

**GIVE IT TO ME UNIFORMLY: WEST VIRGINIA  
WANTS INITIAL DISCLOSURE**

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I. INTRODUCTION

Showing your playbook to the opposing coach is unthinkable and careless, right? Most would think so, but in the context of the modern adversarial system, it’s required. Unlike football, the name of the game in filing lawsuits is a quick, painless resolution. In other words, get rid of your quarterback sneaks and let’s see who wins. Enter Federal Rule of Civil Procedure 26(a)—initial disclosure.<sup>1</sup>

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

Federal Rule of Civil Procedure 26(a) (“initial disclosure”) requires parties to divulge categories of preliminary information to the opposing party without the opposing party requesting the information.<sup>2</sup> This mandatory exchange saves parties time and money that would otherwise be spent requesting the information.<sup>3</sup> Initial disclosure exists in the Federal Rules of Civil Procedure (“Federal Rules”) but not in the West Virginia Rules of Civil Procedure (“West Virginia Rules”). This Note addresses why the Federal Rules have adopted initial disclosure,<sup>4</sup> why the West Virginia Rules have not,<sup>5</sup> and why West Virginia should now adopt the Federal Rule for initial disclosure.<sup>6</sup>

Before diving into the debate, this Part of this Note provides a brief synopsis of the initial disclosure rule and a birds-eye view of some tensions the rule poses. The brief synopsis serves to familiarize the reader with terminology and themes that recur throughout this Note.

Part II chronicles the history of the Federal Rules’ initial disclosure provisions and the history of the West Virginia Rules. Beginning with a look at the opt-in era of initial disclosure, Part II discusses the Federal Rules’ transition to mandatory initial disclosure. Next, Part II explores the West Virginia Rules’ history of tracking the Federal Rules and explains reasons for West Virginia’s deviation from the Federal Rules. The history of both the Federal and West Virginia Rules serve to bolster the argument for West Virginia’s realignment with the Federal Rules in Part V.

Part III begins by addressing initial disclosure’s tensions with the adversarial system. Tensions with the adversarial system are analyzed and pitted against the purposes of the initial disclosure—to save parties time and money. A look at the rule’s tensions with the adversarial system and its purpose of efficiency is reconciled in favor of initial disclosure and thus in favor of West Virginia’s adoption of an initial disclosure rule.

Part IV argues that the purposes from Part III—saving parties time and money and striving for efficiency—have been achieved in the federal system. This Part examines studies that have evaluated initial disclosure’s effectiveness. The results of these studies are shown to support initial disclosure’s purpose of efficiency by saving parties time and money. Showing that the initial disclosure rule’s purposes have been achieved should encourage adoption of the rule in West Virginia.

Part V introduces the survey conducted for this Note and explains the methods employed to get responses from judges statewide. This Part explains the state and federal judge questionnaire formats and then discusses and

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

<sup>3</sup> *See infra* Parts III.B, IV.A.

<sup>4</sup> *See infra* Part II.A.

<sup>5</sup> *See infra* Part II.B.

<sup>6</sup> *See infra* Parts III–V.

evaluates the responses from each questionnaire. The results of these questionnaires suggest that the West Virginia Supreme Court should amend the West Virginia Rules to include initial disclosure modeled after the Federal Rules.<sup>7</sup>

Part VI of this Note proposes that West Virginia adopt initial disclosure based on West Virginia's long history of tracking the Federal Rules, the prescribed and proven purposes of initial disclosure on the federal and state level, and what judges across the state have recommended.

In sum, this Note addresses West Virginia's deviation from the Federal Rules and urges West Virginia to get on board with initial disclosure for three reasons: initial disclosure has proven its purposes on the federal level,<sup>8</sup> West Virginia has historically followed the Federal Rules,<sup>9</sup> and West Virginia judges recommend adopting initial disclosure.<sup>10</sup>

A. *The Initial Disclosure Rule Summarized*

Federal Rule 26(a) requires parties to automatically disclose to opposing parties four categories of information that would normally be requested from parties during the more expansive discovery process.<sup>11</sup> Without initial disclosure, parties must request the information they seek. The first category of required initial disclosures includes names, addresses, and phone numbers of individuals "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses."<sup>12</sup> Along with listing each individual likely to have discoverable information, the disclosing party is also required to describe the subjects of the discoverable information.<sup>13</sup> The second category includes a copy or description of all documents and tangible things that the disclosing party possesses that may support its claims or defenses.<sup>14</sup> The third category includes a "computation of each category of damages claimed by the disclosing party," including the bases of computation and "materials bearing on the nature and extent of injuries suffered."<sup>15</sup> The

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<sup>7</sup> See *infra* Appendix 3.

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Part II.B.

<sup>10</sup> See *infra* Part V.C, E, and F.

<sup>11</sup> FED. R. CIV. P. 26 advisory committee's notes (amended 1993) ("[Initial disclosure] imposes on parties a duty to disclose . . . certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.").

<sup>12</sup> FED. R. CIV. P. 26(a)(1)(A)(i).

<sup>13</sup> *Id.*

<sup>14</sup> FED. R. CIV. P. 26(a)(1)(A)(ii). To satisfy the second category, only a list needs to be disclosed and not the listed items themselves. *Id.*

<sup>15</sup> FED. R. CIV. P. 26(a)(1)(A)(iii).

fourth category includes “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment” or to “indemnify or reimburse for payments made to satisfy the judgment.”<sup>16</sup>

The parties are required to supplement their initial disclosures after the four categories of information are disclosed if the disclosing party discovers more information pertinent to the initial disclosure rule or if the disclosing party’s initial disclosures were defective.<sup>17</sup> If the above information is not disclosed, Rule 37 allows the opposing party to compel the disclosures and impose sanctions.<sup>18</sup>

### B. *A Synopsis of Arguments*

The initial disclosure requirement has been lauded for reducing cost and time because parties do not have to make requests for information pursuant to Rule 26(a)(1).<sup>19</sup> However, some critics of initial disclosure have also pointed out initial disclosure’s tensions with the adversarial system.<sup>20</sup> The adversarial system pits parties against each other, which makes voluntarily divulging crucial information of one’s case grate against the grain of the system.<sup>21</sup> Supporters of the adversarial system and critics of initial disclosure alike point out that parties’ disclosure of information to opponents undermines the

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<sup>16</sup> FED. R. CIV. P. 26(a)(1)(A)(iv).

<sup>17</sup> FED. R. CIV. P. 26(e).

<sup>18</sup> FED. R. CIV. P. 37(a)(3)(A).

<sup>19</sup> 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, 562–63 (1998) (Eighty percent of attorneys reported that initial disclosure’s intended effects were working. Initial disclosure’s main effect has been saving parties time and money by decreasing “overall litigation expenses, the time from filing to disposition, the amount of discovery, and the number of discovery disputes.”). The same material presented in the article was presented to the Advisory Committee in 1997 and published by the Federal Judicial Center, which is cited later in this Note as WILLGING ET AL., *infra* note 56.

<sup>20</sup> See *In re Lotus Dev. Corp. Sec. Litig.*, 875 F. Supp. 48, 51 (1995) (reconciling Rule 26(a) with foundations of the adversarial system); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 811 (1993); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 714 (1989) (“It can be difficult to explain to clients that damaging evidence has to be disclosed to the opponent . . .”); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1435 (1999); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 268 (1992).

<sup>21</sup> See WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 4 (Russell Sage Foundation 1968) (“[T]he adversary system gives each party the full responsibility and opportunity to reveal defects in the rival’s arguments and proofs.”). *But see* EDMUND MORRIS MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 34–35 (Columbia University Press 1956) (explaining that parties cannot sufficiently prepare their cases without knowing all pertinent information).

competition that is supposed to drive the adversarial system.<sup>22</sup> For example, under Rule 26(a), a defense counsel may have to hand over certain information that could tip-off a plaintiff's counsel to a defense theory it had not yet prepared for. This debate can be summed up as a battle between efficiency and the adversarial process, and so far, it seems efficiency is winning.<sup>23</sup>

In addition to the adversarial critique, critics question whether the initial disclosure requirement fulfills its purpose of reducing cost and time spent toward a case's resolution<sup>24</sup> and whether the rule is needed at all. Critics who question its purpose argue that initial disclosure does not decrease time and cost when judges or parties do not adhere to the rule.<sup>25</sup> Conversely, when the rule is enforced, the purpose is fulfilled, so this skepticism seems to be aimed not at the rule's substance, but at its implementation.<sup>26</sup> Critics who attack initial disclosure tend to argue that discovery reform is wholly unfounded. Linda S. Mullenix is a leading proponent of this argument, and in 1994, a year after initial disclosure was adopted into the Federal Rules, she argued that discovery reform is based on "the pervasive myth of discovery abuse, . . . a larger myth of American litigiousness, . . . [and] a pervasive belief that has seized the public consciousness."<sup>27</sup> Mullenix attacked initial disclosure on the grounds that, at the time, districts could opt out of enforcing it.<sup>28</sup> As shown in Part II of this Note, however, districts no longer have the option of opting out, and as shown in Part IV, numerous studies continue to report the hazards of discovery.

## II. HISTORY OF THE RULES

The Federal Rules were created in 1938 to unify civil procedure rules in a time when efficient resolution of disputes was lacking among federal

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<sup>22</sup> See Marcus, *supra* note 20, at 793; cf. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1302 (1978) ("[I]f opposing parties and counsel knew before trial what the evidence would be . . . they would feel capable of predicting . . . the outcome.").

<sup>23</sup> Willging et al., *supra* note 19.

<sup>24</sup> AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT 7 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (last visited Sept. 8, 2012) [hereinafter TASK FORCE FINAL REPORT].

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994).

