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THE MONTANA FEDERAL CIVIL JUSTICE PLAN

Carl Tobias*

The Montana Federal District Court and thirty-three other federal districts recently took steps to qualify as Early Implementation District Courts (EIDC) under the Civil Justice Reform Act of 1990.¹ The Montana District completed the development of its civil justice expense and delay reduction plan, which also includes numerous proposed amendments of the local rules necessary to implement the plan, before the December 31, 1991 statutory deadline. In the last issue of this journal, I analyzed the work that preceded development of the plan.² I examined the efforts of the Advisory Group to Implement the Civil Justice Reform Act of 1990 (Group) and its August 1991 report to the Montana District Court. I also criticized certain aspects of the recommendations that the Group made in its report. The plan includes numerous concepts that should improve civil justice in the Montana Federal District Court. Nevertheless, I believe that some features of the plan could prove problematic for judicial officers, lawyers and litigants in the Montana District and that a few may even increase delay and expense. Those dimensions of the plan that I consider most troubling are the focus of this essay.

The plan that the Montana Federal District Court published in December, 1991, is essentially an abbreviated version of the report that the Advisory Group submitted to the Montana federal judges last August. The plan includes numerous suggestions for change in the local rules that are to be adopted formally when implementing the plan's provisions. The plan is scheduled to become fully effective in April, 1992, so that the public should have adequate time to comment on the court's proposals to change the local rules to effectuate the plan. The Montana Federal District Court, with the Advisory Group's assistance, concluded "that a system of differential case management centered on the active and informed participation of both counsel and a judicial officer in the develop-

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1. See Judicial Improvements Act of 1990, tit. I., Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (Supp. 1990)). See also Donna Stienstra, Districts That Submitted CJRA Advisory Group Reports and Delay Reduction Plans By December 31, 1991 (Feb. 29, 1992) (list compiled for Federal Judicial Center) (copy on file with author). See generally Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

2. See Tobias, *Federal Court Procedural Reform*, 52 MONT. L. REV. 433, 437-51 (1991).

ment of a case-specific management plan will ensure the civil litigation process accomplishes its intended purpose, *i.e.*, the fair and efficient disposition of civil disputes.”³ The court intends to assess the efficacy of provisions in the plan on a continuing basis and, with the help of the Advisory Group, evaluate periodically the condition of the court’s criminal and civil docket. The Montana Federal District Court also will alter the plan if conditions so indicate to improve continually the district’s civil justice system.

It is incumbent upon Montana attorneys who practice in the federal court to analyze and comment on the plan. If the plan is implemented as proposed, it will significantly change the character of federal court practice, particularly lawyers’ understanding and development of their cases and judicial officers’ management of lawsuits from filing to disposition.⁴ The public will have a forty-five day period for comment on the plan and the local rules, and the judges will have an opportunity to analyze that public input and make changes as warranted. The plan and the local rules that implement it are scheduled to take effect on April 1, 1992.

Of course, it is impossible to quarrel in the abstract with the admirable goal of reducing delay and expense in the civil justice system. Whether the provisions prescribed for attaining this objective will achieve it in practice, however, remains uncertain. Several broad themes that run throughout the plan and the proposed local rules could prove problematic.

One such theme is numerous arguable assumptions that apparently underlie the plan. For instance, the plan assumes that judicial officers in the Montana District will have the requisite time, energy and inclination to micro-manage all non-exempted civil cases on their dockets in the close way that the plan contemplates. The plan also assumes that all attorneys will devote substantial time, effort and interest to researching and understanding their cases. It is possible that neither the judicial officers nor the lawyers will be able to discharge properly all of the responsibilities that the plan imposes. For example, it will take considerable effort for the judicial officers to be sufficiently steeped in the law and facts of each of their cases to prepare a discovery management plan for every one of them. Correspondingly, attorneys may experience difficulty complying with the plan’s requirements that they prepare

3. See United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan 1 (Dec. 1991) [hereinafter Plan].

4. See *id.* at 3. See generally Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391-400 (1982).

and file pretrial statements and pre-discovery disclosure statements as well as attend preliminary pretrial conferences.⁵ Imposing more responsibilities on lawyers, in terms of paper filings and participating in activities, concomitantly promises to increase litigation delay and expense and to favor attorneys and clients who have greater resources.⁶

Another general theme in the plan and suggested local rules is the provision of rather inflexible time requirements and numerical limitations which were included in the apparent belief that judges and lawyers cannot be trusted to act responsibly. For instance, if a judicial officer fails to rule on a pending motion by a date certain, the clerk of court is to advise the officer of that fact and if the judicial officer does not decide within thirty days, the clerk is to report this delinquency to the chief judge.⁷ Memoranda supporting motions will be restricted to twenty pages, while more than fifty interrogatories will be presumed excessive.⁸

In addition to these broad themes, numerous specific aspects of the plan and proposed local rules could prove problematic. The possibility that lawyers and litigants will have to demand reassignment of their cases to Article III judges from magistrate judges could adversely affect the relations between "repeat players" and the judicial officers, especially in a district that is as sparsely populated as the Montana District and which has so few active federal court practitioners.⁹ The potential for magistrate judges to share

5. See Plan, *supra* note 3, at 10-13. These, and other requirements imposed, by virtue of the effort required to master and comply with them, may additionally reduce the already small size of the federal court bar.

