

# INITIAL DISCLOSURES AND DISCOVERY REFORM IN THE WAKE OF PLAUSIBLE PLEADING STANDARDS

**Abstract:** This Note advocates for the reform of the federal initial disclosure of documents rule. Plausible pleadings, mandated by Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, provide sufficient foundation to support increased use of initial disclosures as a means to reduce the costs of civil discovery. The Massachusetts Superior Court Business Litigation Session's Discovery Pilot Project pioneered a reform initial disclosure rule. The Discovery Pilot Project's initial disclosure rule differs from the initial disclosure requirement under the Federal Rules of Civil Procedure in that it (i) requires actual document production and (ii) is intended as a principal document discovery tool. The federal initial disclosure of documents rule should be amended to include an actual production requirement, but the use of initial disclosures as a principal discovery tool is still too ambitious to warrant national replication.

## INTRODUCTION

Discovery, a significant component of the civil adjudicatory process, can impose devastating, even prohibitive, costs on both parties and nonparties to litigation.<sup>1</sup> In 2009, in *In re Fannie Mae Securities Litigation*, the U.S. Court of Appeals for the District of Columbia Circuit upheld a contempt citation against the Office of Federal Housing Enterprise Oversight ("OFHEO") for failing to comply with a discovery deadline.<sup>2</sup> The OFHEO was a nonparty to multidistrict litigation against the Federal National Mortgage Association (Fannie Mae), a government-sponsored mortgage provider that the OFHEO regulated.<sup>3</sup> Several former Fannie Mae executives subpoenaed the OFHEO to obtain records collected pursuant to its oversight functions and a 2003 investigation of Fannie Mae's financial and accounting practices.<sup>4</sup>

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<sup>1</sup> William Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178 (1991); see *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 824 (D.C. Cir. 2009).

<sup>2</sup> *In re Fannie Mae*, 552 F.3d at 824. This case illustrates the potentially exorbitant costs of discovery and the associated need for discovery reform. See *id.* at 817. This Note explores reform of the federal initial disclosure rule as a means to achieve efficiencies and cost savings in the federal discovery scheme. See *infra* notes 99–309 and accompanying text.

<sup>3</sup> *In re Fannie Mae*, 552 F.3d at 816.

<sup>4</sup> *Id.*

A dispute ensued over the extent of requisite production of electronically stored information from the OFHEO's off-site disaster recovery back-up tapes.<sup>5</sup> The U.S. District Court for the District of Columbia declined to limit the scope of Fannie Mae's request for electronic discovery and ordered the production of the nearly 660,000 implicated documents, approximately 80% of the office's emails.<sup>6</sup> The OFHEO, despite remaining a nonparty to the underlying suit, hired 50 contract attorneys in an effort to abide by the court order.<sup>7</sup> Notwithstanding the OFHEO's compliance efforts, it missed several discovery deadlines.<sup>8</sup> The district court consequently held the OFHEO in contempt and the D.C. Circuit affirmed.<sup>9</sup> The OFHEO also took a significant financial hit; it spent approximately \$6,000,000—over 9% of its annual budget—responding to discovery requests.<sup>10</sup>

This Note weighs in on the discovery reform debate in light of the prohibitive costs and burdens of discovery in the American civil justice system.<sup>11</sup> It focuses in particular on the federal initial document disclosure rule<sup>12</sup> and recommendations for its reform.<sup>13</sup>

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<sup>5</sup> *Id.* at 817. Skeptical of the OFHEO's limited production following a broad request for documents, the defendants discovered that the OFHEO failed to search all of its off-site, disaster-recovery back-up tapes. *Id.* The OFHEO argued that it did not understand the defendant's request for document production to include documents stored on its disaster-recovery back-up tapes. *Id.*

<sup>6</sup> *Id.* at 817, 821.

<sup>7</sup> *Id.* at 822.

<sup>8</sup> *Id.* at 817–18. One day before an interim deadline for production of several categories of documents, the OFHEO requested a nearly month-long extension because it was unable to meet the next-day deadline. *Id.* The district court granted the motion for an extension. *Id.* Two days before the extended deadline, the OFHEO again informed the court that it would be unable to comply with the new interim deadline because its previous promise to meet it was based on insufficient information and also because it had only recently hired the necessary number of contract attorneys. *Id.* The OFHEO also said that, although it expected to be able to provide all non-privileged documents by the final deadline, it would further need even more time to produce requisite logs of privileged documents. *Id.* After these communications, the defendants moved to hold OFHEO in contempt. *Id.*

<sup>9</sup> *In re Fannie Mae*, 552 F.3d at 823–24. The consequence of the contempt finding was, in essence, a limited waiver of privilege. *Id.* at 823. The district court required the OFHEO to provide actual documents to defendants' counsel that were withheld because they were privileged and were not included in the privilege log by the final deadline. *Id.*

<sup>10</sup> *Id.* at 817; see also Tamar Lewin, *Business and the Law: A Plan to Limit Pretrial Work*, N.Y. TIMES, Dec. 14, 1982, at D2 (observing that litigation can entail years of pretrial discovery and enormous costs).

<sup>11</sup> See *infra* notes 177–309 and accompanying text.

<sup>12</sup> Initial disclosure of documents is one of four categories of requisite initial disclosure. FED. R. CIV. P. 26(a)(1)(A)(ii). The three additional categories are: the name and contact information of individuals with discoverable information, a computation of damages, and any implicated insurance agreements. FED. R. CIV. P. 26(a)(1)(A)(i)–(iv); see

Initial disclosures<sup>14</sup> are information exchanged on a self-executing basis<sup>15</sup> at the outset of litigation.<sup>16</sup> The Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (“Joint Project”) emphasized reform of the federal initial disclosure rule in its Final Report, in fact calling its initial disclosure reform recommendations “radical” and its most “significant.”<sup>17</sup> The Massachusetts Superior Court’s Business Litigation Session (“BLS”) also recently put the Joint Project’s federal initial disclosure reform recommendations into practice, administering a state-level pilot program from January 2010 to December 2010.<sup>18</sup>

This Note advocates for reform of the federal initial disclosure requirement.<sup>19</sup> It asserts that plausible pleadings, mandated by the U.S. Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*, provide sufficient foundation to support increased use of initial disclosures.<sup>20</sup> The Note specifically argues that—per the Final Report’s recommendation and the Massachusetts reform initial disclosure model—the federal initial disclosure rule should be amended to include an actual production requirement.<sup>21</sup> The Final Report and the Massachusetts pilot’s

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*infra* notes 121–126 and accompanying text for further discussion of the additional categories of required initial disclosure.

<sup>13</sup> See *infra* notes 142–176 and accompanying text.

<sup>14</sup> Initial disclosures are also known as “automatic” disclosures because they are made without a specific request from the opposing party. See, e.g., Eric F. Spade, *A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 CLEV. ST. L. REV. 147, 152 (1995).

<sup>15</sup> FED. R. CIV. P. 26(a)(1)(A). That initial disclosures are “self-executing” means that they are made without awaiting a Rule 34 request for document production or any other request for information. *Id.*; *Forbes v. 21st Century Ins. Co.*, 258 F.R.D. 335, 338 (D. Ariz. 2009).

<sup>16</sup> FED. R. CIV. P. 26(a)(1)(C) (requiring parties to make initial disclosures within fourteen days of a Rule 26(f) conference); FED. R. CIV. P. 26(a)(1)(D) (permitting parties served or joined after a Rule 26(f) conference thirty days to make initial disclosures).

<sup>17</sup> See AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT 9 (2009) [hereinafter FINAL REPORT], available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

<sup>18</sup> Robert J. Muldoon, Jr. et al., BLS Pilot Project, 2–3 (last visited Aug. 31, 2011), <http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf> [hereinafter BLS Pilot Project]; Press Release, Supreme Judicial Court, Superior Court Implements Discovery Pilot Project, at 1 (Dec. 1, 2009) (on file with the Massachusetts Supreme Judicial Court) [hereinafter SJC Press Release].

<sup>19</sup> See *infra* notes 242–309 and accompanying text.

<sup>20</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63, 570 (2007); *infra* notes 251–274 and accompanying text.

<sup>21</sup> See *infra* notes 275–295 and accompanying text.

emphasis on initial disclosures as a principal discovery tool, however, is too ambitious to warrant national replication.<sup>22</sup>

Part I chronicles the ever-broadening development of discovery in the American civil justice system and the resultant concern that discovery has become so broad as to become overly burdensome and costly.<sup>23</sup> Part I then presents survey data capturing the experiences of litigating attorneys in federal court regarding the extent of the discovery problem.<sup>24</sup>

Part II first focuses on initial disclosures as a discovery tool, describing the history and development of the current federal initial disclosure scheme.<sup>25</sup> Part II next describes the reform initial disclosure rule proposed in the Joint Project's Final Report, and put into practice in the Massachusetts Superior Court.<sup>26</sup>

Part III reconsiders the role of initial disclosures in the American civil justice system in light of the Final Report's recommendations and the Massachusetts's initial disclosure reform model.<sup>27</sup> It presents arguments for and against initial disclosures as effective discovery tools and highlights a principal criticism, manifest in practice, that notice pleadings fail to provide a sufficient foundation for any significant use of initial disclosures.<sup>28</sup> Part III then relates the Supreme Court's decision in *Twombly*, which imposed a plausible pleading requirement on litigants in federal court.<sup>29</sup>

Part IV argues for increased use of initial disclosure in the federal discovery scheme.<sup>30</sup> It asserts that the central argument against initial disclosures has been undermined by the plausible pleading requirement and that plausible pleadings are sufficiently specific to support increased use of initial disclosures.<sup>31</sup> In particular, Part IV argues for actual production of documents substantiating facts plausibly alleged as initial disclosures, but not for the use of initial disclosures as a principal document discovery tool.<sup>32</sup> In so doing, this Note supports the national

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<sup>22</sup> See *infra* notes 296–309 and accompanying text.

<sup>23</sup> See *infra* notes 34–65 and accompanying text.

<sup>24</sup> See *infra* notes 66–98 and accompanying text.

<sup>25</sup> See *infra* notes 99–141 and accompanying text.

<sup>26</sup> See *infra* notes 142–176 and accompanying text.

<sup>27</sup> See *infra* notes 177–241 and accompanying text.

<sup>28</sup> See *infra* notes 177–232 and accompanying text.

<sup>29</sup> See *infra* notes 233–238 and accompanying text.

<sup>30</sup> See *infra* notes 242–309 and accompanying text.

<sup>31</sup> See *infra* notes 251–274 and accompanying text.

<sup>32</sup> See *infra* notes 275–309 and accompanying text.

adoption of one of two principles features of the reform initial disclosure rule advanced in the Final Report and piloted in Massachusetts.<sup>33</sup>

## I. THE FEDERAL DISCOVERY SCHEME: HISTORY, CONCERNS, AND COSTS

This Part focuses on the history of civil litigation discovery in the United States and efforts to measure its costs.<sup>34</sup> Section A tracks the development of discovery as it broadened in scope from before the 1938 adoption of the Federal Rules of Civil Procedure through the early 1970s.<sup>35</sup> Section B highlights several recent studies on the current impact of discovery in the American civil justice system.<sup>36</sup> These studies sought to capture whether and to what extent discovery is prohibitively expensive and burdensome.<sup>37</sup> Accordingly, the studies are significant for their role in informing the discovery reform debate.<sup>38</sup>

### A. *Civil Discovery in America: Its History and Breaking Point*

In the late-nineteenth and early-twentieth centuries, discovery in the federal judicial system in the United States was minimal.<sup>39</sup> The limi-

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<sup>33</sup> See *infra* notes 275–309 and accompanying text.

<sup>34</sup> See *infra* notes 39–98 and accompanying text.

<sup>35</sup> See *infra* notes 39–65 and accompanying text.

<sup>36</sup> See *infra* notes 66–98 and accompanying text.

<sup>37</sup> See *infra* notes 66–98 and accompanying text.

<sup>38</sup> See *infra* notes 66–98 and accompanying text.

<sup>39</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694 (1998) [hereinafter Subrin, *Fishing Expeditions Allowed*].

Early state-level civil procedure codes included discovery rules, albeit in a more limited form than those employed in the federal system today. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 554 n.27 (2010); Subrin, *Fishing Expeditions Allowed*, *supra*, at 696 (discussing the limited discovery under the Field Code). New York's Field Code system—the first code of civil procedure in the United States—serves as an example. Beisner, *supra*, at 554; Subrin, *Fishing Expeditions Allowed*, *supra*, at 693, 696. Under the Field Code, advanced by David Dudley Field and implemented in New York in 1848, document requests were rare and were only available with court permission. Beisner, *supra*, at 554, 555 n.27; Subrin, *supra*, at 693. Depositions were similarly infrequent and could only be taken from the opposition in open court. Beisner, *supra*, at 555; Subrin, *Fishing Expeditions Allowed*, *supra*, at 696. Interrogatories were forbidden. Beisner, *supra*, at 555; Subrin, *Fishing Expeditions Allowed*, *supra*, at 696 (quoting Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 333 (1988)).

Many state civil procedure codes were patterned on New York's Field Code. Subrin, *Fishing Expeditions Allowed*, *supra*, at 696. The Field Code also influenced the adoption of the first national code of civil procedure, the 1912 Equity Rules, which have subsequently been superseded by the Federal Rules of Civil Procedure ("Rules"). See 4 CHARLES ALAN

tations on a party's ability to discover the factual position of an opponent were due to practical considerations, as well as values and religious beliefs.<sup>40</sup> Travel was historically difficult, making obtaining discoverable information impractical.<sup>41</sup> Juries were composed of community members already familiar with the facts of the case; therefore, additional fact-finding was considered unnecessary.<sup>42</sup> The American value of self-sufficiency also counseled against discovery, as it was difficult to reconcile the autonomy impulse with the obligation to aid an opponent through information disclosure.<sup>43</sup> Minimal discovery may further be attributed to the view that litigation was not a rational quest for objective fact, but an effort to determine God's truth or serve the perceived interests of justice.<sup>44</sup>

In the 1911 decision *Carpenter v. Winn*, the Supreme Court held that the Judiciary Act of 1789 did not empower the court to compel pre-trial discovery of books and other writings.<sup>45</sup> Demonstrating the prevailing view of discovery at the time, the Court reasoned that such pre-trial document discovery amounted to prying into the affairs of the adversary; therefore, it was impermissible.<sup>46</sup>

Although pre-trial discovery remained relatively rare into the 1930s, suspicion of discovery was waning.<sup>47</sup> By 1932, some states permitted the use of interrogatories and the taking of witness's depositions.<sup>48</sup> In 1938, the Supreme Court adopted the Federal Rules of Civil Procedure ("Rules"), which includes the modern discovery rules.<sup>49</sup> The purpose behind the adoption of the Rules was to secure "just, speedy[,]

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WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1002 (3d ed. 2010) (reporting that the Equity Rules "in some respects resembled code pleading").