<sup>28</sup> *Id.* at 1444–45.

courts.<sup>29</sup> Over twenty years later, the West Virginia Rules of Civil Procedure were created for the reasons of uniformity and efficiency.<sup>30</sup> If necessity is the mother of invention, it seems that uniformity is the mother of both the Federal Rules and the West Virginia Rules. In the years following the enactment of the Federal Rules, inefficiencies within the Rules became evident.<sup>31</sup> Prompted by further need for efficiency, the Federal Rules were amended in 1993 to include initial disclosure.<sup>32</sup> After the Federal Rules' amendments, West Virginia decided not to implement initial disclosure. This Part of the Note examines the Federal Rules' transition toward initial disclosure and West Virginia's transition from the Federal Rules after the Federal Rules were amended to include initial disclosure.

#### A. *Federal Rules' History*

Before 1938, parties had to beg opposing parties for information necessary to prepare their cases.<sup>33</sup> For some time before 1938, judges and litigants alike saw the need for better access to information for the sake of their cases,<sup>34</sup> for the only formal vehicle for receiving any information from the opponent was through the pleadings.<sup>35</sup> Indeed, this was the only mandatory pre-trial process, and the trier of fact had to take what was presented to the court at face value, as there was no way to ascertain validity.<sup>36</sup> This brand of litigation was coined the "sporting theory" of litigation for the element of surprise that ultimately led to a type of court-circus where no one knew what to expect.<sup>37</sup> Thus, the United States Supreme Court prompted the creation of the Federal

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<sup>29</sup> See *infra* Part II.A.

<sup>30</sup> "[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. "[The West Virginia Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." W. VA. R. CIV. P. 1.

<sup>31</sup> Brazil, *supra* note 22, at 1332–38.

<sup>32</sup> FED. R. CIV. P. 26(a)(1) advisory committee's notes (amended 1993).

<sup>33</sup> See *Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947). Supreme Court Justice Murphy described pre-1938 discovery, saying that "[i]nquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method." *Id.*

<sup>34</sup> See *Shaw v. Ohio Edison Installation Co.*, 9 Ohio Dec. Reprint 809 (Ohio Super. Ct. 1887). Writing the opinion, Judge Taft declared that "[t]here is no objection that I know, why each party should not know the other's case." *Id.* at 812.

<sup>35</sup> Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 216 (1937). Sunderland is credited with drafting the discovery provisions of the 1938 Federal Rules. Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6 (1959).

<sup>36</sup> *Id.*

<sup>37</sup> Brazil, *supra* note 22, at 1301.

Rules through a mandate for uniform procedures<sup>38</sup> in 1938 in which parties could access information necessary to come before the court.<sup>39</sup> Doing away with the “sporting theory” of pre-trial discovery, the drafters of the new rules envisioned parties exchanging information cooperatively for the sake of a more efficient process.<sup>40</sup>

While the 1938 Rules of Civil Procedure were hailed as a mechanism for encouraging parties to disclose basic issues “to the fullest practicable extent,”<sup>41</sup> the hoped-for self-regulating discovery procedure eventually showed signs of weakness in the years following the Federal Rules’ creation.<sup>42</sup> Parties were not cooperatively disclosing information as the drafters<sup>43</sup> of the original rules had hoped. By the 1980s, new technologies caused an overload of discoverable material, and lack of cooperation between parties brought discovery procedure to a gridlock.<sup>44</sup> Either parties had too much information to disclose or parties refused to go through the troubles of discovery altogether.<sup>45</sup> Frequent discovery squabbles led to the 1993 adoption of Rule 26(a) initial disclosure.<sup>46</sup>

Upon adding initial disclosure to the discovery process’ repertoire, strong opposition to the requirement from some districts led drafters to allow districts to opt out of adopting it.<sup>47</sup> These districts had either already passed

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<sup>38</sup> In Order of June 3, 1935, 295 U.S. 774, 775 (1935), the Court declared that it would “undertake the preparation of a unified system of general rules . . . so as to secure one form of civil action.” And in 1938 the Federal Rules of Civil Procedure were adopted. *See also* 11B AM. JURIS. PLEADINGS AND PRACTICE FORMS ANNOTATED 263 (2007) (“One of the purposes of the Federal Rules of Civil Procedure was to bring about uniformity of basic procedures.”).

<sup>39</sup> FED. R. CIV. P. 26 advisory committee’s notes (adopted 1937). The Advisory Committee accounted for many states’ differing stances on discovery practices, stating, “While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts.” *Id.*

<sup>40</sup> Brazil, *supra* note 22, at 1301–03.

<sup>41</sup> United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); *see also* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376 (1961); Brazil, *supra* note 22, at 1301.

<sup>42</sup> Brazil, *supra* note 22, at 1296–97. *Contra* Mullenix, *supra* note 27 (arguing that the notion that discovery is oft-abused does not rest on sound foundation (i.e., that research tending to show discovery abuse is not reliable)).

<sup>43</sup> *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 357 n.24 (1978).

<sup>44</sup> George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH., no. 3, 2007, at 1, 3, 19 (discussing how the advent of computer technology changed the game of discovery practice).

<sup>45</sup> *Id.*

<sup>46</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s notes (amended 1993).

<sup>47</sup> FED. R. CIV. P. 26(a)(1) (“Except as . . . otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the parties . . .”).

their own versions of disclosure requirements or were content with the present system.<sup>48</sup> As a compromise, the Advisory Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States (“Advisory Committee”) allowed districts to opt out, yet the Committee “hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice.”<sup>49</sup> In the years following 1993, many districts opted out—a development that proved to be a digression from the uniformity the Federal Rules were supposed to progress.<sup>50</sup>

To address the opting-out problem, the Advisory Committee sponsored several studies and in turn discerned a widespread need for uniformity among federal civil procedure regimes.<sup>51</sup> Another study, conducted four years after initial disclosure was adopted, reported that forty-nine of ninety-four federal district courts and seven of fourteen of the largest district courts had adopted initial disclosure pursuant to the Federal Rules.<sup>52</sup> This figure was substantially less than federal districts’ adoptions of other Rule 26 required disclosures.<sup>53</sup> For example, eighty federal districts had adopted Rule 26(a)(2) expert testimony disclosures and seventy-eight federal districts had adopted Rule 26(a)(3) pretrial disclosures.<sup>54</sup> Another study, also conducted four years after initial disclosure was adopted, reported that 58% of attorneys used initial disclosure pursuant to Rule 26(a) or local provisions.<sup>55</sup> This study surveyed lawyers and asked them how discovery practices should be changed to maximize efficiency.<sup>56</sup> The lawyers that were surveyed ranked adoption of a uniform national disclosure rule second among proposed rule changes.<sup>57</sup> The lawyers

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<sup>48</sup> The Advisory Committee recognized that “many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act.” FED. R. CIV. P. 26 advisory committee’s notes (amended 2000).

<sup>49</sup> *Id.*

<sup>50</sup> FED. R. CIV. P. 26(a)(1) advisory committee’s notes (amended 2000).

<sup>51</sup> *Id.*

<sup>52</sup> DONNA STIENSTRA, FED. JUD. 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 5–6 (March 30, 1998), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/\\$File/FRCP2698.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/$File/FRCP2698.pdf) (last visited Sept. 8, 2012) (describing and categorizing local regimes).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Willging et al., *supra* note 19, at 534.

<sup>56</sup> THOMAS E. WILLGING ET AL., FED. JUD. CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 44–45, (1997) *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/discovry.pdf/\\$file/discovry.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discovry.pdf/$file/discovry.pdf) (last visited Sept. 8, 2012) (The substance of this article is much of the same material discussed in Willging et al., *supra* note 19.).

<sup>57</sup> *Id.*

noted that they had experienced difficulty in coping with divergent disclosure practices as they moved from one district to another.<sup>58</sup> As a whole, these studies showed that the initial disclosure rule was not being followed uniformly.<sup>59</sup> Yet, where it was followed, the rule was working as intended—increasing fairness and reducing costs and delays more often than not.<sup>60</sup> In response, the Advisory Committee recommended three solutions: amending Rule 26(a) by deleting most of the provisions authorizing local rules, narrowing initial disclosure to only that information that supports a party's position,<sup>61</sup> and exempting categories of proceedings from initial disclosure requirements—all to establish “a nationally uniform practice.”<sup>62</sup> The Advisory Committee's recommendations were adopted and became law on December 1, 2000.<sup>63</sup> The Advisory Committee cited both studies<sup>64</sup> as reasons why the opt-out option was amended out of Rule 26.<sup>65</sup>

### B. *West Virginia Rules' History*

Before 1960, West Virginia did not have a uniform set of civil procedure rules and only followed common law rules of procedure.<sup>66</sup> After the Federal Rules' enactment in 1938 and before the West Virginia Rules'

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<sup>58</sup> *Id.* at 42.

<sup>59</sup> See FED. R. CIV. P. 26 advisory committee's notes (amended 2000). While the 1993 amendments did not expressly state a need for uniformity among districts, the advisory notes to the 2000 amendments stated in retrospect, “It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice.” *Id.*

<sup>60</sup> WILLGING ET AL., *supra* note 56, at 2.

<sup>61</sup> A party only has to disclose information that will be used to support its claims or defenses. FED. R. CIV. P. 26(a)(1)(A). Because this was added to the initial disclosure rule, the reference to particularity in pleading in the 1993 amendment was removed. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2053 (3d ed. 2010).

<sup>62</sup> FED. R. CIV. P. 26 advisory committee's notes (amended 2000).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Today, seven states have adopted the federal initial disclosure rule. See ALA. R. CIV. P. 26; ARIZ. R. CIV. P. 26.1; COLO. R. CIV. P. 26; NEV. R. CIV. P. 16.1; OKLA. STAT. ANN. § 3226; UTAH R. CIV. P. 26; WYO. R. CIV. P. 26. This list was compiled by searching every state's rules of civil procedure to find initial disclosure provisions. This list may be read to update or contradict an early 2000 study reporting that only three states have adopted the initial disclosure rule as of 2003. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 386 (2002–2003).