6. For example, preparing and filing statements, mentioned *supra* text accompanying note 5, will fall more heavily on those who possess limited resources. This correspondingly may mean that the requirements give the plan a pro-defendant tilt. See also Tobias, *supra* note 2, at 450-51. See generally Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFF. L. REV.* 485, 495-98 (1988-89). *But cf.* Plan, *supra* note 3, at 13 (judicial officer's role will be to assist counsel in developing case management plan that will preclude use of court process as strategic weapon).

7. See Plan, *supra* note 3, at 20-21, 32.

8. See *id.* at 20, 16. If interrogatories are the "poor litigant's discovery," restricting their number has the same effect as was discussed *supra* note 6 and accompanying text.

9. See Plan, *supra* note 3, at 3-4. Each Article III judge in active service is to develop and implement a plan for assigning civil cases to magistrate judges, although it now appears that most of the Article III judges will assign cases on a co-equal basis. See *id.* Litigants are to be notified of their right to request reassignment to an Article III judge, but if parties fail to make a timely request that right will be deemed waived. *Id.* at 4. See generally Tobias, *supra* note 2, at 442-43. Requiring that litigants request timely reassignment or suffer waiver, rather than proceeding only after they have affirmatively consented, seems inconsistent with 28 U.S.C. § 636(c). Section 636(c)(1) provides for magistrates to exercise civil jurisdiction "[u]pon the consent of the parties." Section 636(c)(2) states that parties shall be advised that "they are free to withhold consent without adverse substantive consequences."

Most important, that subsection states that "rules of court for the reference of civil matters

the caseload could correspondingly foster "judicial officer shopping."¹⁰

The creation of an expedited civil trial docket apparently would be an advance, if it can be implemented in practice.¹¹ Attorneys may encounter difficulty assembling their cases in the six-month period prescribed, while judicial caseloads may not accommodate such a docket.¹² Before adopting this proposal, the Montana Federal District Court may want to review the situation in the Eastern District of Virginia, which is notorious for its "rocket docket," although that case-processing system has not been closely analyzed.¹³

The prescriptions governing mandatory pre-discovery disclosure, which are "more extensive than the proposed amendments to" Federal Rule 26,¹⁴ appear inadvisable, particularly because

to magistrates shall include procedures to protect the voluntariness of the parties' consent." *Id.* See also FED. R. CIV. P. 73.

The Senate Committee Report that accompanied passage of the CJRA also includes a passage which appears to cast doubt on this approach:

While the legislation provides for the exercise of the full role of magistrates in the pretrial process, valid questions have been raised about the full extent of the magistrates' constitutional authority. Indeed, three recent Supreme Court decisions, *Northern Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50 (1982), *Granfinanciera v. Nordberg*, 109 S. Ct. 2782 (1989), and *Gomez v. United States*, 109 S. Ct. 2237 (1989), raise questions about what issues may be handled by non-Article III judicial officers. Accordingly, the committee agrees with the recommendation of the Federal Courts Study Committee (Report of the Federal Courts Study Committee (April 1990) at 80) that the Judicial Conference should conduct an indepth study of the constitutional parameters within which magistrates may properly exercise authority.

See SENATE COMM. ON JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. Rep. No. 101-416, 101st Cong., 2d Sess. 20 (1990), reprinted in 1990 U.S.C.C.A.N. 6823 n. 10.

10. I simply mean to say that a party could request reassignment because the litigant believes that an Article III judge is more likely than the magistrate judge to rule for the party on the merits. See also Tobias, *supra* note 2, at 442-43. See generally Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

11. See Plan, *supra* note 3, at 11, 14.

12. The Plan seems to have anticipated these problems and attempts to allow for them. See *id.* at 11-12, 14.

13. See Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 101 (Summer 1991). See generally Report of the Civil Justice Reform Act Advisory Group for the Eastern District of Virginia (Sept. 19, 1991).