<sup>40</sup> Subrin, *Fishing Expeditions Allowed*, *supra* note 39, at 694–95.

<sup>41</sup> *Id.* at 695. Travel as a practical impediment to discovery was also historically rooted in the English judicial tradition. *Id.* In England, barristers (lawyer-advocates) were typically centered in London. *Id.* It was difficult for them to travel to the distant counties to conduct discovery. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 221 U.S. 533, 545 (1911).

<sup>46</sup> *Id.* at 540 (characterizing warrantless discovery as a "fishing bill"); *see also* Subrin, *Fishing Expeditions Allowed*, *supra* note 39, at 697 (explaining the "fishing bill" metaphor as signaling an intrusion in an adversary's affairs).

<sup>47</sup> Beisner, *supra* note 39, at 555.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 556; Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 6 (1992).

and inexpensive” dispute resolution, for example by encouraging information exchange in discovery.<sup>50</sup>

Although the Rules broadened the scope of permissible discovery, federal courts were still loath to make full use of the discovery rules.<sup>51</sup> It was not until the 1946 amendments to the Rules that liberal discovery was truly embraced.<sup>52</sup> The Supreme Court’s 1947 decision in *Hickman v. Taylor*—that an attorney’s work-product was privileged and immune from discovery—demonstrated the Court’s changed view.<sup>53</sup> Notwithstanding its decision to preclude discovery of privileged material in the instant case, the Court proclaimed that the discovery rules were to be “accorded a broad and liberal treatment.”<sup>54</sup>

With the Supreme Court’s blessing and the discovery tools in place, discovery proceeded along an ever-broadening trajectory.<sup>55</sup> In 1970, the scope of discovery hit an apex when drafters amended the Rules to remove vestiges of limits on discovery from previous iterations of the Rules.<sup>56</sup> The 1970 amendments also brought concerns that discovery had become over broad to the fore.<sup>57</sup> The sentiment was that

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<sup>50</sup> Schwarzer, *supra* note 1, at 178. To advance “just, speedy, and inexpensive” dispute resolution remains the central tenant of the Rules today. FED. R. CIV. P. 1; Schwarzer, *supra* note 1, at 178 (reporting that discovery was intended to provide each side with full information to encourage settlement or, at the very least, prevent “trial by ambush”); *see also* *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (setting the goal of discovery at obtaining the fullest possible knowledge of the central facts and disputed issues before trial).

<sup>51</sup> Beisner, *supra* note 39, at 558–59. For example, some courts limited discovery to admissible evidence. *Id.* at 558. Others disallowed discovery of information related to the adversary’s case and permitted discovery only to support a requesting party’s own case. *Id.* 558–59.

<sup>52</sup> *See id.* at 559. A feature of the 1946 Amendments was to make clear that discovery was applicable even to inadmissible evidence, so long as information discovered was likely to lead to information that would be admissible. *Id.*

<sup>53</sup> *See* 329 U.S. at 509–10.

<sup>54</sup> *Id.* at 507 (rejecting the argument that discovery should be precluded because it amounts to a “fishing expedition”).

<sup>55</sup> Beisner, *supra* note 39, at 560–61; Schwarzer, *supra* note 1, at 178 (reporting that discovery worked well for thirty-five years before problems started to arise); *see also* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998) (finding the “highwater mark” of discovery in 1970).

<sup>56</sup> *See* Beisner, *supra* note 39, at 560–61; Marcus, *supra* note 55, at 748–49. The 1970 amendments allowed parties to pursue discovery as frequently as desired and abandoned the requirement that parties show “good cause” to justify a document production request. Beisner, *supra* note 39, at 561.

<sup>57</sup> Beisner, *supra* note 39, at 561 (writing of the backlash against broad discovery in 1970); Bell, *supra* note 49, at 9 (reporting that discovery problems were recognized by the mid-1970s); Marcus, *supra* note 55, at 752 (finding that opposition to the liberal thrust of discovery grew by 1970); Schwarzer, *supra* note 1, at 178 (asserting that it was approximately in the 1970s when the burdens of discovery began skyrocketing). Beisner also attributes the increased total amount of discovery to the increased volume of litigation asso-

discovery was dominating litigation.<sup>58</sup> Litigants had come to use discovery tools like depositions, interrogatories, and requests for document production as weapons to overburden and wear down the opponent.<sup>59</sup> Even if not used to inflict intentional abuse, discovery was thought to occasion excess.<sup>60</sup> Anxious to leave no stone unturned, parties were using the discovery tools to over-discover, requesting and producing much more than necessary to inform the key issues in dispute.<sup>61</sup> As a consequence, cases were viewed as turning on a party's ability to endure discovery and not the merits of the underlying claim.<sup>62</sup>

Breadth in and of itself was less of a concern than the perceived costs—both in time and money—of overbroad discovery.<sup>63</sup> Such concerns resulted in decades of debate over how to fashion the rules to maximize the benefits and minimize the costs of liberal discovery.<sup>64</sup> The advent of electronic discovery ensured the continuing vitality of the debate over how to curb discovery abuse and safeguard against the unwarranted expense and delay often associated with discovery.<sup>65</sup>

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ciated with civil rights legislation, the enforcement of criminal penalties, and the increase in suits between private parties. Beisner, *supra* note 39, at 560.

<sup>58</sup> Schwarzer, *supra* note 1, at 178; *see also* Marcus, *supra* note 55, at 752 (observing that discovery tools would often “eclipse[], or even subvert[]” the underlying claim and its merits).

<sup>59</sup> Schwarzer, *supra* note 1, at 178; *see also* Beisner, *supra* note 39, at 557, 563 (reporting that discovery abuse had been prevalent since before the 1938 adoption of the Rules). *But see generally* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (challenging social science research that substantiates the perception of widespread discovery abuse).

<sup>60</sup> Schwarzer, *supra* note 1, at 178.

<sup>61</sup> *Id.*; *see also* Warren E. Burger, Chief Justice, U.S. Supreme Court, Keynote Address at the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice: Agenda for 2000 A.D.—Need for Systematic Anticipation (Apr. 7, 1976), in 70 F.R.D. 79, 95 (1976) (stating that discovery was being “misused and overused”).

<sup>62</sup> Schwarzer, *supra* note 1, at 178.

<sup>63</sup> *See* Beisner, *supra* note 39, at 563 (noting that delay and excessive costs are hallmarks of discovery); Burger, *supra* note 61, at 95–96 (noting the high costs of discovery); Schwarzer, *supra* note 1, at 178 (characterizing discovery as increasingly expensive and time consuming).

<sup>64</sup> Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 (1998) (observing that the Advisory Committee on Civil Rules has been concerned with discovery for decades). The 1983, 1993, and 2000 Amendments to the Rules have been characterized as efforts to strike the balance between liberal and abusive discovery. Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 54–60 (2007).

<sup>65</sup> *See* Beisner, *supra* note 39, at 563. The use of computers has significantly increased the volume of potentially discoverable documents. *Id.* at 564. Experts report that 99% of the world's information is now generated and stored electronically. *Id.* (citations omitted). On a given day, for example, 36.5 trillion emails are sent worldwide, employees receive (on average) 135 emails, and people exchange 12 billion instant messages. *Id.* (citations omit-



### B. *The Costs of Discovery*

To inform the debate on the optimum structure of the federal discovery rules, researchers have explored whether or to what extent discovery is prohibitively costly and burdensome.<sup>66</sup> In 2008 and 2009, the Joint Project of the American College of Trial Lawyers Task Force<sup>67</sup> on Discovery and the Institute for the Advancement of the American Legal System<sup>68</sup> (“Joint Project”) examined the role of discovery in civil litigation and made recommendations for reform based on its findings.<sup>69</sup> The project was initiated in response to the concern that the increasing length and expense of discovery was adversely affecting the American civil justice system.<sup>70</sup>

The Joint Project began by conducting a survey of the fellows of the American College of Trial Lawyers.<sup>71</sup> Regarding the costs of discov-

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ted). The costs of producing electronically stored information also exceeds that of paper documents because, unlike paper records, electronic data must be processed into a special database to be reviewed for relevance. *Id.* at 565. Beisner estimates that electronic discovery can amount to billions of pages and cost millions of dollars in a given case. *Id.* at 563.

<sup>66</sup> See, e.g., EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 35–36 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); FINAL REPORT, *supra* note 17, at 1; LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 3–5 (2010) [hereinafter MAJOR COMPANIES], available at <http://www.lexakos.com/lexakos.asp?id=363&category=4> (follow “For a copy of the study click here” hyperlink).

<sup>67</sup> The American College of Trial Lawyers is an association of trial lawyers whose mission is the improvement of trial practice standards and justice administration. *About Us—Overview*, AM. COLL. OF TRIAL LAW., [http://www.actl.com/AM/Template.cfm?Section=About\\_Us](http://www.actl.com/AM/Template.cfm?Section=About_Us) (last visited Apr. 6, 2011).

<sup>68</sup> The Institute for the Advancement of the American Legal System is a national, non-partisan organization affiliated with the University of Denver that aims to improve the American civil justice system. *Mission*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://www.du.edu/legalinstitute/mission.html> (last visited Apr. 6, 2011).

<sup>69</sup> FINAL REPORT, *supra* note 17, at 1.

<sup>70</sup> AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT 1 (2008) [hereinafter INTERIM REPORT], available at <http://www.actl.com/AM/Template.cfm?Section=Home&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm>.

<sup>71</sup> *Id.* at 2. The Joint Project administered the survey over a one month period beginning on April 23, 2008. *Id.* The survey included questions about various aspects of civil litigation procedure. *Id.* at 3. Survey questions addressed all aspects of civil litigation so as not to take discovery out of context and distort responses. *Id.*

Of the 3812 fellows who received the survey, 1494, or 42%, responded. *Id.* at 2. Respondents averaged thirty-eight years of experience practicing law. *Id.* Of the participants, 31% exclusively represented defendants, 24% represented exclusively represented plaintiffs, and 44% represented both on occasion, though they primarily represented defendants. *Id.* The survey methodology has been criticized as according too great a weight to

ery, “85% of respondents thought that litigation in general, and discovery in particular, are too expensive.”<sup>72</sup> Over 75% of respondents agreed that discovery costs increased disproportionately due to electronic discovery.<sup>73</sup> In response to questions about delays associated with discovery, 56% reported that the time required to complete discovery was the principal cause of delay in litigation.<sup>74</sup> Further, there was overwhelming agreement that discovery delay and cost are directly related; according to 92% of respondents, “the longer a case goes on, the more it costs.”<sup>75</sup> From these survey results, the Joint Project’s Final Report concluded that the discovery process was prohibitively costly and has taken on a life disproportionate to the scope of the underlying litigation.<sup>76</sup> Therefore, the authors of the Final Report concluded that the current rules governing discovery are in serious need of reform.<sup>77</sup>

Empirical studies have also produced data on the extent of costs and delays associated with discovery.<sup>78</sup> Two studies in particular were considered at a conference held by the Advisory Committee on Civil Rules in May 2010 on issues of cost and delay in the federal civil litigation system.<sup>79</sup> The first, a Federal Judicial Center<sup>80</sup> survey, asked attorneys about their specific experiences in federal cases closed in the

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the defense perspective. J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL, Nov. 2009, at 52, 52–54 (noting that three-fourths of the survey respondents primarily do defense work).

<sup>72</sup> INTERIM REPORT, *supra* note 70, at 4.

<sup>73</sup> *Id.* at A-4.

<sup>74</sup> *Id.* at A-6.

<sup>75</sup> *Id.*

<sup>76</sup> FINAL REPORT, *supra* note 17, at 2. Critics of the Final Report’s findings alleged that authors distorted the survey results to serve their reformist ends. *See* Richards & Vail, *supra* note 71, at 54. The survey, according to some critics, does not support the contention that reform of the federal discovery rules—much less the radical overhaul proposed in the Final Report—is necessary. *Id.*; *see also* INTERIM REPORT, *supra* note 70, at A-2 (recounting that only 23% of survey respondents indicated that the civil justice system is “broken”).

<sup>77</sup> FINAL REPORT, *supra* note 17, at 2.

<sup>78</sup> *See generally* McKenna & Wiggins, *supra* note 64 (summarizing additional empirical studies on discovery practice).

<sup>79</sup> John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 539–40 (2010). Standing Committee on the Rules of Practice and Procedure Chairman, Judge Lee Rosenthal, and Civil Rules Advisory Committee Chairman, Judge Mark Kravitz, convened and organized the conference. *Id.* at 538. The conference was intended to address the issues of costs and delay in the federal civil litigation system. *Id.* It was held at Duke University School of Law in May 2010. *Id.*

<sup>80</sup> The Federal Judicial Center is a public research and education agency of the federal judicial system. *About the Federal Judicial Center*, FED. JUD. CENTER, <http://www.fjc.gov/> (last visited Apr. 6, 2011).

fourth quarter of 2008.<sup>81</sup> The survey showed that, in cases which employed one or more discovery tools, the median litigation cost including attorney's fees was \$15,000 for plaintiffs and \$20,000 for defendants.<sup>82</sup> It also revealed that litigation costs are generally proportionate to the stakes of the underlying claim.<sup>83</sup> Therefore, the authors concluded that the medians do not support the contention that federal litigation is too costly.<sup>84</sup> The costs of discovery in high-stakes litigation, however, were significant.<sup>85</sup> Plaintiffs and defendants in the 95th percentile of discovery costs spent \$280,000 and \$300,000 respectively.<sup>86</sup>

The RAND Institute for Civil Justice<sup>87</sup> and the Searle Center on Law, Regulation, and Economic Growth<sup>88</sup> conducted a second study which focused on the discovery costs of large companies in litigation

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<sup>81</sup> LEE & WILLGING, *supra* note 66, at 5. A sample population for this study was created using the Federal Judicial Center's Integrated Data Base which included information on all civil cases closed in the final quarter of 2008, with the exception of cases in which discovery problems were unlikely, such as social security claims, student loan collection actions, and bankruptcy appeals. *Id.* at 77. Eighty percent, or a total of 5685 attorneys for both the plaintiff and defendant in each case, were contacted to take the survey; 2690, or approximately 47%, responded. *Id.* at 77–78. This report has been called particularly authoritative because it elicited information about specific cases, not merely general impressions. Koeltl, *supra* note 79, at 539.