<sup>66</sup> See MARLYN E. LUGAR & LEE SILVERSTEIN, W. VA. RULES OF CIVIL PROCEDURE vii–xiv (The Michie Company 1960).

enactment in 1960, West Virginia scholars had recognized the deficiencies of the West Virginia common law rules for procedure as compared to the Federal Rules.<sup>67</sup> Marlyn E. Lugar, a former professor of law at West Virginia University, and Charles C. Wise, a former President of the West Virginia State Bar, recognized that the Federal Rules' "more liberal procedure [had] been found to be successful in practice"<sup>68</sup> and that West Virginia common law rules lacked the ability "to arrive at the truth" because "many artificial barriers . . . becloud . . . [and] prevent the attainment of a just solution to a case."<sup>69</sup> Prompted by this outcry, the West Virginia Supreme Court of Appeals designated a Standing Committee on Civil Rules in 1950 to prepare rules in a way that would comport with "modern and generally accepted standards of procedure."<sup>70</sup>

To achieve the goal of modernizing the rules, the drafters of the West Virginia Rules followed the purposes of the Federal Rules. According to the drafters of the 1960 West Virginia Rules, the new discovery rules served "(1) to narrow the issues for trial, (2) to obtain evidence for use at the trial, and (3) . . . to secure information as to the existence of evidence and how, and from whom, it may be obtained for use at the trial."<sup>71</sup> The 1960 West Virginia Rules carried out these purposes, followed the trends of the Federal Rules, and provided a

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<sup>67</sup> *Id.*; Lee Silverstein, *Should West Virginia Adopt the Federal Rules of Civil Procedure?*, 1 W. VA. STATE BAR NEWS 195 (July 1953). Lee Silverstein's article was the winner of an essay contest sponsored by the West Virginia State Bar in 1953 held to stimulate interest in procedural reform. LUGAR & SILVERSTEIN, *supra*, at x. In the article, Silverstein argues for West Virginia to conform to the Federal Rules: "It is well known that the theory of the federal rules is to simplify and speed up the procedure by eliminating technicalities and encouraging the use of pre-trial discovery provisions." Silverstein, *supra*, at 196.

<sup>68</sup> Marlyn E. Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 52 W. VA. L. REV. 137, 142 (1950).

<sup>69</sup> Charles C. Wise, Jr., *The Public and the State Bar*, 53 W. VA. L. REV. 65, 68 (1950).

<sup>70</sup> LUGAR & SILVERSTEIN, *supra* note 66, at viii.

<sup>71</sup> *Id.* at 215. Today, West Virginia discovery and disclosure rules continue to uphold these purposes' legacy. See FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 689-96 (2d ed. 2006). Without addressing the history of West Virginia Rule 26, former West Virginia Supreme Court Justice Franklin D. Cleckley and his cohorts state that "the overarching purpose of discovery is to clarify and narrow the issues in litigations, so as to efficiently resolve disputes." *Id.* at 689. This stated purpose comports with the purposes of initial disclosure. See *infra* Part III.B. These purposes can also easily be read to comport with initial disclosure's purposes of accelerating "the exchange of basic information about the case and [eliminating] the paper work involved in requesting such information" which are discussed in the Advisory Committee notes to the 1993 and 2000 amendments. FED. R. CIV. P. 26(a) advisory committee's notes (amended 1993 and 2000).

uniform system of rules within the state.<sup>72</sup> In 1960, the West Virginia Rules were created and completely conformed to the Federal Rules.<sup>73</sup>

Indeed, from 1960 to 1993 the West Virginia Rules were labeled a spitting image of the Federal Rules.<sup>74</sup> But after initial disclosure was enacted in 1993, West Virginia deviated from the Federal Rules for the first time in over 30 years. Thus, uniformity, the mother of the Federal Rules, has been lost as the West Virginia Rules have departed from the Federal Rules. Because the civil procedure framework still diverges at the state and federal divide,<sup>75</sup> West Virginia state courts are not required to follow the federal regime, and thus, they are not required to incorporate initial disclosure in civil proceedings.<sup>76</sup>

This divide is not unique to West Virginia. According to a study conducted in 2003 that surveyed states' adherence to the Federal Rules, the West Virginia Rules complied with just above half of the 1993 amendments.<sup>77</sup> More generally, the study reported that states are shifting away from conformity with the Federal Rules and toward localism.<sup>78</sup> The trend of the Federal Rules and states' rules divergence<sup>79</sup> suggests a history lesson. If states' civil procedure rules continue to move away from uniformity, then perhaps a lesson should be learned from the Federal Rules' history of remedying the problems that nonuniformity causes.<sup>80</sup> Nevertheless, West Virginia is among the states that began moving away from uniformity after the 1993 amendments to the Federal Rules.

Realizing the divide between the state and federal regimes, the West Virginia Supreme Court sought to address the issue and update the West

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<sup>72</sup> LUGAR & SILVERSTEIN, *supra* note 66; *see* CLECKLEY, DAVIS & PALMER, *supra* note 71, at 689.

<sup>73</sup> LUGAR & SILVERSTEIN, *supra* note 66, at 214–20.

<sup>74</sup> *Compare* W. VA. R. CIV. P., *with* FED. R. CIV. P. In a 2002 study comparing states' adherence to the Federal Rules, Professor Oakley labeled West Virginia a replica state before West Virginia deviated from the Federal Rules in 1993. *See* Oakley, *supra* note 65, at 374, 385.

<sup>75</sup> *Compare* W. VA. R. CIV. P. 26, *with* FED. R. CIV. P. 26.

<sup>76</sup> FED. R. CIV. P. 26(a)(1) (“Except as . . . otherwise stipulated or ordered by the court . . .”).

<sup>77</sup> Oakley, *supra* note 65. According to Professor Oakley's study, the West Virginia Rules adopted the 1993 amendments to the Federal Rules 11, 16, and 33 (partially); the West Virginia Rules did not adopt the amendments to rules 4(d), 26(a), and 30. *Id.*

<sup>78</sup> *Compare id.* at 355, *with* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (calling the 1938 creation of the Federal Rules “a triumph of uniformity over localism”).

<sup>79</sup> *See, e.g.*, FED. R. CIV. P. 26(a) advisory committee's notes (amended 2000); Oakley, *supra* note 65, at 355.

<sup>80</sup> *See supra* Part II.A (showing that the lack of uniformity before the inception of the Federal Rules and after the inception of the initial disclosure rule prompted the Federal Rules' drafters to mandate uniformity, as the lack of uniformity caused the problems of inefficient resolution, high costs, and delay).

Virginia Rules.<sup>81</sup> In 1996, the court appointed a West Virginia Supreme Court Rules Advisory Committee to study the rules and recommend to the court whether or not West Virginia should track the Federal Rules verbatim like West Virginia had done since 1960.<sup>82</sup> The committee included Al Emch,<sup>83</sup> who served as chair on the committee, and Charles DiSalvo,<sup>84</sup> who served as vice chair.<sup>85</sup> The committee discussed revisions to the West Virginia Rules, including a near-total rewrite of certain rules.<sup>86</sup>

When the committee considered Rule 26, many lawyers on the committee expressed concern with mimicking the federal initial disclosure concept.<sup>87</sup> Primarily defendants' lawyers opposed adopting initial disclosure<sup>88</sup> and thought that automatic disclosure undermined the adversarial system because the rule would force lawyers to make strategic decisions before they had the opportunity to develop the facts.<sup>89</sup> Their concern was that opponent parties should not divulge information that could expose their weaknesses, efficiency notwithstanding.<sup>90</sup> Plaintiffs' and defendants' lawyers alike saw the requirements of disclosing information as a threat to the traditional adversarial role that could harm their clients.<sup>91</sup> The lawyers supporting initial disclosure's adoption expressed the need for uniformity between the Federal Rules and the West Virginia Rules and the need for efficient resolution of cases.<sup>92</sup> In the face of a divided constituency, the committee determined that allowing an experimentation period and not recommending the adoption of the federal initial disclosure rules would best serve the state.<sup>93</sup> Moreover, the committee

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<sup>81</sup> Interview with Charles DiSalvo, Woodrow A. Potesta Professor of Law at the West Virginia University College of Law and the Vice-Chair of the 1998 West Virginia Supreme Court Rules Advisory Committee, in Morgantown, W. Va. (Nov. 18, 2011).

<sup>82</sup> *Id.*

<sup>83</sup> Mr. Emch is presently a partner and formerly the CEO of Jackson Kelly, PLLC.

<sup>84</sup> Charles DiSalvo, Woodrow A. Potesta Professor of Law at the West Virginia University College of Law and the Vice-Chair of the 1998 West Virginia Supreme Court Rules Advisory Committee.

<sup>85</sup> Interview with Charles DiSalvo, *supra* note 81.

<sup>86</sup> *Id.* One rule that was almost completely rewritten was Rule 4. *Id.*; see Charles DiSalvo, *Filing Is What Counts! How the 1998 Amendments to the West Virginia Civil Rules Will Affect Your Practice*, W. VA. LAWYER, Apr. 1998, at 23 (explaining West Virginia's 1998 amendments to rules 4–6, 11, 15–16, 23, 26, 30, 32–33, 37, 45, 47, 50, 52(b), 59(b), 59(c), 59(e), 60, 65, and 71 that comply with the Federal Rules to varying degrees).

<sup>87</sup> Interview with Charles DiSalvo, *supra* note 81.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see DiSalvo, *supra* note 86, at 24, 25.

<sup>90</sup> Interview with Charles DiSalvo, *supra* note 81.

<sup>91</sup> DiSalvo, *supra* note 86, at 25.

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

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

saw the lack of uniformity between federal courts and West Virginia state courts as an advantage in which two sets of rules could run concurrently—the Federal Rules requiring disclosure and the West Virginia Rules not requiring disclosure.<sup>94</sup> The committee then recommended revisiting initial disclosure in later years to see if West Virginia should realign with the Federal Rules.<sup>95</sup>

The new West Virginia Rules of Civil Procedure came into effect on April 1, 1998, and have not been amended since.<sup>96</sup> The Federal Rules, however, have been amended several times since 1998.<sup>97</sup> Thus, it is time for West Virginia to revisit the West Virginia Rules and address the widening gap between the Federal Rules and the West Virginia Rules, especially in regard to initial disclosure.