14. The plan "does not limit the disclosure to persons and documents that 'significantly' bear upon the issues in the case. The elimination of any qualifying term will make it more difficult for a litigant or attorney to avoid appropriate disclosure by relying upon the relative concept of significance." Plan, *supra* note 3, at 18 (citation omitted). See also Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendment of Federal Rule of Civil Procedure 26(a), reprinted in 137 F.R.D. 87, 87-88 (1991).

they could prove overly burdensome¹⁵ and because the controversial nature of the proposed revision in Federal Rule 26 means that it is likely to be altered significantly.¹⁶ Nonetheless, the Civil Justice Reform Act may authorize experimentation in specific districts with local rules that differ from the Federal Rules,¹⁷ and the Advisory Committee has proposed an amendment to Federal Rule 83(b) that would have an analogous effect.¹⁸

Perhaps the most troubling feature of the plan is its proposal to establish in every division of the Montana District a peer review committee to review the litigation conduct and discovery practices of lawyers who practice before the court.¹⁹ The committees would be comprised of practicing members of the bar to "be appointed by majority vote of the Article III judges of the district in active service."²⁰ The committees would review discovery or litigation practices at the request of any judicial officer who is to provide them with a statement delineating the questioned practice.²¹ After considering the record, the committees would "present the judicial officer with an advisory opinion stating whether the practice or conduct falls within the bounds of accepted discovery or litigation practice."²²

Little data appear to suggest that litigation or discovery abuse in the Montana District warrants corrective action, especially with a remedy as potentially severe as that proposed. Even if there were information showing that abuse's magnitude or seriousness is substantial, creation of these committees seems inadvisable. First, Article III judges may lack adequate authority to name such committees, although this seems to be a close question.²³ Neither criteria

15. See *supra* notes 5-6 and accompanying text.

16. Considerable opposition to the proposal was expressed in written public comments and at the hearings held by the Advisory Committee during November, 1991 in Los Angeles and during February, 1992 in Atlanta.

17. See SENATE COMM. ON JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. Rep. No. 101-416, 101st Cong., 2d Sess. 14-32 (1990), reprinted in 1990 U.S.C.A.N. 6802, 6816-35.

18. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendment of Federal Rule of Civil Procedure 83(b), reprinted in 137 F.R.D. at 153. See generally Tobias, *supra* note 1, at 51-52 n.15. The Advisory Committee, in formulating proposals to amend two provisions of Rule 26, also explicitly recognized that district courts might make exceptions to the federal provision by local rule. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rule of Civil Procedure 26(a)(2)(C), 26(b)(2), reprinted in 137 F.R.D. at 89, 91-92.

19. The court is to establish the committees "not later than June 30, 1992." Plan, *supra* note 3, at 17.

20. *Id.*

21. *Id.*

22. *Id.*

23. Federal judges have appointed all manner of adjuncts, such as special masters,

for appointment nor terms of service are prescribed. The plan seems to give the committees a roving commission to review any behavior that a judicial officer certifies to them. The committees would be charged with reviewing suspect conduct pursuant to a standard that is at best vague, and in any event too insubstantial—"whether the practice or conduct falls within the bounds of accepted discovery or litigation practice."²⁴ For example, one lawyer's professional behavior is another attorney's improper conduct, while it may be a judge's abusive activity. The plan makes little procedural provision, particularly in terms of due process. For instance, some paper record is prescribed, but there is no provision for oral testimony, evidentiary presentation, or the right to challenge assertions in the paper record. The plan does not state whether a majority of the committees' members must agree, whether the committees' advisory opinions are to be in writing and how they are to be justified, and what will be the predicate if the committees find that the behavior certified is not acceptable.²⁵

A few requirements relating to settlement also could pose problems. Mandating attendance at settlement negotiations by representatives of each litigant having authority to participate and effect a complete compromise may place undue pressure on certain parties, especially those with scarce resources.²⁶ The Advisory Group's recommendation that the judicial officer have discretion to preside over settlement conferences could have similar effects.²⁷

In conclusion, the civil justice plan developed by the Montana Federal District Court promises to reduce expense and delay in the

amici and advisory committees, to assist them. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1300-01 (1976). Statutes or rules authorize most such appointments. See, e.g., FED. R. CIV. P. 53 (special masters). See also Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984). See generally Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 281 (1989). The Supreme Court also recently recognized that the federal judiciary has a broad ambit in which it may exercise inherent judicial authority to protect the court's own processes from litigation and discovery abuse. See *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991). See generally Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 948-49 (1991).

24. See Plan, *supra* note 3, at 17.

25. See *id.* The predicate apparently would be some form of sanction. If so, that should be specifically stated.

26. See *id.* at 22. The Civil Justice Reform Act, 28 U.S.C. §473(b)(5), now authorizes such compulsory attendance, although the question of whether courts had this authority had been highly controversial. See, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). See also *supra* notes 6, 8 and accompanying text.

27. See Plan, *supra* note 3, at 22. Cf. Tobias, *supra* note 2, at 443-45 (discussion of problems that arise from affording judicial officers discretion to preside over settlement conferences).

civil litigation process. Nonetheless, certain components of the plan may not have those effects and some parts could well increase expense and delay. Montana attorneys, whether they practice often or infrequently in federal court, should scrutinize the plan, search for ways of improving it, and make their views known to the Montana federal district judges. With thorough, informed input, the Montana Federal District Court should be able to revise the plan in a way that will enable it to reduce cost and delay in the civil justice system most effectively.

