in a more efficient way. These concerns remain equally valid—and likely even more so—in our current landscape. In fact, the current landscape of civil litigation, particularly in

148. Corina Gerety, *EXCESS AND ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE* 8 (2011).

149. AM. BAR ASS’N, *ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT* 56 (2009) [hereinafter *AM. BAR ASS’N, ABA LITIGATION SURVEY*]; Rebecca M. Hamburg & Matthew C. Koski, *NAT’L EMP’T LAWYERS ASS’N, SUMMARY OF RESULTS OF FED. JUD. CTR. SURVEY OF NELA MEMBERS, FALL 2009*, 29 (2010) [hereinafter *Hamburg & Koski, NELA SURVEY*]; Kirsten Barrett et al., *MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT* 38 (2008) [hereinafter *Barrett et al., ACTL FELLOWS SURVEY*].

150. AM. BAR ASS’N, *ABA LITIGATION SURVEY*, *supra* note 149, at 57; Hamburg & Koski, *NELA SURVEY*, *supra* note 149, at 29; Barrett et al., *ACTL FELLOWS SURVEY*, *supra* note 149, at 38.

151. AM. BAR ASS’N, *ABA LITIGATION SURVEY*, *supra* note 149, at 59; Hamburg & Koski, *NELA SURVEY*, *supra* note 149, at 29.

152. Emily C. Gainor, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. REV. 1441, 1457 (2011).

the state courts, suggests that a new model is essential for ensuring a system that is affordable and accessible to the user.

In 2015, the NCSC, in support of the work of the CCJ Civil Justice Improvements Committee, undertook a study of ten jurisdictions—and approximately one million cases—to determine the current landscape of litigation in the state courts.¹⁵³ The last time such a comprehensive study of civil caseloads was done was the 1992 Civil Justice Survey of State Courts.¹⁵⁴ This study reflects the landscape of the state courts when the 1993 federal amendments went into effect. In that study, attorneys represented both plaintiff and defendants in 95% of cases.¹⁵⁵ This level of representation existed across case types.¹⁵⁶

In contrast, while representation of plaintiffs today remains at similar levels (92%), representation of defendants is just 26%.¹⁵⁷ In our state courts today, there is an attorney on both sides of the “v” in only 24% of cases.¹⁵⁸ That means 76% of the time the case does not reflect the attorney v. attorney model that most have in mind. At the same time, there are much fewer cases engaging in the pretrial process. While the federal courts have not seen this same dramatic rise in self-represented litigants, their absolute number is growing in federal courts as well.¹⁵⁹ In 1992, 14% of cases in state courts ended in a default judgment and 11% in dismissal.¹⁶⁰ Today, those numbers have jumped to 35% dismissals, 20% default judgment, and 26% of unspecified judgments, which are likely predominantly default judgments.¹⁶¹ At a total of 81% of cases, this represents a dramatic shift toward a state court system where the vast majority of cases are engaging in little or no process in our courts.

In thinking about discovery—and in particular about disclosure—we need to design a scheme that will address the current landscape and challenges in our courts, with the ultimate goal of ensuring an accessible and efficient way to deliver justice to the user. The changing landscape

153. Paula Hannaford-Agor, Scott Graves, & Shelley Spacek Miller, NAT'L CTR. ST. CTS., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015) [hereinafter, Hannaford-Agor et al., *LANDSCAPE OF CIVIL LITIGATION*].

154. *Id.* at 6.

155. *Id.* at 31.

156. *Id.*

157. *Id.*

158. *Id.*

159. See Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499, 505 (2015) (noting that while the percentage has remained relatively steady, the absolute number of non-prisoner pro se filings increased by 65% between 1999 and 2013).

160. Hannaford-Agor et al., *LANDSCAPE OF CIVIL LITIGATION*, *supra* note 153, at 7.

161. *Id.* at 20-21.

weighs in favor of early, broad disclosure now more than ever. For example, in New Hampshire's recent pilot project experience, New Hampshire implemented rules that included fact-based pleadings and initial disclosures.¹⁶² The result was a dramatic decrease in the proportion of cases that were disposed of by default: "the fact pleading and automatic disclosure provisions provided defendants in the [pilot] cases with sufficient information on which to contest claims alleged by the plaintiff and possibly obtain a fairer resolution to the case."¹⁶³ Initial disclosures have the potential for great impact given the current landscape. For example, early disclosure of underlying information and documents in debt collection cases could decrease the high default rate in those cases by providing information on which claims can be evaluated, contested, and perhaps settled or tried.