### III. INITIAL DISCLOSURE'S PURPOSES

Initial disclosure exists to limit discovery and thereby curtail the time and money spent in the litigation process.<sup>98</sup> Proponents of the rule praise its effect as a catalyst of cases;<sup>99</sup> critics of the rule scoff at increased costs of producing information.<sup>100</sup> However, the voluntary, anti-competitive nature of initial disclosure seems at odds with the gamesmanship and partisanship of the adversarial system. Before delving into how initial disclosure helps the system, the first Section of this Part discusses whether initial disclosure and the adversarial system may be compatible.

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<sup>94</sup> *Id.* The committee did not account for cases that began in state court and were removed to federal court. *Id.* When this happens in a state without initial disclosure, it is likely that the case will stall so that parties can comply with the federal initial disclosure rules. As such, efficiency suffers even more.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 23.

<sup>97</sup> See FED. R. CIV. P. 26 advisory committee's notes (amended 2000, 2006, 2007, and 2010).

<sup>98</sup> See *infra* Parts III.B, IV.A.

<sup>99</sup> See generally, e.g., William W. Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655 (1993) (responding to Griffin Bell's criticism of initial disclosure and defending initial disclosure's expedient purposes); Tobias, *supra* note 20, at 1442–43 (arguing for initial disclosure's effectiveness); Willging et al., *supra* note 19.

<sup>100</sup> See generally, e.g., John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (“[R]ecent efforts to amend the Federal Rules . . . have failed to combat the abuses of civil discovery.”); Griffin Bell, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 5 (1992) (“[T]he new rule is fraught with mischief because . . . [it] would require counsel to use his . . . talents to discern the theories of the adversary, then tell the client that, based on counsel's own analysis, harmful as well as helpful documents must be produced.”); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 84–85 (1995) (explaining that initial disclosure will not eliminate discovery abuse).

A. *Adversarial Tensions*

The initial disclosure rule requires parties to exchange information automatically.<sup>101</sup> On one hand, the automatic and unprovoked exchange of information seems to clash with the traditional adversarial system.<sup>102</sup> Traditionally, parties battle toward resolution through the adversarial system. As Supreme Court Justice Warren Burger forecasted, “[T]rials by the adversary contest must in time go the way of the ancient trial by battle and blood.”<sup>103</sup> But the battle toward resolution has never been more costly, nor the weapons more effective. If the adversarial process pits parties against each other, then it would seem that the cooperative component of initial disclosure betrays the system.

On the other hand, in the modern adversarial system, the battleground of the courtroom may seem beyond reach as it is a costly and time-consuming process.<sup>104</sup> Reaching the courtroom may not be necessary to reach a resolution.<sup>105</sup> The tool of initial disclosure increases the likelihood that a case will be settled before reaching the costly courtroom.<sup>106</sup> Moreover, the increased likelihood of settlement is good for parties because resolving a case through settlement decreases the possibility of having to pay or be paid too little or too much.<sup>107</sup> In other words, the longer a case drags on, the more the parties will wish they had settled earlier.<sup>108</sup> As such, the courtroom need not be the only promise-land of resolution because with initial disclosure, the courtroom

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<sup>101</sup> Compare FED. R. CIV. P. 26(a) (not requiring requests for information), with FED. R. CIV. P. 26(b) (requiring requests for information).

<sup>102</sup> Bell, *supra* note 100; DiSalvo, *supra* note 86, at 25.

<sup>103</sup> Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

<sup>104</sup> See Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 892–93 (2009); Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. REV. 1441, 1452 (2011).

<sup>105</sup> See generally Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008).

<sup>106</sup> Willging et al., *supra* note 19, at 535 (explaining that initial disclosure increases the likelihood of settlement); see Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES, Aug. 7, 2008, at C1, available at <http://www.nytimes.com/2008/08/08/business/08law.html?scp=1&sq=cost%20of%20not%20settling%20a%20lawsuit&st=cse> (last visited Sept. 8, 2012) (explaining that plaintiffs who decide to proceed to trial instead of settling will lose \$43,000 on average and defendants who do the same will lose \$1.1 million on average).

<sup>107</sup> Kiser et al., *supra* note 105, at 566–67.

<sup>108</sup> *Id.*

battleground drifts away<sup>109</sup> and thus disproves Justice Burger's bleak forecast.<sup>110</sup> "[T]rial by battle and blood"<sup>111</sup> is replaced with efficiency, which is more effective in providing opponents with necessary weapons for resolution that avoid the costly courtroom.

Perhaps the practice of parties voluntarily exchanging information through initial disclosure is not at odds with the adversarial system.<sup>112</sup> On one hand, if cases are resolved earlier, then perhaps the adversarial game or "sport" has just been slated earlier, before the courtroom need be reached. Avoiding the courtroom's scrutiny opens up other arenas for the system to operate, and in these other arenas, new weapons for adversarial gamesmanship and strategy can be discovered.<sup>113</sup> On the other hand, even if cases do reach the court, the adversarial system is further enhanced by both parties having pertinent, relevant information.<sup>114</sup> This way, the "game" is no longer "trial by ambush"<sup>115</sup> and becomes trial by truth.<sup>116</sup> However the adversarial system is defined and however it may be furthered or inhibited by initial disclosure, the effects that initial disclosure has had on case-efficiency should outweigh whatever effects it has had on the adversarial system. As this Note discusses in Parts III.B and

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<sup>109</sup> See Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIG. ONLINE 1, available at [http://www.americanbar.org/content/dam/aba/publishing/litigation\\_journal/04winter\\_openingstatement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf) (last visited Sept. 8, 2012).

<sup>110</sup> See Burger, *supra* note 103.

<sup>111</sup> *Id.*

<sup>112</sup> Brazil, *supra* note 22, at 1303–04 (“[The discovery process has] provided attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail.”). *Contra* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 8–9 (2010) (“What some would call cults of judicial management and alternative dispute resolution have arisen, eroding certain aspects of the adversary system and blocking access to the courtroom for a trial on the merits.”).

<sup>113</sup> Aside from normal strategy, “weapons” could include overloading opponents with too much information.

<sup>114</sup> See Sunderland, *supra* note 35.

<sup>115</sup> William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178 (1991) (“Discovery was intended to provide each side with all relevant information about the case to help bring about settlement or, if not, avoid trial by ambush.”).

<sup>116</sup> *Id.*; see GLASER, *supra* note 21, at 7.

In theory, the adversary system motivates both sides to get all the facts. But the partisans are not required to present all the facts to the court; in practice, each side is motivated to introduce only the evidence and witnesses that buttress its own case. While the trier of facts wishes to know everything that is pertinent, a partisan who discovers harmful information is motivated to conceal it from the adversary and from the court.

*Id.*

IV.A, initial disclosure is necessary to promote efficiency and cost reduction, whether or not it departs from the traditional adversarial process.<sup>117</sup>

*B. Cost, Delay, and Efficiency*

Initial disclosure was incorporated into the Federal Rules to combat cost and delay in numerous and increasingly complex cases on federal court dockets.<sup>118</sup> Before initial disclosure, some argued that cost and delay ran rampant through the discovery process where the Federal Rules did not directly address the potential and actual abuses of discovery devices.<sup>119</sup> The drafters of the 1938 Federal Rules operated under the notion that attorneys would not abuse the discovery procedures and would instead focus on saving their clients' time and money.<sup>120</sup> Critics, however, began to see what was going on behind the scenes: attorneys were billing clients for increasing amounts of discovery.<sup>121</sup> Unfortunately, many lawyers thought zealous representation meant taking full advantage of every discovery device offered by the rules, including those devices that might serve as obstacles to the other party.<sup>122</sup> This interpretation resulted in increased delay, cost, and inefficiency.<sup>123</sup>

Prompted by outcry for revision,<sup>124</sup> the Advisory Committee saw initial disclosure as the solution. The Committee put it explicitly, "[a] major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and

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<sup>117</sup> WILLGING ET AL., *supra* note 56, at 2 ("Initial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays.").

<sup>118</sup> FED. R. CIV. P. 26 advisory committee's notes (amended 1983) ("[Before initial disclosure, discovery practices imposed] costs on an already overburdened system and impede[d] the fundamental goal of the 'just, speedy, and inexpensive determination of every action.'").

<sup>119</sup> Bell, *supra* note 100, at 8 ("The authors of the Federal Rules believed that the process would allow a vast amount of information to be disclosed in a system that would be efficiently regulated by the attorneys themselves. Unfortunately, discovery under the Federal Rules has fallen short of these lofty expectations."). *Contra* Linda S. Mullenix, *supra* note 27, at 1396 ("We believe American civil litigation is out of hand because notoriously greedy lawyers engage in serious discovery abuse—not because they do, but because litigiousness has become linked in our minds with discovery abuse.").

<sup>120</sup> Bell, *supra* note 100, at 8.

<sup>121</sup> Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579, 582 (1981). For a discussion on attorney's unethical billing practices, see Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008–2009).

<sup>122</sup> See Bell, *supra* note 100, at 12.

<sup>123</sup> *Id.* at 8.

<sup>124</sup> The Advisory Committee cites several articles and studies in their 1993 and 2000 notes that pled for discovery reform, including: Brazil, *supra* note 22; Schwarzer, *supra* note 20; STIENSTRA, *supra* note 52; WILLGING ET AL., *supra* note 56.

the rule should be applied in a manner to achieve those objectives.”<sup>125</sup> In effect, initial disclosure bypasses the discovery process to achieve the same goal of disclosure.<sup>126</sup> The Advisory Committee reasoned that, with initial disclosure, expenses incurred and time wasted making routine discovery requests will be avoided.<sup>127</sup> And in the broader sense, the initial disclosure rule was drafted for the purpose of maximizing efficiency by decreasing discovery disputes.<sup>128</sup> As Part IV of this Note discusses, these purposes have largely been satisfied.