<sup>82</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010).

<sup>83</sup> *Id.* at 774; see also Jack Dew, *BLS Pilot Aimed at Reining in Discovery: Voluntary Project Begins* Jan. 4, 38 MASS. LAWS. WKLY. 787, 787 (2010) (explaining that the proportionality principal means that a \$50,000 case should not incur \$500,000 worth of discovery expenses); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998) (reporting that most cases have small costs or at least costs in proportion to the needs and stakes of the cases).

<sup>84</sup> Lee & Willging, *supra* note 82, at 770; see also Willging, *supra* note 83, at 527 (finding that, contrary to popular belief that the costs of discovery are excessive and disproportionate to the stakes of the underlying case, empirical research suggests that discovery costs are modest and proportional).

<sup>85</sup> Koeltl, *supra* note 79, at 539 (citing LEE & WILLGING, *supra* note 66, at 35–36). Others have also suggested that “problematic discovery” is confined to “complex-high-stakes litigation.” See, e.g., Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683, 685 (1998). Scholars thus found that discovery does not pose cost problems in the majority of litigation. *Id.* at 683.

<sup>86</sup> LEE & WILLGING, *supra* note 66, at 36.

<sup>87</sup> The RAND Institute for Civil Justice is a non-profit division of the RAND Corporation and conducts research to further the goals of efficiency and equity in the civil justice system. *About the RAND Institute for Civil Justice*, RAND CORP., <http://www.rand.org/icj/about.htm> (last visited Apr. 6, 2011).

<sup>88</sup> The Searle Center on Law, Regulation, and Economic Growth is a non-profit research and education center at Northwestern University School of Law and focuses on the impact of law and regulation on economic growth. *Searle Center on Law, Regulation, and Economic Growth*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/searlecenter> (last visited Apr. 6, 2011).

with litigation costs exceeding \$250,000.<sup>89</sup> Although only some respondents provided data on a per-case basis, companies that did exhibited average discovery costs ranged from \$621,880 to \$2,993,567 between 2006 and 2008.<sup>90</sup> Companies reporting at the high end of discovery costs reported average per-case discovery costs of between \$2,354,868 and \$9,759,900.<sup>91</sup> Authors of the report believed the cost estimates were conservative.<sup>92</sup> The authors concluded that companies are annually spending billions on litigation and that discovery costs assume a large portion of the total litigation costs.<sup>93</sup> Thus, according to the report, “[r]eform is clearly needed.”<sup>94</sup>

The story of discovery in the United States is one of expanding breadth.<sup>95</sup> Such growth led to concerns that over-broad discovery compromises the central purpose of the Rules and impose significant burdens and costs on litigants in federal court.<sup>96</sup> Studies, including recent efforts by the Joint Project, the Federal Judicial Center, the RAND Institute, and the Searle Center, attempted to capture or quantify the extent to which discovery impedes federal civil litigation.<sup>97</sup> Although there is variance among researchers as to the extent of the discovery problem, there is agreement that discovery can lead to significant expense and delay.<sup>98</sup>

## II. THE FEDERAL INITIAL DISCLOSURE SCHEME AND REFORM MODELS

Section A of this Part begins by chronicling the development of the federal initial disclosure rule from its initial recommendation in 1991 to its present form.<sup>99</sup> The Section then provides a detailed de-

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<sup>89</sup> MAJOR COMPANIES, *supra* note 66, at 2. The study was based on a survey which was sent to all of the Fortune 200 companies in December 2009. *Id.* Nearly 20% of target companies, representing fourteen of the nineteen industry sectors, responded. *Id.* The study has been criticized as having a relatively small sample size and low response rate. Lee & Willging, *supra* note 82, at 770 (reporting that the response rate in MAJOR COMPANIES, *supra* note 65 was only 10%). Lee and Willging also note that, although reported costs may appear high in absolute terms, high costs do not answer the relative question of whether they are *too* high, or not worth the price. *Id.* at 770–71.

<sup>90</sup> MAJOR COMPANIES, *supra* note 66, at 3.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> *Id.*

<sup>95</sup> See *supra* notes 39–56 and accompanying text.

<sup>96</sup> See *supra* notes 57–65 and accompanying text.

<sup>97</sup> See *supra* notes 66–94 and accompanying text.

<sup>98</sup> Schwarzer, *supra* note 1, at 178 (observing that discovery is prone to abuse which leads to added costs and delay); see *supra* notes 66–94 and accompanying text.

<sup>99</sup> See *infra* notes 105–119 and accompanying text.

scription of the current initial disclosure scheme under the Federal Rules.<sup>100</sup> At present, description of discoverable documents satisfies the federal initial disclosure requirement, and initial disclosures are not regarded as principal document discovery vehicles.<sup>101</sup> Section B then describes the Joint Project's initial disclosure reform recommendations.<sup>102</sup> Next, it describes a discovery reform effort, piloted in Massachusetts Superior Court, which experimented in practice with the initial disclosure scheme advanced in the Final Report.<sup>103</sup> Both the initial disclosure scheme proposed by the Final Report and implemented in Massachusetts stand in marked contrast to the current initial disclosure scheme under the Federal Rules in two principal respects—the reform initial disclosure rules (1) require actual document production and (2) are intended as a principal document discovery tool.<sup>104</sup>

*A. The Federal Initial Disclosure Scheme: History, Development,  
and the Current Rule*

When the inclusion of a federal initial disclosure rule was first recommended in 1991, the proposed rule was worded broadly.<sup>105</sup> The draft language called for the initial disclosure of “information that *bears significantly* on any claim or defense.”<sup>106</sup> Opposition to the broad language of the proposed rule by members of the drafting committee compelled redrafting of the proposed rule in narrower terms.<sup>107</sup> When Rule 26(a)(1), which mandated initial disclosure, was first adopted in 1993, it limited requisite initial disclosures to potential evidence “relevant to disputed facts alleged with particularity in the pleadings.”<sup>108</sup> The “par-

<sup>100</sup> See *infra* notes 120–141 and accompanying text.

<sup>101</sup> See *infra* notes 127–141 and accompanying text.

<sup>102</sup> See *infra* notes 142–154 and accompanying text.

<sup>103</sup> See *infra* notes 155–176 and accompanying text.

<sup>104</sup> See *infra* notes 142–176 and accompanying text.

<sup>105</sup> 8A WRIGHT & MILLER, *supra* note 39, § 2053.

<sup>106</sup> *Id.* (emphasis added) (noting the broad scope of the *bear significantly* standard) (quoting PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FED. RULES OF CIVIL PROCEDURE & THE FED. RULES OF EVIDENCE, 137 F.R.D. 53, 88 (1991)).

<sup>107</sup> *Id.* Concerns regarding a broadly worded initial disclosure rule included that the disclosure obligation would be especially burdensome for large organizational litigants, that notice pleading would make it difficult to determine what to disclose initially, and that a broad rule would subsume work-product and attorney-client privileges. *Id.*

<sup>108</sup> FED. R. CIV. P. 26(a)(1)(A) (1993) (amended 2000, 2006). Like the current rule, the 1993 version similarly laid out four categories of information subject to the initial disclosure rule: (1) names and contact information of individuals with discoverable information, (2) documents that a party may use to support its claims or defenses, (3) damage computations, and (4) implicated insurance agreements. FED. R. CIV. P. 26(a)(1) advisory committee's note (1993) (referring to information about potential witnesses, documen-

ticularity” concept narrowed the initial disclosure obligation envisioned in the draft rule in an effort not to impose on parties’ obligations to disclose evidence of uncertain relevance in response to broad or ambiguous pleadings.<sup>109</sup>

The 1993 version of Rule 26(a)(1) also included an “opt-out” provision, which permitted districts to decline to impose initial disclosure obligations entirely, or to choose whether to comply with federal or instead with local initial disclosure rules.<sup>110</sup> This provision was included to mollify the critics of a national initial disclosure rule, but also to allow room for experimentation with different initial disclosure schemes.<sup>111</sup>

The lack of national uniformity which resulted from the opt-out provision led, in part, to an amendment of Rule 26(a)(1) in 2000.<sup>112</sup> The 2000 amendment restored procedural uniformity by requiring that all judicial districts comply with the federal initial disclosure requirements.<sup>113</sup> The language of Rule 26(a)(1) was also amended in 2000.<sup>114</sup> The “particularity” requirement was replaced with even narrower terminology.<sup>115</sup> That revision to Rule 26(a)(1), the pertinent language of which survives today, mandates only that a party initially disclose information it “*may use to support its claims or defenses.*”<sup>116</sup> Replacing the

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tary evidence, damages, and insurance as the basic information litigants should provide their adversaries without awaiting formal discovery requests).

<sup>109</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993) (reassuring that “[b]road, vague, and conclusory allegations sometimes tolerated in notice pleading” would not, under the *alleged with particularity* standard, impose an initial disclosure obligation).

<sup>110</sup> FED. R. CIV. P. 26(a)(1) (2006). *See generally* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5090 (codified at 28 U.S.C. §§ 471–482 (1994)) (directing judicial districts implement Civil Justice Expense and Delay Reduction Plans). Under the Civil Justice Reform Act of 1990, many districts experimented with initial disclosure rules. FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000).

<sup>111</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000). A 1995 study by the Federal Judicial Center found that six of the fourteen largest judicial districts implemented the federal initial disclosure requirement. DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1995). Another four districts declined automatic imposition of the rule, but authorized judges to order compliance in specific instances. *Id.* Two of the fourteen largest districts preferred local initial disclosure rules over the Federal Rules. *Id.* Two districts declined to impose any initial disclosure requirements. *Id.*

<sup>112</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See* FED. R. CIV. P. 26(a)(1)(A)(ii); WRIGHT & MILLER, *supra* note 38, § 2053.

plead “with particularity” language with the “may use” provision was intended to signal that a party need not disclose information that was harmful to its case; parties would not *use* incriminating information, so initial disclosures would not oblige a party to turn over information that would aid its opponent.<sup>117</sup> The result of the 2000 amendment to Rule 26 was, thus, a diminished initial disclosure obligation.<sup>118</sup> As a consequence, the bulk of document discovery was pushed to later in the discovery process.<sup>119</sup>

Thus, the initial disclosure rule that stands today functions as a narrow stepping stone into expansive discovery.<sup>120</sup> The current Rule 26, the basic roadmap to discovery, contains the federal initial disclosure requirement.<sup>121</sup> Rule 26(a)(1)(A) concerns initial disclosures and provides for four categories of information which a party is required to produce as initial disclosures.<sup>122</sup> The first is “the name and, if known, the address and telephone number of each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses.”<sup>123</sup> The second category is either “a copy—or

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<sup>117</sup> WRIGHT & MILLER, *supra* note 105, § 2053.

<sup>118</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000).

<sup>119</sup> *See id.* (narrowing the scope of initial disclosure). Rule 26(a)(1) was further amended in 2006 in response to a proliferation of electronic discovery. FED. R. CIV. P. 26(a)(1) advisory committee’s note (2006). Rule 26(a)(1)(A)(ii) now includes electronically stored information among the list of requisite initial disclosures. FED. R. CIV. P. 26(a)(1)(A)(ii) (2006).

<sup>120</sup> FED. R. CIV. P. 26(a) advisory committee’s note (2000) (explaining that the 2000 amendments narrowed the scope of the initial disclosure obligation).

<sup>121</sup> FED. R. CIV. P. 26. Rule 26 provides for three types of self-executing disclosures: initial disclosure, expert disclosure, and pretrial disclosure. FED. R. CIV. P. 26(a)(1)–(3). This Note focuses only on initial disclosures.

<sup>122</sup> FED. R. CIV. P. 26(a)(1)(A)(i)–(iv).

<sup>123</sup> FED. R. CIV. P. 26(a)(1)(A)(i). Commentators have noted the challenges of applying Rule 26 given its lack of guidance as to the extent and precise nature of requisite initial disclosures. Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994) (arguing that, because the federal automatic disclosure rules must be applicable to all types of civil cases, they are vague as to the practical requirements); *see also* United States v. Merck-Medco Managed Care, L.L.C., 223 F.R.D. 330, 333 (E.D. Pa. 2004) (observing that deciding whether Rule 26 was violated is difficult because no federal circuit courts have decided how the rule should be interpreted). The United States District Court for the District of New Jersey, however, in its 1997 decision of *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 589 (D.N.J. 1997), interpreted the requirement to initially disclose names of individuals with discoverable information under Rule 26(a)(1)(A)(i). The court held that the plaintiffs’ failure to disclose declarations in support of a motion for class certification violated the initial disclosure requirement. *Id.* The court reasoned that the plaintiffs had not met their initial disclosure obligation because their complaint was sufficiently specific as to the membership of the class implicated and because of their early intent to use the declaration in support of class certification. *Id.*

a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession . . . may use to support its claims or defenses.”<sup>124</sup> The third category is a “computation of each category of damages.”<sup>125</sup> The fourth and final category is “any insurance agreement” implicated in the litigation.<sup>126</sup>

The second category of requisite initial disclosures governing document discovery has two defining characteristics.<sup>127</sup> The first is that actual production is not required in order to satisfy the initial document disclosure obligation.<sup>128</sup> Under Rule 26(a)(1)(A)(ii), parties satisfy the initial disclosure obligation by providing their adversary with a statement describing discoverable documents by category and location; actual production of discoverable documents as initial disclosures is not mandated.<sup>129</sup> Adversaries, therefore, are generally expected to actually obtain documents by serving a production request under Rule 34 on their adversary or by requesting production of documents through informal means.<sup>130</sup> The onus is thus on the party seeking information to

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<sup>124</sup> FED. R. CIV. P. 26(a)(1)(A)(ii). See *infra* notes 127–141 and accompanying text for a description of the application of this Rule.

