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## UPDATING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

The Montana Federal District Court has now implemented most aspects of the civil justice expense and delay reduction plan that it formally adopted in April of 1992. Moreover, all of the judicial officers and many Montana attorneys who practice in federal court have had experience with those procedures which the plan imposes. Furthermore, there have been certain new developments relating to the implementation of federal civil justice reform nationally. This article provides an update of significant developments involving federal civil justice reform at the national level and in the Montana District as the court and practitioners enter their second year of experience with civil justice reform.<sup>1</sup>

### I. NATIONAL DEVELOPMENTS

#### A. *Civil Justice Reform Act of 1990*

There has been somewhat of a lull in developments nationally since I last reported on civil justice planning around the country.<sup>2</sup> The Judicial Conference of the United States Committee on Case Management and Court Administration officially designated thirty-four federal districts, including the Montana District, as Early Implementation District Courts (EIDC) on July 30, 1992.<sup>3</sup> Since early 1992, most of those districts have been applying the

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\* Professor of Law, University of Montana. I wish to thank Lori Harper, Jerry Lynch, Peggy Sanner, and Tammy Wyatt-Shaw for valuable suggestions, numerous Montana practitioners for their insights on civil justice reform, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. I have documented and analyzed prior developments in civil justice reform in earlier issues of this journal. See Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992) [hereinafter *Plan*]; Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992) [hereinafter *Civil Justice*]; Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 437-51 (1991) [hereinafter *Procedural Reform*].

2. See Tobias, *Civil Justice*, *supra* note 1, at 244-48. See also Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992).

3. See, e.g., Letter to Gene E. Brooks, Chief Judge, United States District Court for the Southern District of Indiana, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992); Letter to Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992). See also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (list of EIDCs).

procedures promulgated in their civil justice plans. Some of the courts have recently completed or should soon finish their first annual assessments of the procedures' efficacy in reducing cost and delay.<sup>4</sup> A number of the districts found that the procedures were relatively effective in decreasing expense and delay, and a few of the courts have made adjustments in those plans which are intended to reduce further cost and delay.<sup>5</sup>

In all of the non-EIDCs, the advisory groups have been developing reports and recommendations, and the courts, upon receiving the reports and suggestions, have been fashioning civil justice plans.<sup>6</sup> A tiny number of these remaining sixty districts issued civil justice plans in 1992, but the overwhelming majority will do so in 1993 before the December deadline.<sup>7</sup>

Each of the advisory group reports and civil justice plans published during 1992 included certain provisions that I found were advisable, some which were less advisable, and others that had both advisable and less advisable features. An example of the last is the Western District of Missouri's introduction of an ambitious "early assessment program" under which it randomly assigns one-third of its civil caseload to some form of non-binding alternative dispute resolution (ADR).<sup>8</sup> Lawyers and parties, whose cases are so assigned, but who do not participate in good faith in prescribed ADR, however, can be sanctioned.<sup>9</sup> These requirements could be especially onerous for resource-poor litigants.<sup>10</sup> The parties have to

4. See, e.g., United States District Court District of New Jersey, Annual Assessment of the Civil Justice Expense and Delay Reduction Plan for Implementation of the Civil Justice Reform Act of 1990 in the District of New Jersey (Dec. 1992); Annual Report of Western District of Wisconsin Advisory Group (Jan. 8, 1993).

5. See, e.g., United States District Court for the Eastern District of Texas, General Order No. 92-23 Amending Article Four, Civil Justice Expense and Delay Reduction Plan (Oct. 29, 1992). Cf. Differentiated Case Management Plan of the United States District Court for the Western District of Michigan (Sept. 1, 1992) (amendment of plan to implement differentiated case management system).

6. See, e.g., United States District Court for the Eastern District of Tennessee, Report of the Advisory Group on Litigation Cost and Delay (Dec. 1992); United States District Court for the Northern District of Texas, Civil Justice Reform Act Advisory Committee Report (May 7, 1992).

7. See, e.g., Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Western District of Missouri (Apr. 30, 1992). See also Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1).

8. See United States District Court for the Western District of Missouri, Early Assessment Program Early Implementation Project, at 1-15 (Oct. 31, 1991). See also Western District of Missouri Plan, *supra* note 7, at 2, Exhibit A.