The changing landscape also poses new challenges for the integration of effective disclosures. For example, the growing number of self-represented litigants means that a clear and streamlined process of initial disclosures—particularly in smaller dollar value cases where self-represented litigants (SRLs) are most prevalent—is essential. The evaluation of Utah's experience addressed this concern and found "no evidence that self-represented litigants tended to have difficulty complying with the Rule 26 requirements."¹⁶⁴ Relatedly, one positive effect of the discovery reforms was a significant increase in attorney representation in these cases, given that attorneys are now able to represent parties in a proportional way.¹⁶⁵

Another important consideration for future reforms is the impact of electronically stored information (ESI) on disclosures. While ESI existed in 1993, the volume of ESI—and its corresponding impact on the traditional discovery process—has ballooned. While disputes over the discovery of ESI were largely confined to large corporations and large cases in the late 1990s and 2000s, today, discovery of ESI touches every case. In 2006, Rule 26(a)(1)(B) was revised to insert the phrase "electronically stored information" into the list of documents and tangible things to be disclosed.¹⁶⁶ The concept of early disclosure of ESI causes concern for many lawyers who question whether such disclosure is

162. Paula Hannaford-Agor et al., NAT'L CTR. ST. CTS., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013).

163. *Id.* at 18.

164. *Id.* at v.

165. Hannaford-Agor & Lee, UTAH, *supra* note 129, at 53-54.

166. See generally Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. U. L. REV. 171, 196 (Spring 2006).

efficient or even possible. While the state experiences reflect that ESI disclosure is possible, this remains a challenge that needs to be addressed head on. The federal pilot project recognizes this challenge and includes specific language in the Standing Orders that directly addresses the disclosure of ESI.¹⁶⁷

B. *The State Courts as Laboratories for Innovation*

In deviating from the federal model, state judicial systems have experimented with a smorgasbord of initiatives aimed at controlling excessive discovery and discovery abuse. In so doing, the states are functioning as “laboratories for experimentation with promising mechanisms” for reducing cost and delay in discovery.¹⁶⁸

A recent and prominent example of this is the adoption of proportionality in the scope of discovery at the state level, to be evaluated and then adopted at the federal level. When the recent 2015 rule amendments were adopted, the Advisory Committee looked to the experiences of the state courts when considering whether to add proportionality into the scope of discovery, including the experiences in Utah, Colorado, and Minnesota.¹⁶⁹

As noted above, there are multiple states that have adopted initial disclosures, including Arizona and Colorado where there is a long history of broad initial disclosure of both the favorable and unfavorable. Given the positive experiences in state courts around the country, the recent state recommendations in support of initial disclosures, and the wave of civil justice reform that is sweeping the state courts, it is likely that we will see an increase in the use of initial disclosures at the state level over the next five years. This will provide an important opportunity for evaluation. In addition, it is likely that the states will experiment with different approaches, including case-specific disclosures in debt collection cases, for example.¹⁷⁰

167. See, e.g., Standing Order Regarding Mandatory Initial Discovery Pilot Project, *In re: Mandatory Initial Discovery Pilot Program in the Northern District of Illinois* at 5-6, <https://www.fjc.gov/sites/default/files/2017/MIDPP%20IllinoisNorthernStandingOrder.pdf> [<https://perma.cc/3KLE-5LAE>].

168. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1174 (2005).

169. See, e.g., Hannaford-Agor & Lee, UTAH, *supra* note 129.

170. CALL TO ACTION, *supra* note 59, at App. I.

C. *The Need for Experience and Empirical Data*

Importantly, as the “laboratories for experimentation,” the states also provide the opportunity for empirical studies of discovery reform. States should be encouraged not only to implement initial disclosures, but to conduct evaluations so that other states and the federal system can learn from the state experiences.

The case-specific disclosures and the federal pilot projects likewise provide important opportunities for evaluations. The federal MIDP project will be evaluated by the FJC. Successes at this level will provide the support and proof of concept needed for broader support and ultimate adoption. One of the primary arguments against reforms, including the 2015 federal amendments, has been that more empirical data is necessary in order to fully evaluate proposed changes prior to nationwide adoption. This is where pilot projects become so important. As Judge Campbell has described them:

The interest in pilot projects was stimulated by the experience in attempting to translate the lessons offered at the 2010 Conference into specific rules proposals. There are limits to what can be accomplished by rules. If a page in history is worth a volume of logic, the purpose of the pilot projects may be to create pages of history by actual experience in testing new approaches. One result may be rules amendments. But pilot projects may provide valuable lessons that are implemented in other ways. The Committee on Court Administration and Case Management may find valuable practices that it can foster through its work. The Judicial Conference may gain similar benefits. It may be that approaches that have been tested and found valuable will be adopted by emulation without the need for formal action by any committee.¹⁷¹

D. *The Important Role of Culture Change*

Legal culture—“defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system”—plays an essential role in the administration of justice in our country.¹⁷² The 1993 and 2000 amendment processes highlight the importance that legal culture plays in the success and failure of civil justice reforms. The 1993 amendment process in