<sup>125</sup> FED. R. CIV. P. 26(a)(1)(A)(iii). In its 2006 decision in *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295–96 (2d Cir. 2006), the United States Court of Appeals for the Second Circuit held that a party was precluded from admitting evidence of “lost profits” for failure to specifically include damages from lost profits as initial disclosures. The court concluded that the rule requiring the “computation of damages” imposed on a party a higher burden than the mere initial disclosure of general financial damages calculations. *Id.* at 293 (requiring the disclosing party to provide a specific formula illustrating its theory of damages from lost profits).

<sup>126</sup> FED. R. CIV. P. 26(a)(1)(A)(iv). Per Rule 26(e), a party who has made initial disclosures has a continuing duty to timely supplement those disclosures if they are found to be incomplete or incorrect, or if ordered by the court. FED. R. CIV. P. 26(e)(1). Failure to comply with the initial disclosure requirements under Rule 26 results in the exclusion of undisclosed information from evidence unless the failure to disclose was substantially justified or harmless. FED. R. CIV. P. 37(c)(1). Sanctions for failure to comply with initial disclosure requirements may also be imposed, including the payment of reasonable expenses and attorneys fees, prohibiting the party that failed to disclose from supporting or opposing implicated claims or defenses, striking the pleadings in whole or in part, or dismissing an action in whole or in part. FED. R. CIV. P. 37(c)(1)(A), (1)(C) (incorporating by reference FED. R. CIV. P. 37(b)(2)(A)(i)–(vi)).

<sup>127</sup> See *infra* notes 128–141 and accompanying text.

<sup>128</sup> FED. R. CIV. P. 26(a)(1)(A)(ii).

<sup>129</sup> *Id.*

<sup>130</sup> *Forbes v. 21st Century Ins. Co.*, 258 F.R.D. 335, 338 (D. Ariz. 2009); see also FED. R. CIV. P. 34(a) (requests for production).



take affirmative steps to procure actual production of discoverable documents.<sup>131</sup>

The second noteworthy feature is that document discovery is typically not completed at the initial disclosure stage.<sup>132</sup> To the contrary, initial disclosures generally serve as an entrée into an expansive discovery process.<sup>133</sup> Accordingly, the default is that although initial disclosures begin discovery, the bulk of information exchange occurs on a rolling basis throughout the remainder of the discovery process.<sup>134</sup>

That initial disclosures merely commence—as opposed to serve as a principal tool of—document discovery is more a function of culture than anything attributable to the plain language of the initial disclosure rule.<sup>135</sup> This cultural orientation is evident in the 2004 decision of the United States District Court for the Eastern District of Pennsylvania in *United States v. Merck-Medco Managed Care, L.L.C.*<sup>136</sup> In *Merck-Medco*, the court held that merely listing the names of nearly 4300 individuals with discoverable information did not violate the purpose of the initial disclosure rule.<sup>137</sup> The court based its decision on its understanding of Congress’s intent in enacting Rule 26(a)(1).<sup>138</sup> It found that the goal of

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<sup>131</sup> See *Solis-Alarcon v. United States*, 514 F. Supp. 2d 185, 190 (D.P.R. 2007) (finding that a party may not “s[i]t idly by” but must instead “vigorously pursue” documents disclosed under Rule 26 if the party seeks actual production).

<sup>132</sup> FINAL REPORT, *supra* note 17, at 9–11.

<sup>133</sup> *Id.* at 9 (characterizing discovery following initial disclosures as “broad, open-ended[,] and ever-expanding”).

<sup>134</sup> See *id.* (reporting that the current practice in federal court is to pursue virtually limitless discovery until a court says to stop); see also FED. R. CIV. P. 26(a)(1) advisory committee’s note (2000) (narrowing the scope of the federal initial disclosure obligation).

<sup>135</sup> FINAL REPORT, *supra* note 17, at 9–11 (characterizing the federal scheme as one of “unlimited discovery” following initial disclosures); *id.* at 25 (quoting Justice Colin Campbell of the Toronto Superior Court of Justice and member of the American College of Trial Lawyers Task Force on Discovery, who said that “Discovery reform . . . will not be complete until there is a cultural change . . . .”); Carla C. Calcagno, *Motion Practice and Settlement at the United States Trademark Trial and Appeal Board*, 926 PRACT. L. INST. 207, 238 (2008) (explaining that initial disclosures focus only on “basic information” exchange and do not substitute for comprehensive document discovery); Julia Reischel, *Need for Discovery Reform in Massachusetts Debated in Wake of Report*, 37 MASS. LAWS. WKLY. 1345, 1371 (2009) (quoting a Boston lawyer who said, “We grew up in a culture of almost anything goes in terms of discovery . . . .”); Symposium, *Transcript of the “Alumni” Panel on Discovery Reform*, 39 B.C. L. REV. 809, 835 (1998) (quoting Judge Wayne Brazil who described a past culture in which ninety-nine out of one hundred lawyers opposed initial disclosures and, thus, were loath to “do it”).

<sup>136</sup> See 223 F.R.D. at 333 (“[S]elf-executing disclosures are merely a starting point for the discovery process.”).

<sup>137</sup> *Id.* at 331, 333–34.

<sup>138</sup> *Id.* at 333. The *Merck-Medco* court noted that no circuit court had rendered a decision concerning the application of Rule 26(a), but that the at least one district court

the federal initial disclosure requirement is to provide an efficient start to discovery by fostering the early exchange of basic information.<sup>139</sup> After the initial disclosure stage, parties have the remainder of the discovery period to obtain more specific information.<sup>140</sup> Thus, in the view of the *Merck-Medco* court, the defendants could gather more focused and specific information during discovery; complete document discovery was not expected at the initial disclosure phase.<sup>141</sup>

B. *The Impetus for and Model of Reform: Theoretical Foundations and Implementation in Practice*

An initial disclosure scheme which requires actual production and uses initial disclosure as a primary document discovery tool would drastically transform the approach to initial disclosures in common practice in federal court.<sup>142</sup> The Joint Project called for that very transformation.<sup>143</sup>

In response to Joint Project questions on the function and effectiveness of the federal initial disclosure requirement, survey respondents expressed their views on initial disclosures mandated under Rule 26(a)(1).<sup>144</sup> Nearly two-thirds of survey respondents said that the current requirements under the Federal Rules “did not reduce discovery or save the client money.”<sup>145</sup>

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grounded its interpretation of the rule in legislative intent extrapolated from the Advisory Committee Notes to the 1993 Amendments to Rule 26. *Id.* The Advisory Committee Notes, however, simply state that the disclosure requirements should be applied with “common sense.” Fed. R. Civ. P. 26(a)(1) advisory committee’s note (1993); *Fitz Inc.*, 174 F.R.D. at 589 (explaining that a “common sense” application of the initial disclosure rule bears the purpose of the rule—the exchange of basic information—in mind).

<sup>139</sup> *Merck-Medco*, 223 F.R.D. at 333.

<sup>140</sup> *Id.* (viewing initial disclosures as a “mere starting” point of the discovery process).

<sup>141</sup> *Id.* at 334.

<sup>142</sup> FINAL REPORT, *supra* note 17, at 7–11 (distinguishing its recommendations from the federal initial disclosure requirements because the reform initial disclosure scheme would: (1) require actual production and, (2) conceive of initial disclosure as a principal document discovery tool).

<sup>143</sup> See *id.* The Joint Project issued the Final Report on March 11, 2009. *Id.* at Title Page.

<sup>144</sup> INTERIM REPORT, *supra* note 70, at A-3.

<sup>145</sup> *Id.* To the contrary, approximately 35% of respondents agreed that Rule 26(a)(1) reduced discovery and approximately 29% expressed their view that Rule 26(a)(1) saves client’s money. *Id.* In another study of discovery reform efforts, conducted after the 1993 adoption of the federal initial disclosure rule, researchers also elicited survey respondents’ views on initial disclosure requirements. See Willging, *supra* note 83, at 542. Forty-one percent of survey respondents favored a uniform national initial disclosure rule, 27% preferred to not have an initial disclosure obligation at all, and 30% would have preferred no change to the initial disclosure scheme at the time, which permitted a choice to follow either federal or local initial disclosure rules. *Id.* at 543; see also FED. R. CIV. P. 26(a)

Given the sentiment of the majority of survey respondents that initial disclosures failed to realize their purpose of reducing later discovery,<sup>146</sup> the Final Report made two principal recommendations for restructuring the current initial disclosure requirement under the Federal Rules.<sup>147</sup> First, the Final Report proposed broadening Rule 26(a)(1)(A)(ii) beyond the permitted “disclosure” of discoverable documents by providing a description of documents by category and location.<sup>148</sup> The suggested revision would instead mandate the actual production of discoverable documents.<sup>149</sup> The reason was that early and *actual* production of documents, without a formal request and the related delay, would foster more effective document exchange, narrow the issues in dispute, and promote settlement.<sup>150</sup>

The Final Report touted its second reform of the federal initial disclosure scheme as a “radical” and its most “significant” proposal.<sup>151</sup> The Final Report proposed only limited discovery after the initial disclosure phase.<sup>152</sup> Any further document discovery beyond initial and

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advisory committee’s note (1993) (explaining that the “opt-out” provision allowed districts either to forgo initial disclosure obligations or enforce local initial disclosure rules). Given the choice of thirteen changes that might reduce litigation costs, the imposition of a national initial disclosure rule came in second with 44% of votes (following only increased judicial case management with 54% of votes). *Id.* at 542.

<sup>146</sup> INTERIM REPORT, *supra* note 70, at 4.

<sup>147</sup> FINAL REPORT, *supra* note 17, at 7–11. The Final Report recommended that, shortly 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.” *Id.* at 7.

<sup>148</sup> *Id.* at 7–8.

<sup>149</sup> *Id.* (maintaining, in addition, a supplemental disclosure requirement as mandated under the Federal Rules); *see also* FED. R. CIV. P. 26(e)(1)(A)–(B) (requiring parties that have made initial disclosures or responded to interrogatories, requests for production, or requests for admission, to supplement or correct its disclosure if a previous disclosure was incomplete or incorrect in material part and additional or corrective information had not otherwise been made available during discovery, or a court ordered supplemental disclosure). Author Eric Spade also proposed an initial disclosure scheme which emphasized actual production. Spade, *supra* note 14, at 187–88. He recommended actual production of documents in “discovery-simple” cases (those with limited amounts of discoverable information) and description of documents by category and location in “discovery-intensive” cases (those of heightened complexity). *Id.*

<sup>150</sup> FINAL REPORT, *supra* note 17, at 8. By way of enforcement, the Final Report recommends that a single judge oversee a case from beginning to end in order to be in the best position to make any requisite rulings, including on discovery matters. *Id.* at 2, 18.

<sup>151</sup> *See id.* at 9.

<sup>152</sup> *Id.* at 10. Even if this proposal was “radical,” as the Final Report claims, it was not novel. *See* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721–22 (1989) (imagining an initial disclosure scheme which obviates the need for subsequent, substantial discovery). Senior U.S. District Judge William Schwarzer proposed a similar reform that placed heightened emphasis on initial disclo-

supplemental disclosure would require either an agreement between parties or a court order.<sup>153</sup> A court order permitting further document discovery would only be granted upon a showing of good cause and that the costs of discovery were proportionate to the magnitude of the underlying claim.<sup>154</sup>

### C. *Discovery Pilot Project*

In addition to recommending an alternative-use model for initial disclosures in theory, the Final Report also informed the development of a discovery reform effort put into practice by the Massachusetts Superior Court.<sup>155</sup> Administered by the Business Litigation Session (“BLS”), the Massachusetts Discovery Pilot Project (“Discovery Pilot”) ran from

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sure as a principal document discovery tool. *Id.* Judge Schwarzer envisioned a system in which each party filing an action would serve not only a summons and a complaint on the adverse party, but also a copy of all reasonably available documents which support any claim or defense. *Id.* The adverse party would similarly include all documents supporting its defense and potential counter-claims with a responsive pleading. *Id.* Most significantly, any further document discovery beyond self-executing initial disclosures would require permission from the court. *Id.*

<sup>153</sup> See FINAL REPORT, *supra* note 17, at 9.

<sup>154</sup> *Id.* The guiding principal of the Final Report was one of limited discovery, tied proportionally to the magnitude of the claims being litigated. *Id.* at 7. The “proportionality principal” was grounded in the notion that the cost of discovery should not far exceed the amount in controversy. *Id.*

Beyond making recommendations concerning reform of the federal initial disclosure requirement, the Final Report included proposed amendments to many current discovery rules. FINAL REPORT, *supra* note 17, at 4–24; see *supra* notes 142–154 and accompanying text. It recommended limiting requests for admission and interrogatories. FED. R. CIV. P. 33 (interrogatories); FED. R. CIV. P. 36 (requests for admission); FINAL REPORT, *supra* note 17, at 17. The Final Report suggested that prospective trial witnesses be disclosed early in the pre-trial phase. FINAL REPORT, *supra* note 17, at 9. It also recommended limiting the scope of discovery to facts that foster the “just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (stating the scope and purpose of the Federal Rules); FINAL REPORT, *supra* note 17, at 11–12. The Final Report further recommended imposing limits on electronic discovery. FINAL REPORT, *supra* note 17, at 14. All reforms of the current discovery rules were based on the proportionality principal, meaning that the scope of discovery should not exceed the magnitude of the underlying claim. *Id.* at 7.