#### IV. INITIAL DISCLOSURE’S PROVEN PURPOSES

This Part of the Note examines studies that look specifically at whether or not the purposes outlined in Part III have been satisfied, i.e., whether or not initial disclosure tends to decrease costs and delay and increase overall efficiency. The studies show that the purposes for initial disclosure’s adoption into the Federal Rules have largely been satisfied.

##### A. *Reduction of Cost and Delay*

“Time is money.”<sup>129</sup> To the dismay of clients, the costs soar in the discovery process for civil cases,<sup>130</sup> and litigation can go on much longer than expected.<sup>131</sup> The higher the stakes, the longer the case takes.<sup>132</sup> The discovery process alone can cause parties to settle a case or abandon a cause of action

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<sup>125</sup> FED. R. CIV. P. 26 advisory committee’s notes (amended 1993).

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1211 (2005). Before the 1993 amendments, discovery disputes that came before the court were largely ineffective. This led to more “hide-the-ball” and even more discovery disputes because attorneys remained undeterred from abusing discovery procedures. *Id.*; *see* Brazil, *supra* note 22, at 1342.

<sup>129</sup> Benjamin Franklin, *Advice to a Young Tradesman*, in WORKS OF THE LATE DOCTOR BENJAMIN FRANKLIN 188 (P. Wogan et al. eds., 1793).

<sup>130</sup> TASK FORCE FINAL REPORT, *supra* note 24, at 2, 16 (“Discovery [and disclosure] expenses typically amount to about 3% of the monetary stakes, whether the stakes are large or small.”); Gainor, *supra* note 104, at 1449; *see* WILLGING ET AL., *supra* note 56, at 16.

<sup>131</sup> Dubbed as America’s longest civil case at the time, *Kemner v. Monsanto Co.* lasted three and a half years. 576 N.E.2d 1146 (Ill. App. Ct. 1991), *discussed in* Michael Tackett, *Nation’s Longest Civil Jury Trial Winds Down*, CHI. TRIB., Sept. 6, 1987, *available at* 1987 WLNR 1463578.

<sup>132</sup> Willging et al., *supra* note 19, at 533. (“The stakes in the litigation were positively correlated with the length of the case: the higher the stakes, the longer the case lasted.”).

altogether.<sup>133</sup> A 1997 study found that half of the total expense of fully litigating a case goes toward the discovery process.<sup>134</sup> High costs of trial preparation are one aspect of what the drafters of the Federal Rules sought to control with the advent of initial disclosure.<sup>135</sup> The Advisory Committee recommended that the initial disclosure rule should be applied so that the objective of catalyzing the exchange of necessary information and doing away with routine paperwork is achieved.<sup>136</sup> This objective was a tall order to change civil procedure, and despite some complaints,<sup>137</sup> the objective has been satisfied. Since initial disclosure's adoption into the Federal Rules, several studies have examined initial disclosure's cost-effectiveness, and overall, the effects have been positive.<sup>138</sup>

In 1997, the Advisory Committee to the Federal Rules asked the Federal Judicial Committee to research initial disclosure's effectiveness.<sup>139</sup> The study focused on attorneys' experiences with initial disclosure at a time when initial disclosure was a relatively new procedure and little research had been done on the matter.<sup>140</sup> It also focused on several aspects of the initial disclosure rule, such as the rule's cost-effectiveness. In the study, attorneys responded that initial disclosure decreased litigation expenses, delay throughout the discovery process, discovery disputes, and the amount of discovery that would typically be requested or produced without initial disclosure.<sup>141</sup> After the automatic exchange of information, parties no longer need to request that information through discovery requests.<sup>142</sup> Moreover, because the initial disclosure rule specifies what information needs to be turned over, parties are able to avoid the effect of broad discovery requests that result in too much information.<sup>143</sup> Additionally, the attorneys noted that initial disclosure increased procedural fairness, the fairness of cases' outcomes, and the likelihood of settlement.<sup>144</sup>

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<sup>133</sup> Moss, *supra* note 104, at 908 (explaining that discovery expenses deny meritorious and unmeritorious claims alike).

<sup>134</sup> Willging et al., *supra* note 19, at 540, 548 (showing that lawyers spend an average of \$13,000 per client throughout the litigation process which is "fairly close to 50%" of the total costs of litigation).

<sup>135</sup> FED. R. CIV. P. 26(a)(1) advisory committee's notes (amended 1993).

<sup>136</sup> *Id.*

<sup>137</sup> See TASK FORCE FINAL REPORT, *supra* note 24, at 9.

<sup>138</sup> See Willging et al., *supra* note 19, at 534 ("In general, initial disclosure appears to be having its intended effects.").

<sup>139</sup> *Id.* at 526.

<sup>140</sup> *Id.* at 527–28.

<sup>141</sup> *Id.* at 535.

<sup>142</sup> See FED. R. CIV. P. 26(a).

<sup>143</sup> *Id.*

<sup>144</sup> See Willging et al., *supra* note 19, at 535.

Compared to other discovery devices, initial disclosure costs less.<sup>145</sup> Specifically, the study showed the average cost-discrepancies between discovery devices: depositions cost \$35,000, expert disclosure and discovery cost \$1375, document production cost \$1100, interrogatories cost \$1000, initial disclosure cost \$750, and meeting and conferring cost \$600.<sup>146</sup> Thus, circa 1997, the cost-effective purpose for which the initial disclosure rule was initially adopted had been achieved.

The 1997 study also showed some problems with initial disclosure's implementation. Incomplete disclosures were the primary problem<sup>147</sup> due to lawyers not appropriately or proportionally following Rule 26(e) supplementation.<sup>148</sup> The study also reported nonuniformity among federal courts as a problem with initial disclosure, which has since been corrected in the 2000 amendments to the Federal Rules.<sup>149</sup> The source of the problem appears to have been caused by practitioners' inexperience with the then-relatively new initial disclosure rule.<sup>150</sup>

In 2009, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System conducted a study to pinpoint problems with the discovery process and recommend solutions.<sup>151</sup> The study reported that the discovery process is too costly and too often forces settlement due to lack of information; it further noted that initial disclosure is not carried out pursuant to the rule,<sup>152</sup> a complaint that echoes the earlier studies. According to the study, judges who neither force parties to disclose per Rule 26(a) nor schedule discovery per Rule 16 cause disclosure problems and forced settlements.<sup>153</sup> The lacking stringency

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<sup>145</sup> *Id.* at 540.

<sup>146</sup> *Id.* These numbers do not take into account the likelihood that initial disclosure will reduce the cost of the other discovery devices. However, although initial disclosure may reduce the cost of other discovery devices, initial disclosures still incur cost. Therefore, depending on the amount saved compared to the amount spent on initial disclosures, initial disclosure may still add cost instead of reducing the net cost. As such, it is possible that initial disclosures operate like a zero sum game, or even yet, it is possible that initial disclosures actually increase net costs.

<sup>147</sup> See Willging et al., *supra* note 19, at 540.

<sup>148</sup> FED. R. CIV. P. 26(e) (requiring parties to supplement disclosures once a party discovers new information that was not previously disclosed).

<sup>149</sup> FED. R. CIV. P. 26 advisory committee's notes (amended 2000) ("These amendments restore national uniformity to disclosure practice.").

<sup>150</sup> Willging et al., *supra* note 19, at 579.

<sup>151</sup> TASK FORCE FINAL REPORT, *supra* note 24, at 1.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> See *id.*; but see *supra* notes 107, 144 and accompanying text ("[T]he increased likelihood of settlement is good for parties because resolving a case through settlement decreases the possibility of having to pay or be paid too little or too much . . . . [A]ttorneys noted that initial disclosure increased . . . the likelihood of settlement.").

of initial disclosure enforcement has led to attorneys' dissatisfaction with initial disclosure as only thirty-four percent of attorneys agree that initial disclosure rules reduce discovery and only twenty-eight percent of attorneys agree that initial disclosure rules reduce costs.<sup>154</sup> The study, therefore, proposes that initial disclosure practices should be more stringently enforced than current practices.<sup>155</sup>

To enhance initial disclosure's effectiveness and remedy the reported widespread dissatisfaction with initial disclosure's implementation, the study proposes several reforms. The reforms include a shorter time (thirty days) between filing and initial disclosure, production of items that would otherwise only be listed, limited discovery after initial disclosure is made, and a continuing duty to supplement disclosures—the goal primarily being limited discovery and effective initial disclosure.<sup>156</sup> But the study gives little reason why such reforms would work, which raises questions of the problems the reforms purport to address. For example, the study gives no reason why limiting time for initial disclosure decreases costs or cures the threat of forced settlement.<sup>157</sup> Conversely, limiting time might even exacerbate the problem, making it less likely that parties will comply under a time crunch. Moreover, the study ignores that Federal Rule 26(e) currently imposes a duty on parties to supplement disclosures. Hence, the study appears to inadequately address the lack of initial disclosure's enforcement and only discuss reforms that focus on more stringent rules that may just as likely not be enforced. If the problem of initial disclosure's effectiveness stems from its lack of enforcement, it would seem that the proposed reforms should consider more extensive sanctions for failure to comply with the current rules instead of creating more rules that are just as likely not to be enforced. Initial disclosure's perceived problems only exist in its implementation, not in its substance, so reforming its substance may not address the real problem, and ignoring its value when it is enforced disserves and disregards the rule's purpose. A little more efficiency is better than none at all.

#### *B. Concluding With Efficiency*

When implemented, initial disclosure satisfies its primary purpose of efficient litigation and settlement by saving parties time and money. The Advisory Committee's comments concerning the 1993 amendments suggest

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<sup>154</sup> TASK FORCE FINAL REPORT, *supra* note 24, at 7.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 8.