171. Advisory Comm. on Civil Rules Agenda Book 73 (Apr. 14-15, 2016).

172. Brittany K.T. Kauffman, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHANGE THE CULTURE, CHANGE THE SYSTEM 2 (2015) [hereinafter Kauffman, CHANGE THE CULTURE]. See also Kourlis & Kauffman, *supra* note 7.

particular highlighted the challenges of changing the culture through rule amendments alone.¹⁷³

Professor Jordan Singer has likewise highlighted the importance of legal culture in addressing “the problem of disproportionate discovery.”¹⁷⁴ He argues:

[D]isproportionate discovery is caused not by abuse of attorney discretion, but by a breakdown of the core values and cultural norms that typically animate civil litigation in the United States. Faith in core values such as access to justice, adjudication on the merits, efficiency, and predictability ordinarily motivates lawyers to tailor the scope and volume of their discovery requests appropriately without judicial intervention. It is when these values are not strongly held that two forms of disproportionate discovery [excessive and abusive] emerge.¹⁷⁵

This brings us full circle to the very reason why initial disclosures were proposed in the first place. The goal of initial disclosures is to achieve an efficient and proportional process by disclosing information early in the life of the case so that the remaining discovery and pretrial process can be focused on the issues and streamlined to the extent possible. It puts the core values of access to justice, adjudication on the merits, efficiency, and predictability at the forefront. This is particularly true for broad mandatory disclosures that include both favorable and unfavorable evidence, where disclosures get everything out on the table early so that the focus can be on the merits rather than who can “win at discovery.”¹⁷⁶

Lawyers tend to elevate winning over achieving a just outcome, particularly when it comes to discovery. This is supported by the survey data from prior to the 2015 federal rule amendments, which found that a notable portion of attorneys responded that discovery abuse touches almost every case.¹⁷⁷ A study of general counsel confirmed that a majority

173. Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, 101 JUDICATURE 16 (Autumn 2017). When discussing the 1993 amendments, Judge Jeffrey Sutton, chair of the Standing Comm. on Rules of Practice and Procedure when the 2015 rule amendments went into effect, has noted that they “suffered from an excess of ambition.” *Id.*

174. See Jordan M. Singer, *Proportionality’s Culture Foundation*, 52 SANTA CLARA L. REV. 145, 149 (2012).

175. *Id.*

176. Kauffman, CHANGE THE CULTURE, *supra* note 172, at 8.

177. AM. BAR ASS’N, ABA LITIGATION SURVEY, *supra* note 149, at 62 (51% agreed); Hamburg & Koski, NELA SURVEY, *supra* note 149, at 30 (65% agreed); Emery G. Lee III & Thomas E. Willging, FED. JUD. CTR., FED. JUD. CTR.; NAT’L, CASE-BASED CIVIL RULES SURVEY 70-71 (2009) (21% of plaintiff attorneys, 23% of plaintiff and defense attorneys, and 16% of defense attorneys agreed); Kirsten Barrett et al., ACTL FELLOWS SURVEY, *supra* note 149, at 45 (45% agreed).

agreed that opposing counsel are generally uncooperative, with a high level of discovery misconduct in the form of overusing discovery procedures.¹⁷⁸ The surveys reflect that we have not had a “culture of proportionality” in our system, where the parties and the court work in tandem to ensure that the process remains proportional to the needs of the case—and to the needs of the litigants.¹⁷⁹ The vehement reaction by some to the notion of initial disclosures in 1993 illustrates that for many, this was a very large cultural shift from the adversary system of discovery that they knew and espoused.

The ACTL Task Force recognized the gravity of their proposal for broad mandatory initial disclosures:

This change represents a dramatic shift in litigation practice, but business as usual is not working for clients and it is certainly not ideal for legal professionals. It is our hope that this Principle will lead to significant cultural change. The civil pre-trial process should not be a game of “hide the ball,” with the outcome decided by attrition. Rather, the arguments should be about the merits, with the outcome decided by the evidence (whether at trial or through settlement).¹⁸⁰

A lot has changed since 1993, and while legal culture will always be slow to catch up,¹⁸¹ the current landscape, the experimentation at the state level, the growing body of empirical evidence, and the use of pilot projects suggest that culture change is both possible and is happening. The 2015 rule amendments have also paved the way for further reform, by making proportionality a focal point and highlighting the importance of cooperation. Rule 1 now explicitly recognizes the need for the parties to work across the aisle in order to keep cost and delay to a minimum in the best interests of their clients. In a 2009 study by the FJC, 63.8% of plaintiffs’ attorneys and 61% of defense attorneys agreed that the parties in their cases “were able to reduce the cost and burden of discovery through cooperation.”¹⁸²

Advances in e-discovery and technology are also playing a role. While counsel has not historically disclosed the manner in which documents are preserved, collected, reviewed, and produced, this is

178. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 22 (2010).