9. See Western District of Missouri Early Assessment Program, *supra* note 8, at 15.

10. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L. J. 1393, 1421 nn.141-43 (1993). See generally Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89).

spend scarce resources participating in non-binding proceedings, while litigants risk exposure to sanctions if they fail to act in good faith. The Advisory Group for the Northern District of Texas has correspondingly recommended that the district impose numerical limitations on interrogatories and depositions. Although this technique might reduce certain discovery delay and expense, it may afford insufficient flexibility to treat a broad range of cases—particularly complex litigation.<sup>11</sup>

### B. Executive Branch Civil Justice Reform

The Bush Administration instituted several civil justice reform initiatives. In October 1991, President Bush promulgated an Executive Order that was meant to “facilitate the just and efficient resolution of civil claims involving the United States Government.”<sup>12</sup> He asserted that it was appropriate to experiment with litigation in which the government is a participant, because government counsel should be held to higher standards and ought to set the tone for all lawyers and litigants.<sup>13</sup> Integral to Executive Order 12778 are “reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases.”<sup>14</sup>

In late January 1992, the United States Department of Justice issued a memorandum implementing the Executive Order which afforded government counsel and administrative agencies preliminary guidance for conducting litigation on behalf of the federal government.<sup>15</sup> After the Justice Department received input on this experiment in July 1992 from government lawyers and agencies, the Department intended to issue final guidelines covering government litigation, and the Attorney General signed them in January 1993.<sup>16</sup>

During February 1992, the Bush Administration sponsored introduction of the Access to Justice Act, the Administration’s pro-

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11. See Northern District of Texas Report, *supra* note 6, at 37-38.

12. Exec. Order No. 12,778, *reprinted in* 56 Fed. Reg. 55,195 (1991). See generally Tobias, *Roadmap*, *supra* note 2, at 512-15.

13. Exec. Order No. 12,778, *reprinted in* 56 Fed. Reg. 55,195 (1991).

14. Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Exec. Order No. 12,778, 57 Fed. Reg. 3640, 3640-41 (1992).

15. See *id.*

16. Telephone interview with Janice Calabresi, Civil Division, United States Department of Justice, Washington, D.C. (Dec. 3, 1992). See Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12788, 58 Fed. Reg. 6,015 (1993). See also Memorandum of Guidance on Implementation of the Litigation Reforms, *supra* note 14, at 3640.

posal for civil justice reform.<sup>17</sup> The Administration based the bill on suggestions in an August 1991 report titled *Agenda for Civil Justice Reform* prepared by the Council on Competitiveness Working Group on Civil Justice Reform.<sup>18</sup> Congress adjourned without even scheduling a hearing on the proposed legislation in 1992. Significant parts of the bill are very similar to requirements that the Civil Justice Reform Act of 1990 or Executive Order 12778 impose. For example, plaintiffs in all civil lawsuits would be required to afford their opponents written notice of their claims and the damages sought before filing cases.<sup>19</sup> Other important components, such as provision for fee shifting in diversity cases,<sup>20</sup> are highly controversial, and Congress has previously rejected such concepts. The election of Governor Bill Clinton as President and the duplicative, controversial nature of the legislation make it unlikely that the Access to Justice Act will pass in 1993.

## II. MONTANA DEVELOPMENTS

### A. *General Observations on Civil Justice Reform*

Implementation of civil justice reform in the Montana District appears to be proceeding smoothly.<sup>21</sup> Inclusion of the new procedures in the local rules and the circulation of a pamphlet which includes the new procedures and the civil justice plan to all members of the Montana bar clarified and enhanced understanding of the new regime. Practitioners generally seem to encounter little difficulty comprehending and complying with the requirements of civil justice reform, although all lawyers who practice in federal court may not yet be fully aware of the new responsibilities that have been imposed.

The divisions of the Montana District are not applying identical procedures. Although the Billings and Great Falls Divisions are employing similar procedures, the Helena and Missoula Divisions are not applying similar procedures or are applying certain similar procedures differently. A helpful illustration of these differences is the assignment of cases as between Article III judges and magistrate judges. The civil justice plan provides that the Article III

17. See S. 2180, 102d Cong., 2d Sess. (1992); H.R. 4155, 102d Cong., 2d Sess. (1992).

18. COUNCIL ON COMPETITIVENESS WORKING GROUP ON CIVIL JUSTICE REFORM. *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (Aug. 1991).

19. Compare S. 2180, 102d Cong., 2d Sess., § 104 (1992) with Exec. Order 12,778 § 1(a), 56 Fed. Reg. 55,195 (1991).

20. See S. 2180, 102d Cong., 2d Sess., § 102 (1992).

21. The material in this subsection is premised substantially on conversations with numerous Montana practitioners and some court personnel.

judges are to “utilize, to the fullest extent allowed by law, the magistrate judges” and requires the Article III judges to “develop and implement an assignment plan which specifically delineates the assignment practices” to be used.<sup>22</sup>

The Billings Division is employing an opt-out provision, which requires the assignment of civil cases on a co-equal basis to Article III judges and magistrate judges, unless litigants whose cases are assigned to magistrate judges file timely requests for reassignment. The Division is using a wheel, whereby the court randomly assigns ten cases to Article III Judge Shanstrom, ten cases to Magistrate Judge Anderson, and five cases to Senior District Judge Battin.