<sup>157</sup> See Glater, *supra* note 106 (reporting that settlements reap better rewards for defendants and plaintiffs than do trials).

that initial disclosure's purposes serve to resolve the pangs of litigation.<sup>158</sup> With initial disclosure, the Advisory Committee envisioned that parties would have the tools they needed earlier in their case. With the requisite tools, parties would be enabled to evaluate their cases' strengths and weaknesses closer to the outset of litigation. The initial disclosure rule presupposes that the required information would have been received eventually regardless of the rule, but only after parties would request or demand the information through discovery. The automatic component of initial disclosure thus skips the hassle of requesting information, which encourages settlement and concludes cases efficiently. When initial disclosure is employed and enforced, 80% of attorneys agree that initial disclosure has satisfied at least one of the desired effects.<sup>159</sup> So, while it may be unlikely that cases actually conclude this early in the game, if nothing else, the discovery process is shortened, and the end-sum is still more efficient than it otherwise would have been with longer discovery and no initial disclosure.<sup>160</sup>

What appears to be a win-win for all parties has been met with some skepticism from the Supreme Court shortly after the rule's creation. Upon the initial disclosure rule's enactment, Justice Scalia questioned the rule's proposed efficiency:

But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it adds a further layer of discovery. It will likely increase the discovery burdens on district judges, as parties litigate about . . . whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure.<sup>161</sup>

Justice Scalia argued that the effects of initial disclosure would be too burdensome on parties. However, the information required under the initial disclosure rule is basic information that would typically be requested through the discovery process even without the requirement of initial disclosure. Rather than adding a layer of discovery, it circumvents basic discovery requests. Moreover, the initial disclosure rule seems to coincide with the Federal Rules

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<sup>158</sup> FED. R. CIV. P. 26(a)(1) advisory committee's notes (amended 1993). The initial disclosure rule was "designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement." *Id.*

<sup>159</sup> Compare WILLGING ET AL., *supra* note 56, at 26 with text accompanying note 154.

<sup>160</sup> See Gainor, *supra* note 104, at 1464.

<sup>161</sup> Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 510 (1993) (Scalia, J., dissenting).

of Civil Procedure's overarching trend of "notice" and "fairness."<sup>162</sup> In addition to coinciding with the Federal Rules' overarching purpose—"to secure the just, speedy, and inexpensive determination of every action and proceeding"<sup>163</sup>—initial disclosure's purpose of efficiency has been satisfied summarily through cost and time reduction.

#### V. WEST VIRGINIA WANTS INITIAL DISCLOSURE

After over thirty years of emulating the Federal Rules almost verbatim, West Virginia opted out after initial disclosure came along in 1993.<sup>164</sup> Instead of adopting the new rules, the West Virginia advisory committee recommended an experimentation period.<sup>165</sup> Because the purposes of initial disclosure under the Federal Rules appear to have been satisfied<sup>166</sup> and because over a decade has passed since the last time the West Virginia Rules were amended, it is time that the West Virginia advisory committee revisits and realigns with the Federal Rules.

This Part discusses the state-wide survey conducted by the author and judges' responses to the survey. When the advisory committee revisits the rules, the judges' responses to the state-wide survey will provide the committee with a good reason to recommend incorporating initial disclosure provisions into the West Virginia Rules. As the survey shows, the majority of West Virginia state judges do not require a form of initial disclosure as it is not required in West Virginia.<sup>167</sup> However, those state judges that do require some form of de facto initial disclosure have noted increased efficiency of case-resolution. That is, when any form of initial disclosure is required, parties resolve matters more quickly. Federal judges in West Virginia share this sentiment as well. Federal judges who sat before and after 1993—thereby presiding over courts with and without initial disclosure—and judges who have only sat after 1993 praise initial disclosure's effects. Thus, judges in West Virginia support initial disclosure's amendment into the West Virginia Rules.

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<sup>162</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("[G]ive the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."); see *Gainor*, *supra* note 104; *Miller*, *supra* note 112.

<sup>163</sup> FED. R. CIV. P. 1.

<sup>164</sup> See W. VA. R. CIV. P. 26.

<sup>165</sup> See *supra* Section II.B.

<sup>166</sup> See *supra* Sections III, IV.

<sup>167</sup> Judges have discretion in planning stages of discovery to effectuate initial disclosure through West Virginia Rule of Civil Procedure 16. W. VA. R. CIV. P. 16.

A. *A State-Wide Survey*

A total of thirty-five randomly selected state and federal judges across West Virginia were sent and have received questionnaires for this Note.<sup>168</sup> Of the thirty-five judges, fifteen judges responded to questions asking, mainly, if West Virginia should adopt initial disclosure rules.<sup>169</sup> Of the fifteen judges that responded, eight are federal judges and seven are state judges. While the response rate may seem low, the responses show judges' support for initial disclosure.<sup>170</sup> Moreover, enough data was received so that if any further examination or inquiry into this Note's topic is conducted, a sound foundation has been established here.<sup>171</sup>

Questions addressed to state judges varied slightly from the questions addressed to federal judges. In both the state and federal judges' questionnaires, the questions called for judges to give reasons in support of their answers. To encourage freedom of thought and increase the response rate, judges have been granted anonymity. Some questions were divided into multiple parts in order to increase detail and further extract judges' opinions. This technique often elicited more thorough, detailed answers.

B. *An Overview of the State-Judge Questionnaire*

State judges were asked six questions,<sup>172</sup> the first of which contained four parts. In the first question, state judges were asked if Rule 26 initial disclosure or some other form of involuntary disclosure was required in their court. If the judge answered yes, the judge was then asked if initial disclosure was required pursuant to a local rule or order. If the judge answered yes again,

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<sup>168</sup> Questionnaires from Evan Olds, Assoc. Editor, *West Virginia Law Review*, to Federal and State Judges in W. Va. (on file with the *West Virginia Law Review*). Due to resource and time limitations, attorneys were not sent questionnaires for this Note. See *The West Virginia State Bar County Breakdown of Active Attorneys*, W. VA. ST. B., [http://www.wvbar.org/shared/content/county%20breakdown\\_2012-03-21.pdf](http://www.wvbar.org/shared/content/county%20breakdown_2012-03-21.pdf) (last visited Sept. 8, 2012) (reporting that 4,845 attorneys are currently and actively practicing law in West Virginia).

<sup>169</sup> The questionnaire's response rate has been deemed sufficient by James Heiko, Professor of Empirical Studies at West Virginia University College of Law. Professor Heiko has reviewed the judges' responses and agrees that judges in West Virginia overwhelmingly seem to support and recommend that West Virginia Rules of Civil Procedure be amended to include provisions for initial disclosure rules. Interview with Professor James Heiko, Professor of Empirical Studies, West Virginia University College of Law (Dec. 19, 2011) (on file with author).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* Likewise, further inquiry into attorneys' opinions on initial disclosure could also serve to support or oppose this Note's thesis.

<sup>172</sup> See *infra* Appendix 1.

the judge was requested to quote the local rule or order. The judges were then asked to summarize the court's initial disclosure requirements.

The second question asked the judge what materials parties are required to disclose pursuant to the court's initial disclosure requirements. The second question also included an option that allowed the judge to ignore the question if the first question had already addressed the same matter.

The third question contained three parts. First, the judge was asked to state whether or not initial disclosure had made litigation more efficient. Second, the judge was asked to explain why or why not initial disclosure increased trial efficiency in his or her court. Third, the judge was asked to state other effects initial disclosure had on his or her cases.

The fourth question also contained three parts. First, the judge was asked what strengths and weaknesses were evident in initial disclosure rules. Second, the judge was asked whether or not the West Virginia Rules should be amended to include provisions for initial disclosure. Third, the judge was asked to explain why or why not the West Virginia Rules should be amended to include provisions for initial disclosure.

The fifth question expounded on the fourth question and asked the judge whether or not the West Virginia Rules should mimic the Federal Rules if initial disclosure were to be adopted in West Virginia.

The sixth question asked for any additional comments.

### C. *Evaluating State-Judge Responses*

The evaluation of the state-judge responses begins by discussing the responses from judges who require de facto initial disclosure independent from the absent West Virginia initial disclosure provisions.<sup>173</sup> The evaluation discusses the kinds of initial disclosure required by the judges who act independently from the West Virginia Rules. Next, the responses from judges who do not require initial disclosure are discussed. For all judges, reasons for and reasons against West Virginia's adoption of initial disclosure are addressed. The end of this section provides a conclusion based on the state-judge responses.

Although the West Virginia Rules do not contain a provision requiring initial disclosure as the Federal Rules do, three of the seven state judges who responded to the questionnaires require some form of initial disclosure in their courts and show support for initial disclosure's adoption into the West Virginia Rules.<sup>174</sup> The three judges that require initial disclosure do so by local order and by Rule 16(b)<sup>175</sup> of the West Virginia Rules.<sup>176</sup> Also pursuant to West

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<sup>173</sup> See *infra* Appendix 3.

<sup>174</sup> *Id.*

<sup>175</sup> Rule 16(b) gives a judge discretion to expedite a case's progression by planning the discovery process:

Virginia Rule 16(b), one judge requires attorneys to submit a pre-trial memo that discloses exhibits, names, and addresses of all witnesses to the court and the opposing party during an early scheduling conference, which is a common practice of judges.<sup>177</sup>

The three judges explain several strengths of requiring initial disclosure, such as a decrease in frivolous lawsuits.<sup>178</sup> Frivolous lawsuits decrease because requiring initial disclosure “forces attorneys to conduct a proper investigation prior to filing [their cases].”<sup>179</sup> Furthermore, initial disclosure “requires counsel to consider early-on how they will prove their cause of action.”<sup>180</sup> Also, the judges state that requiring initial disclosure can lead to an accelerated discovery process, which in turn leads to quicker case resolution and decreases the time and money wasted by having parties make routine discovery requests.<sup>181</sup> As one judge concludes, initial disclosure requirements expedite serious settlement discussions.<sup>182</sup>

The judges also discuss some of initial disclosure’s weaknesses. Some of the judges discuss weaknesses and strengths that seem to contradict each other. For example, one judge explains that requiring initial disclosure could lead to additional work and expense, but the judge also states that requiring initial disclosure could save parties time and money.<sup>183</sup> This apparent contradiction may be explained in two ways. First, materials required by initial disclosure rules may prove futile in some cases but prove useful in other cases.