179. See generally Kourlis & Kauffman, *supra* note 7, at 513; Singer, *supra* note 174.

180. REPORT ON PROGRESS AND PROMISE, *supra* note 70, at 21.

181. Kauffman, CHANGE THE CULTURE, *supra* note 172, at 4.

182. Emery G. Lee III & Thomas E. Willging, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conf. Advisory Comm. on Civil Rules 30-31 & fig. 17 (2009).

changing as a result of the growing use of technology-assisted review.¹⁸³ More and more courts are looking to the mandate of Rule 1, The Sedona Conference Cooperation Proclamation,¹⁸⁴ and the goals behind the Federal Rules to support cooperation and disclosure rather than gamesmanship.¹⁸⁵ While the disclosure of discovery process is different than the disclosure of evidence, an increased comfort in the legal culture with disclosure has the possibility of changing the dynamic and the culture of disclosure more broadly.

V. CONCLUSION

What does this mean for initial disclosure reform? Is the system—and the profession—now ready for a broad disclosure rule, as foreshadowed by Judge Niemeyer? How about the users—are they in need of such a process, focused on the merits and the delivery of justice? My response to this last question is *absolutely*. But, like steering a large ship, such dramatic changes to our civil justice system take time, and past experience suggests that the steps to achieve change must be deliberate and incremental. The 2015 rule amendments are still fresh, and it is important to give them the time and space to be successful in their own right. In addition, given the failed history of the 1993 amendments, a second attempt must be launched with broader support. Thus, the time is right for “intermediary steps” toward greater reform. In fact, this is exactly where we stand in terms of initial disclosure reform. The pilot projects and case-specific pattern discovery efforts are important steps in changing the culture and providing experience and empirical data to support broader disclosures.

Looking to the future, over the next five to ten years, more and more states will adopt initial disclosures. These will take a variety of forms. Some states will adopt initial disclosures on a statewide basis. Others will implement case-type specific disclosures, enumerating exactly what needs to be disclosed for particular high-volume case types. This is particularly likely in the area of debt collection, where significant impacts can be achieved for the users in a large number of cases. At the federal level, the new FLSA discovery protocols reflect a similar opportunity to make a significant impact for a large number of cases. The new federal

183. See Karl Schieneman & Thomas C. Gricks III, *The Implications of Rule 26(g) on the Use of Technology-Assisted Review*, 7 FED. CTS L. REV. 240, 254-55 (2013).

184. The Sedona Conference, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

185. See Schieneman & Gricks, *supra* note 183, at 254-59.

MIDP project provides another important opportunity for evaluation and culture change. The project incorporates many of the lessons learned from the state experiences, such as: 1) actual production, 2) notice filed with the court upon service, 3) supplementation, and 4) enforcement. As the ACTL Task Force has recognized, one takeaway from the state initial disclosure experience is that “enforcement is essential.”¹⁸⁶ It is “critical that there be consequences related to the lack of initial disclosures or inadequate disclosures.”¹⁸⁷ The federal pilot project will be informative on this aspect of initial disclosures as well.

While these are intermediary steps, they are necessary precursors to national reform. As Judge Jeffrey Sutton, chair of the Standing Committee on Rules of Practice and Procedure when the 2015 rule amendments went into effect and proponent of the federal pilot project, has said about adopting “reforms that are both bold yet empirical, far-reaching yet experimental”:

This will take time, no doubt. And it is perhaps ironic that pilot projects designed to improve the speed and efficiency of federal litigation may delay reform. But that is the fair price of combining the virtues of thinking big and slow, of boldly attempting to transform the self-contained world of pretrial discovery based squarely upon empirical data mined from local experimentation. And it’s a fair price for addressing the risk aversion and change aversion of lawyers.¹⁸⁸

Initial disclosures have played an important role in the history of discovery reform in the United States, and they continue to play an important role today. Despite historical challenges, they are also likely to be the future of discovery in the United States. While the time may not be right to propose broadening the federal disclosure rule, the future is not far off. Important groundwork is being laid for such a proposal to be successful, and when it is, it has the potential to be transformational for the users of the system who deserve a “just, speedy, and inexpensive” system of justice.

186. REPORT ON PROGRESS AND PROMISE, *supra* note 70, at 19. Such enforcement mechanisms could include a sanction for a bad faith failure to comply absent cause or excusable neglect, an order precluding use of such evidence at trial, or a denial of the right to object to the admissibility of the evidence.

187. *Id.* at 19.

188. Sutton & Webb, *supra* note 173, at 19.