The Final Report also made recommendations for reform of the civil justice system beyond restructuring the discovery tools. *Id.* at 4–7, 17–24. The Final Report advocated for fact-based, as opposed to notice, pleadings. *Id.* at 5. It recommended increased judicial management, characterized by increased oversight by a single judicial officer who remains with a suit from beginning to end. *Id.* at 18. It proposed a limit of only one expert witness per party, absent extenuating circumstances. *Id.* at 17. The Final Report further encouraged the increased use of pre-trial dispositive motions to identify and/or resolve issues. *Id.* at 18.

<sup>155</sup> SJC Press Release, *supra* note 18, at 1.

January to December 2010.<sup>156</sup> Participation in the Discovery Pilot was available on a voluntary basis for any BLS matter that had not had a case management conference or had not commenced prior to the Discovery Pilot start date.<sup>157</sup> The purpose of the Discovery Pilot was to reduce the burden and cost of civil pretrial discovery.<sup>158</sup>

In accordance with the Final Report's recommendations, the guiding principal of the Discovery Pilot was limited discovery tied proportionally to the magnitude of the litigation.<sup>159</sup> The proportionality assessment took into account "such factors as the needs of the case, the amount in controversy, the parties' resources, and the complexity and importance of the issues at stake."<sup>160</sup> To realize this objective, BLS judges and litigants who agreed to participate in the Discovery Pilot worked together, typically in the setting of a case management conference, to define the scope of requisite discovery.<sup>161</sup> Pilot participants identified potentially dispositive issues at the outset so discovery could center on the principal matters in dispute.<sup>162</sup> Litigant-participants also limited the length of the discovery period as well as the number of people from whom discovery would be sought.<sup>163</sup>

Initial disclosures under the Massachusetts Discovery Pilot shared the same two key features as the reform initial disclosure rule advanced by the Joint Project's Final Report.<sup>164</sup> The use of initial disclosures under the Discovery Pilot thus represented a significant departure, not only from federal,<sup>165</sup> but also from Massachusetts practice.<sup>166</sup> Under the

<sup>156</sup> BLS Pilot Project, *supra* note 18, at 1.

<sup>157</sup> *Id.* at Introduction.

<sup>158</sup> *Id.* The Discovery Pilot was the result of a joint effort of the BLS Advisory Committee and BLS judges Margaret Hinkle, Stephen Neel, and Judith Fabricant. *Id.*; SJC Press Release, *supra* note 18, at 1.

<sup>159</sup> BLS Pilot Project, *supra* note 18, at 1; see SJC Press Release, *supra* note 18, at 1.

<sup>160</sup> SJC Press Release, *supra* note 18, at 1.

<sup>161</sup> BLS Pilot Project, *supra* note 18, at 1.

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* at 1.

<sup>164</sup> See *id.* at 2, 3 (requiring actual production and near-complete disclosure of discoverable documents as initial disclosures); FINAL REPORT, *supra* note 18, at 7–11 (same).

Other states have also experimented with alternative uses of initial disclosures. See, e.g., Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461, 463–464 (2011). Arizona, for example, has a broader initial disclosure requirement than that mandated under the Federal Rules. *Id.* The Arizona initial disclosure rule requires disclosure, not only of the facts of the case, but also information on the legal theory on which the claim is based. *Id.*

<sup>165</sup> See BLS Pilot Project, *supra* note 18, at 2–3; FINAL REPORT, *supra* note 17, at 7–11.

<sup>166</sup> Dew, *supra* note 83, at 787 (quoting BLS Judge Margaret Hinkle, calling the Discovery Pilot a "very radical departure" from Massachusetts practice).

Discovery Pilot, initial disclosures required actual production of discoverable documents<sup>167</sup> whereas, in federal court, litigants chose either to actually produce or to describe documents by category and location.<sup>168</sup>

The Discovery Pilot model further front-loaded discovery by mandating that the bulk of documents be exchanged as initial disclosures.<sup>169</sup> By using initial disclosures as a principal document exchange tool, the Discovery Pilot emphasized early and near-total automatic disclosure of discoverable information.<sup>170</sup> This differed from the federal discovery scheme which merely opens with initial disclosures but then allows for subsequent discovery.<sup>171</sup>

That the Discovery Pilot was administered by the BLS was also noteworthy.<sup>172</sup> The BLS is responsible for adjudicating commercial disputes.<sup>173</sup> This is significant because there is data to suggest that initial disclosures may be less effective in high stakes and complex cases, such

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<sup>167</sup> Discovery Pilot participants produced all documents that would be used to support that party's claims, counter claims, or defenses at the beginning of the discovery phase without awaiting a document request from the opposing party. BLS Pilot Project, *supra* note 18, at 2–3 (incorporating the initial disclosure mechanism under Fed. R. Civ. P. 26(a)(1)(A), which similarly mandates initial disclosure without awaiting a discovery request). Only privileged materials, work product, or documents not reasonably available were exempt from the actual production requirement. *Id.* at 2. Moreover, initial disclosures were complemented by an ongoing, self-executing duty to supplement information provided at the outset of litigation as new and relevant information became available. *Id.*

<sup>168</sup> Compare BLS Pilot Project, *supra* note 18, at 2 (requiring actual production of documents as initial disclosures), with FED. R. Civ. P. 26(a)(1)(A)(ii) (allowing a party to describe discoverable documents by category and location).

<sup>169</sup> BLS Pilot Project, *supra* note 18, at 3 (citing FINAL REPORT, *supra* note 17, at 9) (recommending that only limited discovery be permitted after the initial disclosure).

<sup>170</sup> See *id.* at 3. As the authors of the Final Report similarly recommended, if a party wanted to expand the scope of discoverable information, it would have to obtain an agreement from the opposing party. *Id.*; see also FINAL REPORT, *supra* note 17, at 9. Alternatively, the party desiring additional discovery could seek a court order. BLS Pilot Project, *supra* note 18, at 3. A court order, however, would only be granted upon a showing of good cause and proportionality. *Id.*

Commentators have observed that the Discovery Pilot approach has potential benefits as well as drawbacks. Robert M. Elmer, *Commentary: BLS Discovery Pilot Has Potential Benefits, Drawbacks*, ALLBUSINESS (Mar. 15, 2010), <http://www.allbusiness.com/legal/trial-procedure-pretrial-discovery/14155716-1.html>. The benefits included increased focus on dispositive issues from the outset of litigation, less business interruption, and ensuring proportionality of discovery to the stakes of the claim. *Id.* Drawbacks, however, were that courts have no clear guidance as to how to apply the proportionality test and that parties give up control over their own discovery. *Id.*

<sup>171</sup> See FINAL REPORT, *supra* note 17, at 9–11.

<sup>172</sup> See BLS Pilot Project, *supra* note 18, at Introduction.

<sup>173</sup> Massachusetts Superior Court Administrative Directive No. 09-1 (2009) [hereinafter Administrative Directive] (listing the cases that may be accepted into the BLS).

as complex commercial matters.<sup>174</sup> Therefore, the BLS of the Massachusetts Superior Court not only put into practice an initial document disclosure scheme that stands in marked contrast to the federal rule,<sup>175</sup> but it also did so in a setting in which effective use of initial disclosures may be least expected.<sup>176</sup>

### III. THE POTENTIAL USEFULNESS OF INITIAL DISCLOSURES: BENEFITS, DRAWBACKS, AND THE LINK TO SPECIFICITY IN PLEADINGS

In light of the Final Report's recommendations and Massachusetts's discovery reform model, this Part reconsiders the role of initial disclosures in the American civil justice system.<sup>177</sup> Section A summarizes the principal arguments for the use of initial disclosures, including that they: (1) ensure early and meaningful information exchange in an adversarial system, (2) increase litigation efficiency, and (3) serve the information-sharing purpose of discovery.<sup>178</sup> It further presents arguments against initial disclosures including that they: (1) neither foster time nor cost savings, (2) do not fit comfortably in an adversarial system, and (3) pose ethical challenges.<sup>179</sup> Section A also highlights a concern that pervades the criticism of initial disclosure use: that notice pleadings fail to provide sufficient foundation to support initial disclosure of discoverable documents.<sup>180</sup>

Section B then demonstrates that initial disclosures typically have, in fact, been used to a greater extent in jurisdictions with fact-based pleadings, as in many civil law countries.<sup>181</sup> It then compares the greater role initial disclosures typically play in fact-based pleading juris-

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<sup>174</sup> Willging, *supra* note 83, at 564 (finding that problems with initial disclosures arose more frequently in cases that are high-stakes, expensive, complex, and "contentious"); *see also* JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & THE COMM. ON THE RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 7 (Feb. 26, 2010) [hereinafter REPORT TO THE CHIEF JUSTICE], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/010%20report.pdf>.

<sup>175</sup> Compare FED. R. CIV. P. 26(a)(1)(A)(ii) (permitting a description of discoverable documents by category and location), with BLS Pilot Project, *supra* note 18, at 2–3 (requiring actual production of documents as initial disclosures).

<sup>176</sup> Willging, *supra* note 83, at 564–65; *see also* Administrative Directive, *supra* note 173; REPORT TO THE CHIEF JUSTICE, *supra* note 174, at 9.

<sup>177</sup> *See infra* notes 184–241 and accompanying text.

<sup>178</sup> *See infra* notes 184–200 and accompanying text.

<sup>179</sup> *See infra* notes 201–219 and accompanying text.

<sup>180</sup> *See infra* notes 216–219 and accompanying text.

<sup>181</sup> *See infra* notes 220–225 and accompanying text. Fact pleadings state only the facts which give rise to a claim or defense and not the legal conclusions which a pleader seeks to prove follow from the facts. BLACK'S LAW DICTIONARY 1271 (9th ed. 2004).

dictions with the limited use of initial disclosures in the American notice pleading tradition.<sup>182</sup> Section B then introduces the 2007 decision in *Bell Atlantic Corp. v. Twombly*, in which the Supreme Court announced a new plausibility pleading standard.<sup>183</sup>

#### A. *Supporters and Detractors: Opposing Views on Initial Disclosure*

Proponents of initial disclosure as a valuable discovery tool point to several principal ways in which initial disclosure requirements enhance discovery.<sup>184</sup> One theory is that initial disclosure rules foster exchange of discoverable information early in the pre-trial stages of litigation.<sup>185</sup> Advocates argue that absent an initial disclosure requirement, the adversarial system disincentivizes disclosing information to the opposing party.<sup>186</sup> The argument is that litigators are so intent on beating

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<sup>182</sup> See *infra* notes 226–232 and accompanying text. Notice pleadings, in contrast, provide the opposing party with fair notice of the plaintiff's legal claim and its grounds, not a complete factual account of situation leading to the litigation. *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by* *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 562–63 (2007); BLACK'S LAW DICTIONARY 1271 (9th ed. 2004).

<sup>183</sup> See *infra* notes 233–238 and accompanying text. The descriptor “plausibility” qualifies notice pleadings. See *Twombly*, 550 U.S. at 570. It indicates that complaints principally intended to notify an adversary of a pending claim must include enough facts to state a plausible claim. *Id.* The plausibility requirement does not signal a wholesale change from notice to fact-based pleadings. *Id.* (maintaining that heightened fact pleading is not required). But see *id.* 588 (Stevens, J., dissenting) (arguing that the plausibility requirement does heighten the pleading standard).

<sup>184</sup> See, e.g., FINAL REPORT, *supra* note 17, at 8; see also Schwarzer, *supra* note 152, at 716; see *infra* notes 185–200 and accompanying text. Wright and Miller put forth an interesting analogy between disclosure requirements in criminal law and in the civil discovery system. WRIGHT & MILLER, *supra* note 39, § 2053. The authors highlight the United States Supreme Court's 1936 decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), in which the Court held that suppression by the prosecution of evidence favorable to the criminal defendant violates due process. WRIGHT & MILLER, *supra* note 39, § 2053. Wright and Miller assert that the decision espouses the general principal that litigants can and should be expected to disclose basic information to the opposing party. *Id.*; see also *Brady*, 373 U.S. at 87.

<sup>185</sup> Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1314, 1349 (1978). This article influenced the amendment of the federal discovery rules to include an initial disclosure requirement. FED. R. CIV. P. 26(a) advisory committee's note (1993).

<sup>186</sup> Brazil, *supra* note 185, at 1349 (arguing that the adversarial structure impairs discovery's disclosure objective); see also Schwarzer, *supra* note 152, at 714 (observing the inconsistency of aiding an opponent in an adversarial system). That the adversarial system—absent a mandatory initial disclosure rule—frustrates disclosure objectives is compounded by an incentive structure which punishes information disclosure. Brazil, *supra* note 185, at 1312. A lawyer who discloses information harmful to a client (absent an initial disclosure obligation) risks the economic consequences of losing the case. *Id.* The lawyer also risks gaining the reputation of being a less-than-zealous advocate. *Id.* In a worst case scenario,



their adversary that they cannot be trusted to disclose discoverable information on their own accord.<sup>187</sup> It is instead more likely to find lawyers playing hide-the-ball than willing to disclose information in the name of cooperation or truth-seeking.<sup>188</sup> And, because increasing numbers of civil actions settle before trial, discovery often becomes the only battlefield on which to win a fight.<sup>189</sup> Therefore, initial disclosure rules serve as tools to compel information sharing, particularly in the early stages of litigation.<sup>190</sup>

The meaningful exchange of initial disclosures also advances litigation efficiency objectives.<sup>191</sup> Informed by initial disclosures, parties have the tools necessary to evaluate the relative strengths of their positions closer to the outset of litigation.<sup>192</sup> Thus, the initial disclosure of relevant information encourages settlement.<sup>193</sup>

Initial disclosure rules also foster administrative efficiency.<sup>194</sup> A key characteristic that distinguishes initial from other types of requisite disclosures is that they are self-executing, meaning that parties disclose information to their adversaries without awaiting a discovery request.<sup>195</sup> As a result, the use of initial disclosures as a discovery tool eliminates the extra step of a Rule 34 document request, or any other informal request for information.<sup>196</sup> This saves both the cost of additional pa-

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the lawyer who voluntarily discloses relevant information that damages a client's case runs the risk of being sued for legal malpractice. *Id.* (“[F]ull disclosure becomes a luxury few lawyers can afford to pursue.”). Therefore, initial disclosure rules are necessary to safeguard lawyers from the potential ramifications of disclosing information in the absence of an obligation to do so. *Id.* at 1349.