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(b) Scheduling and Planning. Except in categories of actions exempted by the Supreme Court of Appeals, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time:

- (1) To join other parties and to amend the pleadings;
- (2) To file and hear motions; and
- (3) To complete discovery.

The scheduling order also may include:

- (4) The date or dates for conferences before trial, a final pretrial conference, and trial; and
- (5) Any other matters appropriate in the circumstances of the case. A schedule shall not be modified except by leave of the judge.

W. VA. R. CIV. P. 16.

<sup>176</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>177</sup> *Id.*; see W. VA. R. CIV. P. 16.

<sup>178</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Second, initial disclosure may increase an attorney's workload at first, but in the long run, the disclosure may decrease work and expense. Among other weaknesses, the judges state that the present form of initial disclosure allowed by West Virginia Rule 16(b) is not as comprehensive or effective as the initial disclosure mandated by Federal Rule 26(a).<sup>184</sup> Granted, these judges may not have as much hands-on experience with initial disclosure, but as discussed later in Sections E and F, initial disclosure's strengths listed by these judges cohere with the same strengths listed by federal judges who have had hands-on experience with the initial disclosure.

The state-judges who independently require initial disclosure conclude that when some form of initial disclosure is required on the state level, cases resolve more efficiently.<sup>185</sup> One judge, however, hypothesizes that some attorneys do not comply with the court's order because West Virginia does not mirror the federal initial disclosure rule which requires disclosure.<sup>186</sup> This criticism comports with the weaknesses described above—that West Virginia's treatment of initial disclosure, as can be read into Rule 16(b),<sup>187</sup> is not altogether as comprehensive or effective as Federal Rule 26(a). Thus, judges who independently require initial disclosure only see a "somewhat" more efficient trial process. This same judge then goes on to urge the adoption of initial disclosure rules pursuant to Federal Rule 26(a), reasoning that attorneys should investigate their cases before filing suit.<sup>188</sup> Another judge ends the questionnaire by stating that the West Virginia Rules should "absolutely" be amended to include provisions for initial disclosure, but suggests that such provisions should include exemptions "tailored to cases common to state court."<sup>189</sup> The judge did not provide specific examples of cases that might be exempted from the reaches of initial disclosure; however, as shown in Section E of this Part, the United States District Court for the Northern District of West Virginia enumerates exemptions in its local rules.<sup>190</sup>

State judges that do not independently require initial disclosure are not uniform in their recommendations for the West Virginia Rules: two judges support West Virginia adopting initial disclosure provisions, and two judges oppose.<sup>191</sup> The two judges who oppose adopting initial disclosure gave no

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> West Virginia Rule 16(b) can be read in a way that gives judges authority to require their own brand of initial disclosure as they deem appropriate. *See* W. VA. R. CIV. P. 16; *supra* note 175 and accompanying text.

<sup>188</sup> Questionnaires from Evan Olds, *supra* note 168.

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

<sup>190</sup> *See infra* notes 210, 211 and accompanying text.

<sup>191</sup> Questionnaires from Evan Olds, *supra* note 168.

reasons for their opinion other than saying that “lawyers are busy enough already following rules. . . . [D]iscovery as mandated by current rules is sufficient.”<sup>192</sup> The two judges who support adopting initial disclosure were more vocal with their reasons. One judge states that “moving cases along” is the main strength of initial disclosure and further explains that “parties really need to be exchanging info as soon as possible to move their cases along.”<sup>193</sup> The same judge states that initial disclosure requirements do not appear to have weaknesses and adds, “I will consider adding a local rule to make this work.”<sup>194</sup> Both judges who support adopting initial disclosure conclude that the West Virginia rule should mimic Federal Rule 26(a).<sup>195</sup>

The state-judge responses show an affinity toward implementing initial disclosure by using their own discretion, by suggesting West Virginia Rules adopt Federal Rule 26(a), or by both. The three judges that require de facto initial disclosure independently from the absent West Virginia disclosure requirements recommend that West Virginia adopt initial disclosure because they have seen its effects reap efficient results on the state level.<sup>196</sup> The four judges that do not independently require initial disclosure are split on the matter, perhaps because they lack experience with requiring initial disclosure.<sup>197</sup> Judges opposing the adoption offer only one reason while judges supporting the adoption delve into much more detail.<sup>198</sup> In sum, a total of five of the seven state-level judges who responded recommend that West Virginia adopt initial disclosure.<sup>199</sup>

#### D. *An Overview of the Federal-Judge Questionnaire*

The federal judges were asked seven questions,<sup>200</sup> the first of which contained two parts. In the first question, federal judges were asked if they required any other form of involuntary disclosure in their court. If the judge answered yes, the judge was then asked to describe the additional initial disclosure requirements.

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See id.* State judges may lack experience with initial disclosure because it is not required by the West Virginia Rules.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*; *see infra* Appendix 3.

<sup>200</sup> *See infra* Appendix 2.

The second question contained three parts and started by asking whether or not the judge had worked as a judge before 1993 when initial disclosure became mandatory. If the judge answered yes, the judge was then asked if the change resulted in a more efficient or less efficient court. Lastly, as a catch-all, the judge was asked to describe how the change affected that judge's court.

The third question contained three parts with an option that gave the judge an opportunity to ignore it if it had been previously answered. First, the judge was asked if initial disclosure had made litigation more efficient. Second, the judge was asked to describe initial disclosure's efficient or inefficient effects on his or her court. Third, as a catch-all, the judge was asked to explain any other effects initial disclosure has had on his or her court.

The fourth question contained four parts with the same option to ignore offered in the third question. First, the judge was asked whether or not litigation would be more efficient without initial disclosure requirements. Second, the judge was asked to explain why or why not. Third, the judge was asked whether or not litigation would be more efficient with more initial disclosure. Fourth, the judge was asked to explain why or why not again.

The fifth question contained three parts. First, the judge was asked what strengths and weaknesses were evident in initial disclosure rules. Second, the judge was asked whether or not the West Virginia Rules should be amended to include provisions for initial disclosure. Third, the judge was asked to explain why or why not the West Virginia Rules should be amended to include provisions for initial disclosure.

The sixth question expounded on the fifth question and asked whether or not the West Virginia Rules should mimic the Federal Rules if initial disclosure were to be adopted in West Virginia.

The seventh question asked for any additional comments.

### *E. Evaluating Federal-Judge Responses*

The evaluation of the federal-judge responses begins by reviewing the responses of judges who sat as judges before 1993. These judges' insights are particularly valuable because they have presided over courts before and after initial disclosure's enactment. Next, responses of judges who sat after 1993 are evaluated and distinguished from those judges who sat before 1993.<sup>201</sup> The end of this Section will provide a conclusion based on the federal-judge responses.<sup>202</sup>

Of the eight federal judges who responded to the questionnaire, three began sitting as judges before 1993, the year of initial disclosure's

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<sup>201</sup> See *infra* Appendix 3.

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

enactment.<sup>203</sup> These three judges agree that the implementation of initial disclosure results in a more orderly and timely discovery process with less litigation costs.<sup>204</sup> Like state judges, these federal judges applaud initial disclosure for encouraging parties to concentrate on discovery and trial preparation earlier.<sup>205</sup>

When asked to list strengths and weaknesses of initial disclosure requirements, one of the judges who sat before 1993 reflects on the United States Supreme Court sanctioned advisory committee, “When the rule was being considered before the Judicial Conference and its Rules of Civil Procedure Committee, it *was* felt that this would unduly favor defendants and disfavor plaintiffs. I’m not sure this has occurred.”<sup>206</sup> Another judge states that initial disclosure requirements do not have weaknesses.<sup>207</sup> Each of the three judges agree that initial disclosure requirements work well overall to reduce litigation costs, avoid discovery disputes, and encourage parties to strategize at earlier dates.<sup>208</sup>

When asked if the West Virginia Rules should be amended to include provisions for initial disclosure, two of the three judges who sat before 1993 agree that West Virginia should adopt initial disclosure.<sup>209</sup> One of the two judges who supports West Virginia’s adoption of initial disclosure suggests that the West Virginia Rules be amended to include exemptions<sup>210</sup> additional to the

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<sup>203</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>204</sup> *Id.*; see *infra* Appendix 3.

<sup>205</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* By local rules, West Virginia’s Northern District Court exempts the following cases from initial disclosure requirements:

- (1) habeas corpus cases and motions attacking a federal sentence;
- (2) procedures and hearings involving recalcitrant witnesses before federal courts or grand juries pursuant to 28 U.S.C. § 1826.
- (3) actions for injunctive relief;
- (4) review of administrative rulings;
- (5) Social Security cases;
- (6) prisoner petitions pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) in which the plaintiff is unrepresented by counsel;
- (7) condemnation actions;
- (8) bankruptcy proceedings appealed to this Court;
- (9) collection and forfeiture cases in which the United States is plaintiff and the defendant is unrepresented by counsel;

ones listed in Federal Rule 26.<sup>211</sup> Only one of the three judges sitting before 1993 remains ambivalent on the matter of West Virginia adopting initial disclosure pursuant to the Federal Rules.<sup>212</sup> That judge states that he has no opinion on the matter, but also states that initial disclosure has been shown to reduce litigation costs and avoid discovery disputes.<sup>213</sup> Thus, the three judges who sat before 1993 appear to support initial disclosure's implementation, though in varying degrees.<sup>214</sup>

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- (10) Freedom of Information Act proceedings;
  - (11) post-judgment enforcement proceedings and debtor examinations;
  - (12) enforcement or vacation of arbitration awards;
  - (13) civil forfeiture actions;
  - (14) student loan collection cases;
  - (15) actions that present purely legal issues, require no resolution of factual issues, and that may be submitted on the pleadings, motions and memoranda of law;
  - (16) certain cases involving the assertion of a right under the Constitution of the United States or a federal statute, if good cause for exemption is shown; and
  - (17) such other categories of actions as may be exempted by standing order.

N.D. W. VA. R. 16.01(g).