Chief Judge Hatfield in the Great Falls Division refers pre-trial matters in those civil cases that do not involve constitutional questions to Magistrate Judge Holter, who tries the suits if litigants consent to magistrate jurisdiction. Chief Judge Hatfield is employing this assignment procedure as an experiment which gauges lawyers’ and litigants’ responses to having a magistrate judge handle their cases and is attempting to develop empirical data to ascertain the most effective way to use magistrate judges in the federal court system.

Judge Lovell in the Helena and Missoula Divisions is assigning cases at his discretion, although he assigns approximately half of the civil cases which are filed in Missoula to Magistrate Judge Erickson for all pretrial matters. Magistrate Judge Erickson correspondingly receives consents in a considerable number of those cases, so that he handles them through final disposition, including trial.

Disuniformity among divisional procedures could undermine the purposes of civil justice reform. For instance, lawyers will spend more time and money discovering, mastering and conforming to procedures that vary from division to division. Moreover, numerous attorneys in Montana have statewide federal practices and thus need to have the same procedures. Because there apparently are few compelling reasons for the inconsistency, it seems preferable to apply uniform procedures throughout the Montana District.

## *B. Observations on Specific Procedures*

### *1. Advisable Aspects of the Reform*

Numerous particular procedures in the civil justice plan ap-

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22. See United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan, at 3-4 (Dec. 1991).

pear to be operating smoothly.<sup>23</sup> Mandatory pre-discovery disclosure seems to be working relatively well in Montana, although the procedure is highly controversial at the national level.<sup>24</sup> Its efficacy may be attributable partly to the fact that most disclosure is general, rather than very specific, in nature. Magistrate Judge Holter regularly requires pre-discovery disclosure in the Great Falls Division and considers this requirement to be an experiment subject to future evaluation. Magistrate Judge Erickson believes that both sides are participating in considerable pre-discovery disclosure and traditional discovery. All of the judicial officers now require that counsel prepare preliminary pre-trial statements under the threat of sanctions if such statements are improperly formulated.

Some attorneys apparently consider the preparation of documents, such as pre-discovery disclosure statements, to be onerous, demanding that they spend considerable time, money and effort. The requirement for attendance at preliminary pre-trial conferences can be expensive, partly because lawyers must prepare to discuss the substance of their cases at an earlier point in time. Required attendance at settlement conferences by representatives of parties can also be costly.

The use of peer review committees, comprised of federal court practitioners who will review discovery controversies and potential litigation abuse upon the request of judicial officers now appears to be considerably less problematic than initially thought.<sup>25</sup> The court has appointed these five-person committees in each division, has asked that the magistrate judges serve as liaisons to the committees, and has clarified the precise role that it intends the committees to play. The committees will be purely advisory, and will make no recommendations as to violations, and the judicial officers will retain complete authority over possible sanctioning in actual cases. The judicial officers may also seek advice from the committees on purely hypothetical fact patterns. These provisions should significantly minimize concerns, especially regarding due process, that have been expressed.<sup>26</sup> Chief Judge Hatfield is developing guidelines for the committees' operation so that they can be fully implemented in 1993.

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23. The material in this subsection is premised substantially on conversations with numerous Montana practitioners and with some court personnel.

24. See Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L. J., May 4, 1992, at 1, 12-13.

25. See, e.g., Tobias, *Procedural Reform*, *supra* note 1, at 449; Tobias, *Plan*, *supra* note 1, at 95-96.

26. See, e.g., Ninth Circuit CJRA Review Committee Report, at 4 (Apr. 14, 1992); Tobias, *supra* note 3, at 52.

## 2. *Aspects of Reform That Are Not Clearly Advisable or Inadvisable*

Some features of civil justice reform are not clearly advisable or less advisable, because they afford both benefits and disadvantages. For example, the judicial officers have been setting and maintaining early, firm trial dates. Although this activity prevents delay, it can disadvantage lawyers and litigants who are not prepared for trial and can be more costly. Anecdotal evidence also suggests that the difficulties of complying with requirements that civil justice reform imposes, particularly in combination with perceived pressures to settle in settlement conferences, have led some practitioners to prefer the state court forum when that option is available. For instance, defense counsel representing insurers may choose not to remove cases that they otherwise could remove to federal court out of concern that undue pressure will be exerted on them and their clients in settlement conferences. This dynamic, of course, affords the benefit of reducing the federal caseload, but presents a less than ideal basis on which to premise forum choices.