<sup>187</sup>*Id.* at 1304.

<sup>188</sup>*Id.* at 1317.

<sup>189</sup>*Id.* at 1304.

<sup>190</sup>*Id.* at 1304, 1349. *But see* Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of “Tort Reform”: Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1476–77 (1993) (recounting an argument that it is “naïve” to think that lawyers will comply with automatic disclosure requirements).

<sup>191</sup>*See* FINAL REPORT, *supra* note 17, at 8. An empirical study showed that initial disclosures achieved their desired outcomes. *See* Willging, *supra* note 83, at 534–35. Such outcomes included decreased litigation expense, shortened discovery, and increased prospects for settlement and fair outcomes. *Id.*

<sup>192</sup>Schwarzer, *supra* note 1, at 178.

<sup>193</sup>FINAL REPORT, *supra* note 17, at 8.

<sup>194</sup>*See* Solis-Alarcon v. United States, 514 F. Supp. 2d 185, 190 (D.P.R. 2007) (explaining the requisite steps to procure actual production following initial disclosure); FINAL REPORT, *supra* note 17, at 7–11.

<sup>195</sup>FED. R. CIV. P. 26(a)(1)(A); *see* Solis-Alarcon, 514 F. Supp. 2d at 190.

<sup>196</sup>*See* Solis-Alarcon, 514 F. Supp. 2d at 190; *see also* Forbes v. 21st Century Ins. Co., 258 F.R.D. 335, 338 (D. Ariz. 2009) (reporting that it is more typical for parties to actually obtain documents under Rule 34 or through informal requests than as initial disclosures).

perwork as well as the delay associated with awaiting a response to a discovery request.<sup>197</sup>

Proponents also assert that initial disclosure requirements serve the information-sharing purpose of the federal discovery rules.<sup>198</sup> Critics caution that the discovery system has become dominated by the process at the expense of the disclosure objective.<sup>199</sup> The argument, thus, is that broad initial disclosure requirements are important because they rightly serve the essential purpose of discovery: information disclosure.<sup>200</sup>

In contrast, critics argue that initial disclosures will not foster efficient discovery.<sup>201</sup> Justice Scalia, dissenting from the recommended adoption of the 1993 amendments to the Federal Rules, argued that imposing initial disclosure obligations would have counter-productive consequences.<sup>202</sup> Disputes could erupt over whether the initial disclosure duty was satisfied, leading to increased motions practice as parties allege failed compliance and pursue sanctions.<sup>203</sup> Judges might also have to assume greater burdens, tasked with regulating and enforcing initial disclosure obligations.<sup>204</sup>

Initial disclosure requirements could also foster over discovery.<sup>205</sup> In an effort to avoid challenges or sanctions for failure to disclose, par-

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<sup>197</sup> See *Solis-Alarcon*, 514 F. Supp. 2d at 190; see also FED. R. CIV. P. 34(b)(2)(A) (allowing a party thirty days after being served to respond to a request for production); WRIGHT & MILLER, *supra* note 39, § 2053 (reporting that initial disclosure requirements were included in the federal discovery rules to “channel[] discovery and avoid wasteful activity”).

<sup>198</sup> Schwarzer, *supra* note 152, at 721; see also *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982) (stating that discovery provisions are designed to encourage open exchange of information); Brazil, *supra* note 185, at 1332 (stating that the primary purpose of discovery is pretrial disclosure of all non-privileged, relevant information and encouragement of settlement).

<sup>199</sup> Schwarzer, *supra* note 152, at 721 (arguing that there is no “intrinsic value” in the discovery process itself); see also Irving R. Kaufman, *Judicial Control over Discovery*, 28 F.R.D. 111, 119 (1960) (“The clear policy of the [Federal] [R]ules is toward full disclosure.”). Even if the focus of discovery is successfully redirected from the discovery process itself to the disclosure objective, there remains a question as to the extent of valuable information disclosure. Compare Sugarman & Perl, *supra* note 190, at 1497–1500 (observing that discovery that leads to full disclosure of information facilitates fact finding and truth-seeking and fosters just outcomes), with Schwarzer, *supra* note 1, at 178 (pointing to undue discovery used as a “weapon to burden, discourage[,] or exhaust the opponent”).

<sup>200</sup> Schwarzer, *supra* note 152, at 721.

<sup>201</sup> See, e.g., Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 510 (1993) [hereinafter Amendments to Rules] (Scalia, J., dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> Bell, *supra* note 49, at 41–42.

<sup>204</sup> Amendments to Rules, *supra* note 201, at 510.

<sup>205</sup> Bell, *supra* note 49, at 43–44.

ties might expend resources producing extraneous information that turns out to be irrelevant to the litigation.<sup>206</sup> Parties may also hide behind an initial disclosure obligation to mask their true objective: either to overburden their adversary or to bury dispositive information in mounds of paperwork.<sup>207</sup> Contrary to the goal of fostering efficiencies, the imposition of initial disclosure obligations might add a further layer (and its associated costs and delays) to an already complex discovery process.<sup>208</sup>

Critics also argue that initial disclosure obligations do not “fit comfortably” in an adversarial system.<sup>209</sup> They assert that there is something anomalous in the notion that a party would simply turn over—without awaiting a specific request—information to an adversary.<sup>210</sup> This proves even more troublesome when some of the information which may be subject to initial disclosure obligations may be harmful to the disclosing party’s case.<sup>211</sup> Providing potentially incriminating information to an adversary challenges the ethical maxim that a lawyer should not advance interests that conflict with a client’s.<sup>212</sup> Initial disclosure rules thus pit an obligation to comply with the rules of a tribunal against a duty to serve as a client’s zealous advocate.<sup>213</sup> A further concern is that initial disclosure obligations might override attorney-client or work-product privileges.<sup>214</sup> Confusion about ethical obligations as well as concerns for the continuing viability of privileges arise in the face of

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<sup>206</sup> *Id.*; see also Amendments to Rules, *supra* note 201, at 510; WRIGHT & MILLER, *supra* note 39, § 2053 (predicting that the burden on large organizational litigants to produce extensive amounts of potentially discoverable information as initial disclosures would be significant).

<sup>207</sup> Sugarman & Perl, *supra* note 190, at 1477. *But see* Schwarzer, *supra* note 1, at 183 (arguing that initial disclosure rules are necessary precisely for their effect of curtailing excess discovery).

<sup>208</sup> Amendments to Rules, *supra* note 201, at 511.

<sup>209</sup> *Id.* at 511. In contrast, there is an argument that initial disclosure rules compensate for the bar to information exchange that is the adversarial process. See Brazil, *supra* note 185, at 1304, 1349. Contrary to being at odds with the adversarial civil litigation system, initial disclosures correct for an inherent flaw. See *id.*

<sup>210</sup> See Amendments to Rules, *supra* note 201, at 511.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See *id.*; see also MODEL RULES OF PROF’L CONDUCT Preamble (stating that a lawyer’s duty as an advocate is to zealously assert a client’s position within the rules of the adversary system).

<sup>214</sup> Bell, *supra* note 49, at 5 (expressing concern that automatic disclosure requirements will undermine work-product and attorney-client privileges). *But see* FED. R. CIV. P. 26(a) advisory committee’s note (1993) (clarifying that automatic disclosure requirements apply only to documents not protected as work-product or otherwise privileged).

ambiguity as to exactly what and how much information need be disclosed initially.<sup>215</sup>

A pervasive concern that runs through the criticisms of initial disclosures is that parties do not know exactly what they “may use” to support their claims or defenses.<sup>216</sup> Therefore, they have difficulty determining what or how much information to disclose.<sup>217</sup> Uncertainty as to what information is subject to an initial disclosure obligation is arguably part-and-parcel of a notice pleading system.<sup>218</sup> The contention is that pleadings which merely give the opposing party fair notice of the nature of the impending legal claim do not provide sufficient facts to guide the initial disclosure of relevant information.<sup>219</sup>

### B. *Specificity in Pleadings: A Foundation for Initial Disclosures*

The view that notice pleadings provide insufficient foundation to support significant use of initial disclosures manifested itself in practice.<sup>220</sup> Jurisdictions with the strictest fact-based pleading standards also typically have broad initial disclosure requirements.<sup>221</sup> For instance, many civil law countries have fact-based pleading standards and also place emphasis on initial disclosures as principal discovery tools.<sup>222</sup> In Germany, for example, complaints must include a statement of the factual basis of a claim.<sup>223</sup> Similarly, Spanish courts require litigants to include a description of the factual background underlying a claim at the pleading stage.<sup>224</sup> In a related vein (and likely made possible by specific information provided in fact-based pleadings), litigants in German and

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<sup>215</sup> See Bell, *supra* note 49, at 5 (asserting that an automatic disclosure rule would require counsel to turn over documents harmful to a client’s case).

<sup>216</sup> FED. R. CIV. P. 26(a)(1)(A) (requiring initial disclosure of documents that a party “may use” to support its claims or defenses); Subrin, *supra* note 123, at 39–40.

<sup>217</sup> See Subrin, *supra* note 123, at 39–40.

<sup>218</sup> *Id.* at 46 (“Notice pleading does not give much guidance for discovery. If one wants a core exchange of information . . . more specific pleading is necessary.”).

<sup>219</sup> *Id.* The drafters of the 1993 version of Rule 26(a)(1) attempted to cure the problem posed by notice pleadings by mandating initial disclosure only of information “*alleged with particularity* in the pleadings.” FED. R. CIV. P. 26(a) advisory committee’s note (1993) (emphasis added) (internal quotation marks omitted). This language, however, did not survive the 2000 amendment of the federal initial disclosure rule. See FED. R. CIV. P. 26(a) advisory committee’s note (2000). Thus, notice pleadings provide little guidance as to what information a party *may use* in litigation. WRIGHT & MILLER, *supra* note 39, § 2053.

<sup>220</sup> See FINAL REPORT, *supra* note 17, Appendix A, at 2.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* The American Federal Rules mandate only that a pleading contain “a short and plain statement” showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a)(i).

Spanish courts supplement pleadings with initial disclosure of documents that speak to factual assertions in the pleadings.<sup>225</sup>

In contrast, initial disclosures assume a relatively minor role in document discovery in the American judicial system.<sup>226</sup> The American system's reduced emphasis on initial disclosure as a principal document discovery vehicle is likely related to its liberal, notice-pleading tradition.<sup>227</sup> Until recently, pleading standards in American federal courts were governed by the 1957 case of *Conley v. Gibson*, in which the United States Supreme Court held that a complaint alleging general failure of a union to adequately protect African-American members from discriminatory discharge was sufficient although it contained "no set of facts."<sup>228</sup> Pleadings, according to the *Conley* Court, were intended only to provide the opposing party with fair notice of the plaintiff's claim and its basis, not its factual specifics.<sup>229</sup>

When the federal initial disclosure rule was codified in the Rules in 1993 and amended in 2000, *Conley* and its "no set of facts" pleading standard governed.<sup>230</sup> Consequently, critics were concerned that such a

<sup>225</sup> FINAL REPORT, *supra* note 17, Appendix A, at 2.

<sup>226</sup> See FED. R. CIV. P. 26(a) advisory committee's note (2000). See *infra* notes 105–119 and accompanying text for a discussion of the history of the federal initial disclosure rule.

<sup>227</sup> *Twombly*, 550 U.S. at 562–63 (abrogating *Conley*); see FINAL REPORT, *supra* note 17, at 5, 7–11 (recommending that fact-based pleading replace notice pleading as a predicate to recommending increased use of initial disclosures as a vehicle for actual and near-total production of discoverable documents); see also *Conley*, 355 U.S. at 47.

<sup>228</sup> 355 U.S. at 45–48. In *Conley*, a class of African-American railroad workers brought suit against their employment union. *Id.* at 42–43. The petitioners alleged that the union did nothing to protect them in face of the demotion or discharge of forty-five African-American workers. *Id.* at 43.

<sup>229</sup> *Id.* at 47. The *Conley* Court bolstered its decision by pointing to the ensuing discovery period and identifying it as the appropriate time to narrow the disputed issues. *Id.* at 47–48. The Court's reliance on the discovery process as the time to focus the claim by narrowing the disputed facts and issues reflected a difference in the times. Compare *id.* (demonstrating comfort in allowing litigants to pass into the discovery phase), with *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (passing into discovery requires well-pleaded facts lending plausibility to the claim), and *Twombly*, 550 U.S. at 559 (finding it necessary to avoid the expense of unwarranted discovery). The *Conley* Court could be so carefree in its decision to push the narrowing of disputed issues off into the discovery phase because, when *Conley* was decided, discovery was not as costly or time-consuming as it is today. See *Schwarzer*, *supra* note 1, at 178 (noting that concerns about discovery arose in the 1970s). Therefore, the need to narrow the issues in dispute from the pleading stage in an effort to conserve resources in the subsequent discovery period was less of a concern to the Supreme Court. See *Conley*, 355 U.S. at 47–48; *Schwarzer*, *supra* note 1, at 178. See also the discussion of *Hickman v. Taylor*, 329 U.S. 495, 501 (1947), *supra* notes 53–54 and accompanying text.

<sup>230</sup> See *Conley*, 355 U.S. at 45, 47–48 (holding that, unless it appeared beyond doubt that a plaintiff could prove "no set of facts," a complaint should not be dismissed). But see *Twombly*, 550 U.S. at 562–63 (noting that the "no set of facts" language of *Conley* had either not always been interpreted literally or was "questioned, criticized, and explained away").

lax pleading standard would fail to provide parties sufficient information to support an initial disclosure obligation.<sup>231</sup> That concern, in turn, led to today's narrow initial disclosure requirement.<sup>232</sup>

The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, however, fundamentally changed the pleading requirements in American courts.<sup>233</sup> In *Twombly*, the Supreme Court abrogated the "no set of facts" pleading standard of *Conley* and held that pleadings must set forth sufficient facts to demonstrate the plausibility of the conduct alleged.<sup>234</sup> The decision centered on a complaint filed by representatives of a class of local telephone and internet service providers alleging defendants' violation of the Sherman Antitrust Act.<sup>235</sup> In their complaint, the plaintiffs failed to plead to any specific facts, but instead merely mimicked the words of the statute.<sup>236</sup> The Supreme Court found this minimal pleading insufficient and held that enough facts must be included in a complaint to state a plausible claim.<sup>237</sup> Mere allegations of wrongdoing without any specific evidence would not survive a motion to dismiss.<sup>238</sup>

<sup>231</sup> WRIGHT & MILLER, *supra* note 39, § 2053.