<sup>211</sup> Compare N.D. W. Va. R. 16.01(g), with FED. R. CIV. P. 26(a)(1)(B):

- (B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:
  - (i) an action for review on an administrative record;
  - (ii) a forfeiture action in rem arising from a federal statute;
  - (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
  - (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
  - (v) an action to enforce or quash an administrative summons or subpoena;
  - (vi) an action by the United States to recover benefit payments;
  - (vii) an action by the United States to collect on a student loan guaranteed by the United States;
  - (viii) a proceeding ancillary to a proceeding in another court; and
  - (ix) an action to enforce an arbitration award.

FED. R. CIV. P. 26(a)(1)(B). For a comparative discussion of local rules and the Federal Rules, see Gerald G. MacDonald, *Investigating Alternative Approaches to the Federal Discovery Reform Initiatives Under Rule 26(a)(1)*, 36 NO. 2 JUDGES. J. 4 (1997).

<sup>212</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>213</sup> *Id.*

<sup>214</sup> See *id.*; *infra* Appendix 3; cf. Silverstein, *supra* note 67, at 196 ("In states which have adopted the federal rules it is reported that bench and bar are very well pleased with them and that hardly anyone wishes to go back to the old system.").

The five remaining judges who began sitting as judges after 1993 state that initial disclosure makes their courts efficient.<sup>215</sup> The judges reason that requiring disclosure accelerates discovery without court intervention and forces lawyers to fairly disclose their evidence.<sup>216</sup> As one judge puts it, the free-flow of information between parties “creates an atmosphere of voluntary disclosure throughout the discovery period.”<sup>217</sup> Otherwise, without initial disclosure, parties are forced to draft and file requests and then wait for responses.<sup>218</sup> So, by using initial disclosure, parties avoid routine discovery requests that cost time and money which in turn creates an atmosphere of cooperation between parties—all resulting in greater efficiency.<sup>219</sup> Similar to the state-judge responses, many of the federal judges state that parties having to evaluate and begin to prepare their cases sooner contribute to initial disclosure’s greater efficiency.<sup>220</sup>

These same judges unequivocally recommend that the West Virginia Rules be amended to include initial disclosure provisions identical to Federal Rule 26(a).<sup>221</sup> As one judge states, having a different sets of rules for state courts discourages and intimidates lawyers from filing in federal courts.<sup>222</sup> Other judges explain more generally that having differing sets of rules makes little sense while having uniform rules provides a valuable consistency.<sup>223</sup> The judges state that the valuable consistency will benefit state courts in the same ways that increased efficiency has benefitted federal courts.<sup>224</sup> However, another judge points out that if the West Virginia Rules were to be amended to mimic the Federal Rules’ provisions for initial disclosure, other West Virginia Rules of Civil Procedure may be affected.<sup>225</sup> For example, Rule 37<sup>226</sup> may need to be amended to provide consequences for failing to disclose documents set forth in West Virginia’s initial disclosure provision.<sup>227</sup> This may remedy the

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<sup>215</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

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

<sup>223</sup> *Id.*; *see supra* Part II.B (discussing that the West Virginia Rules were created to comport with the modern trend of the Federal Rules and had mimicked the Federal Rules for over 60 years before deviating from the Federal Rules).

<sup>224</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>225</sup> *Id.*

<sup>226</sup> West Virginia Rule 37 provides sanctions for discovery abuse. W. VA. R. CIV. P. 37.

<sup>227</sup> Questionnaires from Evan Olds, *supra* note 168.

implementation problem discussed in Part IV of this Note.<sup>228</sup> Apart from the subsidiary effects initial disclosure may have on other rules, the consensus among federal judges who began sitting after 1993 is that West Virginia would benefit from adopting initial disclosure pursuant to Federal Rule 26(a).<sup>229</sup>

The federal-judge responses show a strong affinity overall toward the West Virginia Rules being amended to include initial disclosure.<sup>230</sup> With only one federal judge remaining neutral, seven of eight judges explicitly recommend initial disclosure's adoption into the West Virginia Rules.<sup>231</sup> The judge that remains neutral sat before 1993 and does not criticize initial disclosure requirements, but rather praises the effects initial disclosure has on case resolution.<sup>232</sup> The remaining five judges who were not sitting before 1993 unequivocally recommend that West Virginia adopt initial disclosure pursuant to the Federal Rules.<sup>233</sup> Thus, the judges' conclusion appears to be that because initial disclosure has succeeded on the federal level, the same will happen on the state level.<sup>234</sup>

*F. West Virginia's Judiciary Has Spoken*

Twelve of fifteen judges, or eighty percent, of the judges in West Virginia that responded recommend that the West Virginia Rules be amended to include initial disclosure. Eleven of fifteen judges, or seventy-three percent, recommend that initial disclosure provisions in the West Virginia Rules should mimic Federal Rule 26(a). The one judge who supports the rule being amended into the West Virginia Rules but who opposes the rule mimicking the Federal Rule 26(a) suggests that the rule should be closely tailored to state court needs. The reasons given to support initial disclosure mirror the reasons for which initial disclosure requirements were created—reducing cost and delay and increasing efficiency—and the reasons for which the West Virginia Rules were created—uniformity with the Federal Rules and efficiency. Without criticizing initial disclosure rules, the judges who oppose initial disclosure only say that the current West Virginia Rules are satisfactory. Therefore, based on the responses, judges from across the state definitively support the West Virginia Rules being amended to include initial disclosure provisions.<sup>235</sup>

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<sup>228</sup> See *supra* Part IV (discussing studies that mention problems of judges not enforcing initial disclosure).

<sup>229</sup> Questionnaires from Evan Olds, *supra* note 168.

<sup>230</sup> See *id.*

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*; *infra* Appendix 3.

<sup>235</sup> See *infra* Appendix 3.

## VI. CONCLUSION

The West Virginia Rules should follow the Federal Rules because the West Virginia Rules should once again comport with the trend and purpose of the Federal Rules.<sup>236</sup> The Federal Rules were created in 1938 to establish a uniform set of rules under which courts nationwide could operate, and since then, the trend of the Federal Rules has moved toward requiring disclosure and uniformity, which is exemplified in the current initial disclosure rule. In 1960, the West Virginia Rules were enacted to mimic the Federal Rules and thus follow the “modern and generally accepted standards of procedure.”<sup>237</sup> The Federal Rules have followed the course of efficiency through uniformity and full disclosure to decrease cost and delay, and the West Virginia Rules should do the same.

Not only has the initial disclosure rule been shown to work, but also judges in West Virginia want the rule.<sup>238</sup> Federal judges, who have dealt with initial disclosure, laud its effects of decreasing cost and delay and recommend amending the West Virginia Rules to include it.<sup>239</sup> State judges who have either never dealt with initial disclosure or have dealt with it in a localized, de facto form laud its effects as the federal judges do.<sup>240</sup> When the West Virginia Supreme Court Advisory Committee recommended to the Supreme Court of Appeals of West Virginia to exclude the initial disclosure rule from the West Virginia Rules, it intended to eventually revisit the rules. Now is the time to revisit the rules, to realign with the federal trend of requiring disclosure, to respond to West Virginia judges’ recommendations, and to incorporate Rule 26(a) into the West Virginia Rules.

*Evan Olds\**

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<sup>236</sup> See LUGAR & SILVERSTEIN, *supra* note 66, at viii, 214.

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

<sup>238</sup> See *infra* Appendix 3.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

\* Executive Notes Editor, Volume 115 of the *West Virginia Law Review*; J.D. Candidate, West Virginia University College of Law, 2013; B.A. in English, *cum laude*, Concord University, 2009. I would like to thank my family for their love and support. I would also like to thank my Note Advisor, Professor Charles DiSalvo, for his invaluable insight and guidance, Professor James Heiko for his statistical advice, my colleagues on the *West Virginia Law Review* for their substantive and technical assistance, and the judges whose feedback made this Note possible. Any errors contained herein are mine alone.

## APPENDICES

*Appendix 1*

1. Do you require Rule 26 initial disclosure or some other form of involuntary disclosure in your court?

If so, do you do so by local rule or order?

If you do require disclosure by local rule or order, please quote the rule here:

If you do not require disclosure by local rule or order, would you please describe the disclosure requirements in your court?

2. If you do require initial disclosure, what information or materials do you require to be disclosed? If this information is given in the first question, you do not have to answer this question.

3. Has initial disclosure made the trial process in your court more efficient?

Please explain how disclosure has made the trial process more or less effective in your court here:

What other effects has disclosure had on cases in your court?

4. What are the strengths and weaknesses of the initial disclosure rules?

Do you recommend that the West Virginia Rules of Civil Procedure be amended to include provisions for initial disclosure?

Why or why not?

5. If you do think that West Virginia state courts should adopt initial disclosure, should West Virginia's initial disclosure rule mimic the federal initial disclosure rule?

6. Please add any additional comments here:

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*Appendix 2*

1. Do you require any other form of involuntary disclosure in your court?

If you do require some other form of initial disclosure in your court, would you please describe the initial disclosure requirements in your court?

2. Were you sitting as a judge before 1993 when initial disclosure became mandatory?

If so, has the change made your court more efficient or less efficient?

Would you please describe how the change has affected your court?

3. If the following information is given in the previous question, you do not have to answer this question.

Has initial disclosure made your court more efficient?

Please explain how initial disclosure has made the trial process more or less effective in your court here:

What other effects has initial disclosure had on cases in your court?

4. If the following information is given in question #2, you do not have to answer this question.

Do you think your court would be more efficient without initial disclosure?

Would you please explain why or why not?

Do you think your court would be more efficient with more initial disclosure?

Would you please explain why or why not?

5. What are the strengths and weaknesses of the initial disclosure rules?

Do you recommend that the West Virginia Rules of Civil Procedure be amended to include provisions for initial disclosure?

Would you please explain why or why not?

6. If you do think that West Virginia state courts should adopt initial disclosure, should West Virginia's initial disclosure rule mimic the federal initial disclosure rule?
7. Please add any additional comments here:

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Appendix 3