## 3. *Aspects of Reform That Are Less Advisable*

The aspect of civil justice reform that apparently continues to be most problematic is the opt-out provision. The court, at least in the Billings Division, currently remains firmly committed to co-equal assignment of cases with notice and opportunity to request reassignment. For reasons previously stated,<sup>27</sup> I believe that district courts may lack sufficient authority to employ the opt-out provision. Moreover, a recent Ninth Circuit opinion apparently casts doubts on use of the opt-out approach.<sup>28</sup>

Very real practical problems exacerbate this difficulty.<sup>29</sup> Only a small number of litigants or lawyers will be willing to spend the resources required to challenge the provision. Fewer still will be willing to jeopardize relationships with judicial officers before whom they must continue to appear by challenging the officers' authority in litigation.<sup>30</sup> Even a relatively expeditious challenge may not be resolved in the Ninth Circuit until 1994. By that time, mag-

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27. See, e.g., Tobias, *Procedural Reform*, *supra* note 1, at 442-43; Tobias, *Civil Justice*, *supra* note 1, at 249-50.

28. See *Columbia Record Productions v. Hot Wax Records, Inc.*, 966 F.2d 515, 517 (9th Cir. 1992).

29. I rely substantially in this paragraph on A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1576-79 (1991).

30. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).



istrate judges in the Montana District will have exercised jurisdiction to resolve numerous cases with consents secured under the opt-out provision. If the Ninth Circuit finds that exercise of authority inappropriate, these resolved cases may need to be relitigated.

### III. A GLANCE INTO THE FUTURE

Predictions about the future of federal civil litigation remain as problematic today as when I offered prognostications in the last issue of this journal.<sup>31</sup> Moreover, relatively little pertinent to civil justice reform has changed in the last half-year. Nonetheless, some new developments have occurred, and certain different predictions are now warranted.

#### A. National

Civil justice reform continues to spark intense, instructive debate over the future of federal civil litigation, extensive introspection in the federal districts, and healthy bench-bar interchange. Increased disuniformity and complexity has accompanied much civil justice planning. The September 1992 decision of the Judicial Conference to forward to the Supreme Court a comprehensive group of proposals to amend the Federal Rules has exacerbated these problems.<sup>32</sup>

Congress should attempt to rectify or ameliorate the difficulties.<sup>33</sup> One important approach would be to limit somewhat the extensive experimentation that is presently proceeding. Congress could achieve this result by restricting the number of districts which are participating in civil justice reform, by reducing the number of procedures that courts can implement, or by extending the date on which non-EIDC courts must adopt civil justice plans. Congress should also clarify how much inconsistency among districts and between local procedures and Federal requirements it considers appropriate. This is especially true of mandatory pre-discovery disclosure, because districts have adopted widely varying requirements and the concept is intrinsically controversial.<sup>34</sup>

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31. See Tobias, *Civil Justice*, *supra* note 1, at 250-53.

32. See JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS (Sept. 1992). See generally *The Judicial Conference Would Alter Rule 11*, NAT'L L.J., Oct. 5, 1992, at 5.

33. I rely substantially in this paragraph on Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1992).

34. See *supra* note 24 and accompanying text. Most of these requirements are premised on an early Advisory Committee draft which has been superseded. See Samborn,

### B. Montana

Civil justice reform seems to be functioning rather smoothly in the Montana District. Active case management by judicial officers, compulsory pre-discovery disclosure, and the use of various ADR techniques seem to be operating well, although it is difficult to ascertain accurately whether and, if so, how substantially they have reduced expense and delay. Clarification of the role and responsibilities of the peer review committees has been beneficial, and they promise to decrease the number of discovery controversies and the amount of litigation abuse. Co-equal assignment of cases apparently has reduced the workload of Article III judges, but it may have increased demands imposed on the magistrate judges while leaving lingering concern about judicial authority to use the opt-out provision.

Judicial officers have begun to evaluate the efficacy of civil justice reform and should continue to analyze as many specific reforms as possible. The Montana court, however, does not plan to complete the annual assessment before April 1993 when it will have experimented for a year with the new procedures. The Montana District should attempt to determine precisely whether and, if so, how much the new procedures have reduced expense and delay. The court also ought to maintain and preserve relevant information on civil justice reform for future procedural reform and research efforts.

### IV. CONCLUSION

The pace of civil justice reform will soon accelerate at the national level, as nearly sixty districts must complete their civil justice plans by the end of 1993. The Montana Federal District Court has smoothly implemented the reform during its initial year of experimentation. Careful application of the new procedures should reduce expense and delay in civil litigation. Close monitoring of these procedures' effectiveness will facilitate improvements which the Montana court can implement by refining the procedures as indicated.

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*supra* note 24, at 12. See also *supra* note 32 and accompanying text. See generally Carl Tobias, *Collision Course in Federal Civil Procedure*, Legal Times, Oct. 19, 1992, at 43.