<sup>232</sup> *Id.*

<sup>233</sup> *Twombly*, 550 U.S. at 562–63, 570. Compare *id.* (maintaining that the Supreme Court was not mandating heightened fact pleading of specifics), with A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) ("Notice pleading is dead.").

<sup>234</sup> 550 U.S. at 562–63, 570.

<sup>235</sup> *Id.* at 549, 553.

<sup>236</sup> *Id.* at 551, 553–54. The complaint alleged unlawful contract, combination, or conspiracy, and further pointed only to general parallel conduct to demonstrate the existence of an anti-trust conspiracy. *Id.*

<sup>237</sup> *Id.* at 570.

<sup>238</sup> *Id.* at 562–63, 570. As was the *Conley* Court before it, the *Twombly* Court was influenced in its decision regarding the sufficiency of pleadings by the impending discovery. *Id.* at 559; *Conley*, 355 U.S. 47–48. But, by its 2007 decision in *Twombly*, the Court's view of discovery had changed since the days of its 1957 decision in *Conley*. See *Twombly*, 550 U.S. at 559; *Conley*, 355 U.S. 47–48 (submitting that disputed issues are appropriately narrowed during discovery). The Court was now concerned with the threat of discovery costs, particularly in antitrust litigation, which is notorious for expensive and protracted discovery. *Twombly*, 550 U.S. at 558–59 (citing *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)). Thus, if the door to discovery—with its associated cost and delay—was to open, parties must state a plausible justification. *Id.* at 570.

The dissent in *Twombly* held a different view on the ease with which parties should be permitted to cross into discovery. See *id.* at 577 (Stevens, J., dissenting). They felt that fear of the burdens of discovery should not justify raising the entry bar. See *id.* at 583, 593 n.13 ("The potential for 'sprawling, costly, and hugely time-consuming' discovery is no reason to throw the baby out with the bathwater.") (internal citation omitted). The dissent thought discovery could be controlled through case management at the trial level. *Id.* at 573. Compare *id.* at 596 (Stevens, J., dissenting) (chiding the majority for demonstrating lack of confidence in trial judge's ability to control discovery), with *id.* at 560 n.6 (quoting Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)) (expressing the view that judicial officers cannot know enough about the case to adequately control discovery).

In sum, there are arguments for and against use of initial disclosures in discovery.<sup>239</sup> Opponents of initial disclosures have expressed concern that notice pleadings fail to provide sufficient foundation to support initial disclosures.<sup>240</sup> Although American courts have traditionally permitted notice pleadings, the Supreme Court in *Twombly*, imposed heightened pleading standards on litigants in federal court.<sup>241</sup>

#### IV. REFORMING THE FEDERAL INITIAL DISCLOSURE RULE IN A POST-*TWOMBLY* ERA AND THE NATIONAL APPLICABILITY OF THE MASSACHUSETTS DISCOVERY PILOT PROGRAM

This Part argues for reform of the federal initial disclosure rule.<sup>242</sup> It asserts that plausible pleadings provide sufficient basis to support increased use of initial disclosures in the federal discovery system.<sup>243</sup> It specifically argues for greater actual production of documents as initial disclosures, but not the use of initial disclosures as a principal document discovery tool.<sup>244</sup>

Section A asserts that *Bell Atlantic Corp. v. Twombly* challenges the fundamental assumption that pleadings in the American judicial system

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Two years after the Supreme Court rendered its decision in *Twombly*, it expressly extended the plausibility standard to pleadings in all civil actions. *Iqbal*, 129 S. Ct. at 1953. In its 2009 decision in *Ashcroft v. Iqbal*, the Supreme Court held that a plaintiff's complaint did not surpass the plausibility threshold and should be dismissed. *See id.* at 1954. The plaintiff in *Iqbal* sued multiple federal officials, including Attorney General John Ashcroft and Federal Bureau of Investigations Director John Mueller, for violating his rights under the First and Fifth Amendments stemming from the alleged existence of a policy of "harsh conditions of confinement on account of [] race, religion, or national origin." *Id.* at 1942. The Court held that the allegations in the complaint were bare and conclusory assertions, unsupported by facts lending plausibility to the claim. *Id.* at 1949–50. In light of the holding in *Twombly*, the complaint failed to meet the requisite pleading standard. *Id.* at 1953–54.

In considering whether the complaint would survive a motion to dismiss, the *Iqbal* Court, like the *Twombly* and *Conley* Courts, was influenced by the discovery that would ensue if litigation was allowed to go forward. *Id.* at 1953; *see Twombly*, 550 U.S. at 559; *Conley*, 355 U.S. at 47–48. The Court decided that a complaint which does not state a plausible claim should not "unlock the doors of discovery." *Iqbal*, 129 S. Ct. at 1950; *see, e.g.,* *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2719 (2009) (recognizing that discovery tactics may be abusive and that judges must prevent unwarranted, overbroad discovery). Justice Breyer expressed his alternative view that discovery can be sufficiently limited by means other than heightened pleading standards. 129 S. Ct. at 1961–62 (Stevens, J., dissenting) (opining that lower courts can structure discovery in ways that avoid undue burdens).

<sup>239</sup> *See supra* notes 184–219 and accompanying text.

<sup>240</sup> *See supra* notes 216–219 and accompanying text.

<sup>241</sup> *See supra* notes 226–238 and accompanying text.

<sup>242</sup> *See infra* notes 251–309 and accompanying text.

<sup>243</sup> *See infra* notes 251–274 and accompanying text.

<sup>244</sup> *See infra* notes 275–309 and accompanying text.

provide insufficient foundation to support the use of initial disclosures.<sup>245</sup> It then makes the case that plausible pleadings are sufficiently specific to support increased use of initial disclosures.<sup>246</sup> Section B then considers the question of whether plausible pleadings are sufficiently specific to support initial disclosures to the extent envisioned in the Massachusetts Discovery Pilot.<sup>247</sup> It advocates for actual production as initial disclosure of documents that support facts necessary for plausibility.<sup>248</sup> The Section further asserts, however, that even plausible pleadings may not be sufficiently specific to support the use of initial disclosures as a principal document discovery vehicle.<sup>249</sup> Therefore, although aspects of Massachusetts's reform initial disclosure rule should be adopted nationally, the Discovery Pilot model on the whole is too extreme to warrant national replication.<sup>250</sup>

*A. Initial Disclosures and Pleading Standards: Recalibrating the Relationship Post-Twombly*

The time is ripe for reform of the federal initial disclosure rule to impose a heightened initial disclosure obligation.<sup>251</sup> Now is an opportune time for reform because the Supreme Court, in *Twombly*, raised the pleading requirements in American courts.<sup>252</sup> In announcing the plausibility pleading requirement, the Supreme Court's *Twombly* decision affected more than just the requisite pleading standards in the American civil justice system.<sup>253</sup> It challenged the foundation underlying one of the principal arguments against the federal initial disclosure requirement: that notice pleadings provide insufficient foundation to

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<sup>245</sup> See *infra* notes 251–255 and accompanying text.

<sup>246</sup> See *infra* notes 256–274 and accompanying text.

<sup>247</sup> See *infra* notes 275–309 and accompanying text.

<sup>248</sup> See *infra* notes 275–295 and accompanying text.

<sup>249</sup> See *infra* notes 296–309 and accompanying text.

<sup>250</sup> See *infra* notes 296–309 and accompanying text.

<sup>251</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63, 570 (2007); Subrin, *supra* note 123, at 39–40 (arguing that notice pleadings provide insufficient support to base initial disclosures).

<sup>252</sup> See *Twombly*, 550 U.S. at 562–63, 570.

<sup>253</sup> See FED. R. CIV. P. 26(a)(1) advisory committee's note (1993) (noting the link between specificity in pleadings and usefulness of initial disclosure); *Twombly*, 550 U.S. at 562–63, 570. *Twombly* also reflected the majority's view on discovery and its interest in fostering efficiencies and avoiding excessive costs. 550 U.S. at 559.



support initial disclosure.<sup>254</sup> The Supreme Court's introduction of a plausible pleading standard in *Twombly* undercut this argument.<sup>255</sup>

Newly required plausible pleadings support increased use of initial disclosures.<sup>256</sup> Initially, this is because plausible pleadings are more specific than notice pleadings.<sup>257</sup> Indeed, the *Twombly* Court did not mandate *specific* but *plausible* pleadings.<sup>258</sup> There is, however, a direct relationship between plausibility and specificity.<sup>259</sup> A pleading is only plausible if it includes enough factual information to plausibly suggest wrongful conduct.<sup>260</sup> Therefore, the *Twombly* Court's required inclusion of additional facts necessarily lends specificity, as well as plausibility, to a claim.<sup>261</sup>

The argument that specific (i.e. plausible) pleadings support increased use of initial disclosures next rests on a fundamental assumption about the relationship between the specificity of pleadings and usefulness of initial disclosures.<sup>262</sup> The assumption is that initial disclosures are a less effective discovery tool when pleadings are less specific.<sup>263</sup> Conversely, initial disclosures may be more useful when plead-

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<sup>254</sup> See *Twombly*, 550 U.S. at 562–63, 570. Critics of initial disclosures argue that parties served with notice pleadings cannot know what they may use to support their claims or defenses. Subrin, *supra* note 123, at 39–40.

<sup>255</sup> See *Twombly*, 550 U.S. at 570; see also Daniel E. Troy, *Seize the Opportunity—Reduce the Costs and Burdens of Our Current Justice System*, METRO. CORP. COUNS., July 2010, at 1, 20 (finding plausible pleadings sufficiently focused to eliminate the need for defendants to preserve massive amounts of potentially discoverable information).

<sup>256</sup> Cf. Subrin, *supra* note 123, at 39–40, 46.

<sup>257</sup> See *Twombly*, 550 U.S. at 558, 570; BLACK'S LAW DICTIONARY 1271 (9th ed. 2004) (stating that notice pleadings do not require complete factual detail).

<sup>258</sup> See *Twombly*, 550 U.S. at 556.

<sup>259</sup> See *id.* at 558, 570 (requiring plaintiffs to allege additional facts to surpass the plausibility threshold).

<sup>260</sup> *Id.*

<sup>261</sup> See *id.* at 552, 558, 562–63, 570.

<sup>262</sup> See FED. R. CIV. P. 26(a)(1) advisory committee's note (1993). The Advisory Committee responsible for the 1993 amendments to Rule 26(a)(1) recommended holding a Rule 26(f) conference early in the pre-trial phase when the allegations in the complaint are stated broadly. *Id.* When the pleadings provided insufficient foundation, a Rule 26(f) meeting would facilitate the meaningfulness and usefulness of initial disclosures. *Id.* The meeting would thereby compensate for the lack of specificity in the pleadings and the related lack of grounds on which to base decisions concerning initial disclosure. See *id.*; see also Schwarzer, *supra* note 1, at 180 (“The disclosure system departs from the philosophy underlying notice pleading . . .”).

<sup>263</sup> See, e.g., Rebecca Love Kourlis, Jordan M. Singer, & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 256 (2010) (stating that discovery is ill-equipped to efficiently narrow issues in dispute, particularly when the pleadings do not provide a sufficiently focused framework); Subrin, *supra* note 123, at 47 (observing that notice pleading does not give much guidance for discovery).

ing standards are more specific.<sup>264</sup> More specific pleadings can lead to greater reliance on initial disclosures as document discovery tools because more specific pleadings include more factual detail.<sup>265</sup> Thus, parties have a greater opportunity to gain an early understanding of the principal issues in dispute and, accordingly, what they *may use* to advance their claims or defenses.<sup>266</sup> Accordingly, more specific pleadings promote the early exchange of core information as initial disclosures.<sup>267</sup>

Evidence of the relationship between specificity in pleading and the usefulness of initial disclosures is apparent in the disparate role of initial disclosures in jurisdictions with different pleading standards.<sup>268</sup> In fact-based pleading jurisdictions, as in many civil law countries, initial disclosures play a greater role in discovery.<sup>269</sup> In the United States, with its notice pleading system characterized until recently by the Supreme Court's decision in *Conley*, the breadth and potential usefulness of initial disclosures has been minimized since even before their inclusion in the federal discovery rules.<sup>270</sup>

Thus, at the extreme ends of the notice to fact-based pleading spectrum, initial disclosures assume little and great usefulness respectively.<sup>271</sup> This practical evidence indicates that there is a correlation between the usefulness of initial disclosures and pleadings of greater specificity.<sup>272</sup> Therefore, together with the movement away from pure notice to plausible pleading described in *Twombly*, so too should the

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<sup>264</sup> FED. R. CIV. P. 26(a)(1) advisory committee's note (1993) ("The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the [initial disclosure] of potential witnesses and types of documentary evidence.").

<sup>265</sup> Cf. Subrin, *supra* note 123, at 46 (finding notice pleadings insufficient to support initial disclosures).

<sup>266</sup> See *id.*

<sup>267</sup> See *id.*; see also WRIGHT & MILLER, *supra* note 39, § 2053 (observing that "specific pleadings . . . promote disclosure").

<sup>268</sup> See *supra* notes 220–232 and accompanying text (discussing the greater role of initial disclosures in fact-pleading jurisdictions).

<sup>269</sup> See *supra* notes 220–225 and accompanying text.

<sup>270</sup> See *supra* notes 226–232 and accompanying text.

<sup>271</sup> Compare FED. R. CIV. P. 26(a)(1) advisory committee's note (2000) (narrowing the scope of the federal initial disclosure rule), with FINAL REPORT, *supra* note 17, Appendix A, at 2 (describing increased use of initial disclosures in fact-pleading jurisdictions).

<sup>272</sup> FINAL REPORT, *supra* note 17, Appendix A, at 2. That there is a relationship between the specificity of pleadings and the usefulness of initial disclosures as a principal tool of discovery is also implicit in the Final Report. See *id.* at 5. The Final Report not only recommends the increased use of initial disclosures, but further advocates for the imposition of fact-based as opposed to notice pleading standards. *Id.*

role of initial disclosures in the federal discovery scheme change.<sup>273</sup> In conjunction with the imposition of a heightened pleading standard post-*Twombly*, the federal discovery scheme should place greater emphasis on initial disclosures as a means to achieve cost savings and efficiencies in discovery.<sup>274</sup>

B. *The Middling Path: An Argument for a Federal Initial Disclosure Obligation That Embraces Increased Actual Production but Not the Use of Initial Disclosures as a Principal Document Discovery Tool*

The federal initial disclosure rule should be amended to require increased actual production of documents as initial disclosures.<sup>275</sup> Specifically, the rule should mandate actual production as initial disclosures of documents that substantiate plausibly pled facts.<sup>276</sup>

The plausible pleading standard provides increased opportunity for actual production of discoverable information as initial disclosure because it requires the pleader to narrow and focus the allegations by

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<sup>273</sup> See *Twombly*, 550 U.S. at 559, 562–63; Subrin, *supra* note 123, at 46 (stating that “more specific pleading is necessary” to guide discovery).

<sup>274</sup> See FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993) (“[C]ertain basic information [] is needed in most cases to prepare for trial or make an informed decision about settlement.”); FINAL REPORT, *supra* note 17, at 8.

<sup>275</sup> See BLS Pilot Project, *supra* note 18, at 2.

<sup>276</sup> See FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993) (expecting more meaningful initial disclosures when the pleadings are more specific and clear); BLS Pilot Project, *supra*, note 18, at 2. Much in this analysis resembles the requirement to initially disclose information “alleged with particularity,” as under the 1993 version of the federal initial disclosure rule. FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993). The principal difference between the initial disclosures mandated under the 1993 rule and those advanced in this Note is that the 1993 rule mandated initial disclosure of information relevant to disputed facts “alleged with particularity in the pleadings.” FED. R. CIV. P. 26(a)(1)(A) (1993) (amended 2000, 2006). This Note advocates for actual production of discoverable documents that substantiate facts that put a complaint over the plausibility threshold. See *supra* notes 275–295 and accompanying text; see also FINAL REPORT, *supra* note 17, at 7–8.

Tying initial disclosures to facts that are plausibility pled addresses one of the principal concerns of critics who opposed the *particularity* standard under the 1993 federal initial disclosure rule. See Subrin, *supra* note 123, at 39. Critics of the 1993 rule argued that what constituted a fact *plead with particularity* would be unclear in a notice pleading system; thus, litigants would have no guidance as to what information to disclose initially. See *id.* Plausibility requirements provide that guidance: any fact that makes a claim more plausible than not should be accompanied by actual production of documents as initial disclosures. *But cf. id.* Therefore, if the complaint is held to be sufficient then it should necessarily be followed shortly thereafter with actual documents as initial disclosures. *But cf. id.*

including facts sufficient to lend plausibility to a claim.<sup>277</sup> This localization is conducive to the increased use of initial disclosure as a vehicle for actual production of discoverable documents.<sup>278</sup> Parties initiating litigation, by virtue of having written a plausible complaint, have necessarily gathered sufficient information at the outset to state a plausible claim.<sup>279</sup> Because such information would have informed the drafting of the complaint, it should be readily available to actually produce as initial disclosure.<sup>280</sup> In fact, it seems wasteful—as the current Federal Rules permit—for a plaintiff to have conducted the requisite research to state a plausible claim and then merely to turn over a statement describing the category and location of implicated documents to the adversary.<sup>281</sup> Doing so adds “a further layer” of undue burden and expense to the discovery process.<sup>282</sup> It requires the opposing party to submit a request for the production of documents, which carries with it both time and cost implications.<sup>283</sup> Pigeon-holing an adversary into this position should not be permitted; where possible, it is more efficient to circumvent the middle man that is a request for document production.<sup>284</sup> This will result in time and cost savings.<sup>285</sup>

In turn, plausible complaints allow defendants to focus their defensive efforts, gathering the type and amount of information necessary to refute the more precise allegations.<sup>286</sup> Plausible pleadings also

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<sup>277</sup> Cf. FINAL REPORT, *supra* note 17, at 5 (recommending fact-based as opposed to notice pleadings for their potential to highlight the dispositive issues from the outset of litigation).

<sup>278</sup> Cf. *id.*

<sup>279</sup> See *Twombly*, 550 U.S. at 556–57; BLS Pilot Project, *supra* note 18, at 2.

<sup>280</sup> See FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993) (expecting more meaningful initial disclosures when the pleadings are more specific and clear).

<sup>281</sup> But cf. FED. R. CIV. P. 26(a)(1)(A).

<sup>282</sup> See Amendments to Rules, *supra* note 201, at 510 (Scalia, J., dissenting).

<sup>283</sup> FED. R. CIV. P. 34(b)(2)(A) (allowing thirty days to respond to a request for document production); see *Twombly*, 550 U.S. at 558–59 (noting the expense of discovery in antitrust litigation).

<sup>284</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993) (indicating that initial disclosures can result in time and cost savings); see also *Solis-Alarcon v. United States*, 514 F. Supp. 2d 185, 189 (D.P.R. 2007) (observing that parties typically obtain documents through Rule 34 requests for document production or other informal means).

<sup>285</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s note (1993). Even if these savings are only marginal, they are still time and cost savings. Cf. *id.*

<sup>286</sup> See FINAL REPORT, *supra* note 17, at 7–9; see also Troy, *supra* note 255, at 20 (asserting that plausibility pleadings are sufficiently focused such that the need for defendants to preserve significant amounts of potentially discoverable information is eliminated).

Judges should monitor the parties to ensure that they do not use initial disclosures to overwhelm and overburden their adversary with paperwork. See Schwarzer, *supra* note 1, at 178 (reporting that discovery tools may be used abusively to inundate opponents with

lessen the risk to defendants of turning over potentially incriminating information and significantly aiding the adversary.<sup>287</sup> If plausible facts are included in the complaint, it is because the plaintiff already has evidence of the specific conduct alleged.<sup>288</sup> Therefore, any responsive initial disclosures are unlikely to reveal to a plaintiff much that they did not already know.<sup>289</sup> An obligation to disclose incriminating evidence in this context would increase the likelihood of settlement and, thereby, avoid trial.<sup>290</sup>

Given that facts lending plausibility to a claim set some reasonable boundaries by more tightly pinpointing the precise wrong alleged,<sup>291</sup> parties have more guidance as to what documents to produce as initial disclosures.<sup>292</sup> It is further more reasonable to expect that parties could actually produce more information initially given the plausible confines of the allegation.<sup>293</sup> Actually disclosing information that specifically substantiates plausibly pled facts is administratively feasible; requiring disclosure of potentially massive amounts of information given the broad and amorphous contours of a notice pleading is not.<sup>294</sup>

Thus, the federal initial disclosure rule should follow suit and adopt an actual production requirement as recommended in the Final Report and piloted in the Massachusetts Discovery Pilot.<sup>295</sup>

The Federal Rules should not, however, assume the Final Report and Massachusetts Discovery Pilot's approach in conceiving of initial

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more information than necessary). Documents exchanged as initial disclosures should speak precisely to the plausible facts alleged in the complaint. *See id.* A defendant's initial disclosures should be provided, tit-for-tat, in response to the plaintiffs' initial disclosures. *See* FINAL REPORT, *supra* note 17, at 8; Schwarzer, *supra* note 1, at 178.

<sup>287</sup> *But see* Amendments to Rules, *supra* note 201, at 511 (Scalia, J., dissenting) (arguing that initial disclosures result in parties turning over incriminating information to their adversaries).

<sup>288</sup> *But see id.*

<sup>289</sup> *But see id.*

<sup>290</sup> *See* FINAL REPORT, *supra* note 17, at 8.

<sup>291</sup> *See id.*; *see also* *Twombly*, 550 U.S. at 556–57 (requiring that a pleading place the alleged wrongful conduct in “some setting” to lend plausibility to a claim).

<sup>292</sup> *See Twombly*, 550 U.S. at 565 n.10; BLS Pilot Project, *supra* note 18, at 2; *cf. Twombly*, 550 U.S. at 560 n.6 (finding that allegations of unspecified unlawful conduct, purportedly occurring between “legions” of unspecified management-level employees at an uncertain point over a seven-year span would lead to “sprawling, costly, and hugely time-consuming” discovery).

<sup>293</sup> *See* FED. R. CIV. P. 26(a)(1) advisory committee's note (1993) (tying breadth of initial disclosures to pleading specificity).

<sup>294</sup> *See id.*; Subrin, *supra* note 123, at 38–39 (arguing that vague pleadings will lead to overproduction).

<sup>295</sup> *See* BLS Pilot Project, *supra* note 18, at 2; FINAL REPORT, *supra* note 17, at 7–8.

disclosures as a principal document discovery tool.<sup>296</sup> Although plausible pleadings provide increased opportunity for actual production of discoverable information as initial disclosures, pleadings may still range in degree of specificity.<sup>297</sup> Some may fall toward the more specific end of the spectrum, tightly framing the alleged wrongful act.<sup>298</sup> Other pleadings, however, might only barely cross the *Twombly* Court's plausibility threshold.<sup>299</sup>

Thus, even plausible pleadings may not be sufficiently specific to support use of initial disclosure as a principal means of document discovery.<sup>300</sup> Litigants may still not have enough by way of guidance to support initial disclosure of requisite documents beyond those implicated specifically in the pleadings.<sup>301</sup> They may not yet know all that they *may use* to support any claims, counter-claims, or defenses.<sup>302</sup> It would be unrealistic and unduly burdensome to expect parties to turn over information as initial disclosures beyond that which substantiates facts plausibly alleged.<sup>303</sup>

Without sufficient foundation, it would be impracticable to impose a blanket national rule in the image of the Discovery Pilot Project, which imagines near-complete initial disclosure of all discoverable documents with only limited subsequent discovery.<sup>304</sup> Because plausibility pleadings do not always provide that requisite foundation, the Massachusetts Discovery Pilot model is likely too ambitious in its entirety to warrant national replication.<sup>305</sup>

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<sup>296</sup> See BLS Pilot Project, *supra* note 18, at 3; FINAL REPORT, *supra* note 17, at 9.

<sup>297</sup> See *Twombly*, 550 U.S. at 570 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim . . .”).

<sup>298</sup> See *id.*

<sup>299</sup> See *id.* (holding that the actual complaint filed in *Twombly* failed to “nudge” the plaintiffs’ claim across the threshold from insufficient conceivability to required plausibility).

<sup>300</sup> Cf. BLS Pilot Project, *supra* note 18, at 3.

<sup>301</sup> See Subrin, *supra* note 123, at 39–40.

<sup>302</sup> See *id.*; cf. BLS Pilot Project, *supra* note 18, at 2, 3 (recommending increased use of initial disclosures because potentially dispositive issues are established at the outset).

<sup>303</sup> See WRIGHT & MILLER, *supra* note 39, § 2053 (noting the particular burdens on large, corporate defendants of having to disclose massive amounts of information).

<sup>304</sup> See Subrin, *supra* note 123, at 39–40; cf. BLS Pilot Project, *supra* note 18, at 3.

<sup>305</sup> See *Twombly*, 550 U.S. at 570 (requiring plausible pleadings); BLS Pilot Project, *supra* note 18, at 2, 3; Subrin, *supra* note 123, at 39–40. Because the Massachusetts Discovery Pilot only ended in December 2010, it is still too early to know with certainty whether the program warrants wholesale national replication. BLS Pilot Project at 1. Discovery Pilot participants were asked to provide feedback on their experiences in the program. *Id.* at 3. The next step, then, will be to evaluate the Discovery Pilot in light of participant feedback and reflect on any perceived benefits and/or disadvantages. See *id.*

But it is worth awaiting news on this effort in particular to determine whether even further reforms of the federal initial disclosure are justified.<sup>306</sup> Not only did the Massachusetts Discovery Pilot test the initial disclosure reform recommendations advanced in the Final Report in practice, but it did so in a setting in which achieving greater efficiencies and cost savings is needed.<sup>307</sup> Both the recent Federal Judicial Center and RAND Institute studies indicate the particularly high costs of discovery in complex, commercial matters like those that appear before the BLS.<sup>308</sup> Therefore, if successful, the Discovery Pilot model may inform federal discovery reform efforts.<sup>309</sup>

#### CONCLUSION

Discovery in the American civil justice system is often prohibitively time-consuming and expensive. Therefore, discovery reform is warranted. An area particularly ripe for reform is the federal initial disclosure rule. The Joint Project advanced an alternative initial disclosure scheme which the Massachusetts Superior Court piloted in practice. Because of the relationship between specificity in pleadings and usefulness of initial disclosures, reform of the federal initial disclosure rule is particularly timely given the Supreme Court's introduction of the plausibility pleading standard in *Bell Atlantic Corp. v. Twombly*. Although the Massachusetts Discovery Pilot program is likely too ambitious in conceiving of initial disclosures as a principal document discovery tool to warrant wholesale national replication, the federal initial disclosure rule should be amended to include an actual production requirement.

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<sup>306</sup> See *id.* at 2, 3.

<sup>307</sup> See Administrative Directive, *supra* note 173; LEE & WILLGING, *supra* note 66, at 36; MAJOR COMPANIES, *supra* note 66, at 2–4.

<sup>308</sup> See Administrative Directive, *supra* note 173; LEE & WILLGING, *supra* note 66, at 36; MAJOR COMPANIES, *supra* note 66, at 2–4.

<sup>309</sup> See BLS Pilot Project, *supra* note 17, at 2, 3.

