

July 1993

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### Recommended Citation

Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 Mont. L. Rev. (1993).

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## MORE ON FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

The Montana Federal District Court has been experimenting with practically all of the procedures that it included in the civil justice expense and delay reduction plan that the district formally promulgated in April 1992 under the Civil Justice Reform Act (CJRA) of 1990. The Article III judges and the magistrate judges and numerous Montana federal court practitioners have now accumulated considerable experience with the procedures instituted, while efforts are presently being undertaken to evaluate most of the procedures. Numerous new developments regarding national implementation of federal civil justice reform have also been occurring. Important developments that implicate federal civil justice reform nationally and in the Montana District warrant assessment, so that federal court practitioners in this state are informed of these significant changes in federal civil litigation.<sup>1</sup>

### I. NATIONAL DEVELOPMENTS

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

The rather slow pace of developments in civil justice reform at the national level that I reported in the most recent issue of this journal picked up somewhat during the first half of 1993.<sup>2</sup> The pace will quicken even more substantially in the near future, as advisory groups submit reports to courts and as districts rely on the groups' reports and recommendations to finalize civil justice expense and delay reduction plans before the December 1993 deadline.<sup>3</sup>

All thirty-four of the federal districts, including the Montana

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1. I have documented and analyzed prior developments in civil justice reform in earlier issues of this journal. See Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 437-51 (1991) [hereinafter Tobias, *Procedural Reform*]. See also Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993) [hereinafter Tobias, *Updating*]; Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992) [hereinafter Tobias, *Civil Justice*]; Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992) [hereinafter Tobias, *Plan*].

2. See Tobias, *Updating*, *supra* note 1, at 89-91. See also Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992) [hereinafter Tobias, *Roadmap*].

3. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1).

District, which the Judicial Conference of the United States officially designated as Early Implementation District Courts (EIDC) on July 30, 1992,<sup>4</sup> have continued to experiment with the procedures in their civil justice plans. More than a quarter of these EIDC's have now compiled their initial annual assessments of the effectiveness of these procedures in decreasing expense and delay,<sup>5</sup> while many additional courts should soon be completing their evaluations. Quite a few of the districts determined that the procedures were comparatively effective in reducing cost or delay, and a small number of courts instituted changes in their plans that were meant to decrease expense or delay even more.<sup>6</sup> The District of New Jersey and the Northern Districts of Georgia and Ohio assembled comprehensive annual assessments,<sup>7</sup> although most of the remaining courts developed evaluations that were considerably less thorough.<sup>8</sup>

In nearly all of the districts that are not EIDCs, the advisory groups have been preparing reports and recommendations.<sup>9</sup> After the groups submitted these reports and suggestions to the courts, the judges reviewed them, consulted with the groups, and finalized their civil justice plans.<sup>10</sup> Since I last reported on civil justice reform, a few advisory groups have tendered their reports and rec-

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

5. Telephone Interview with Mark Shapiro, Administrative Office of the United States Courts, Court Administrative Division (Apr. 20, 1993). See also 28 U.S.C. § 475 (Supp. III 1991).

6. 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).

7. See United States District Court for the Northern District of Georgia, Annual Assessment of the Condition of the Court's Docket (Apr. 1, 1993); United States District Court for the 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); United States District Court for the Northern District of Ohio, Annual Assessment of Civil and Criminal Docket (Jan. 29, 1993).

8. See Annual Report of Western District of Wisconsin Advisory Group (Jan. 8, 1993); Annual Assessment for the District of Wyoming (Feb. 1, 1993).

9. See 28 U.S.C. §§ 472(a)-(c), 478 (Supp. III 1991). See also Tobias, *supra* note 2, at 508-09.

10. See 28 U.S.C. §§ 472(a), 473(a) (Supp. III 1991). See also Tobias, *supra* note 2, at 509.

ommendations<sup>11</sup> and several courts have promulgated civil justice plans.<sup>12</sup> The vast majority of the groups will complete their reports and an even larger number of districts will adopt their plans after June 1993 but before the December deadline.

Every advisory group report and civil justice expense and delay reduction plan that was issued since the publication of the most recent issue of this journal included some provisions that I considered advisable, a smaller number that were less advisable, and others that had advisable and less advisable aspects. An example of the last idea is the New Mexico District's recommendation that "all judges consider adopting a policy of determining, as soon as possible, the amount of expert witness discovery which will be required and that limitation of such be as determined by each magistrate judge or district judge during the initial or subsequent pretrial conferences."<sup>13</sup> This procedure certainly could reduce delay and cost entailed in discovery regarding expert witnesses. Nonetheless, the procedure may disadvantage certain litigants, such as resource-poor plaintiffs who have suffered personal injuries, and who might need considerable discovery of defendants' experts to prove their cases or to enable disclosure of experts. Parties and lawyers may also incur delay and expense in preparing the necessary papers seeking exceptions to this policy, while the court will expend time and resources ruling on requests.

Nearly all of the advisory groups have included advisable procedures or suggestions in their reports. For example, the group for the Eastern District of Tennessee recommended that the court adopt a "meet and confer" procedure for automatic pre-discovery disclosure which apparently is more workable and, therefore, preferable to the highly controversial proposal that the Supreme Court recently transmitted to Congress.<sup>14</sup> The Advisory Group for the Middle District of North Carolina included a careful discussion of

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11. See, e.g., Report of the Advisory Group of the United States District Court for the Central District of California (Mar. 19, 1993); Report of the Advisory Group for the United States District Court for the District of Maine (Feb. 1, 1993).

12. See, e.g., United States District Court for the District of New Mexico, Civil Justice Expense and Delay Reduction Plan (Jan. 1, 1993) [hereinafter *New Mexico Plan*]; United States District Court for the Northern District of Texas, Civil Justice Expense and Delay Reduction Plan (Mar. 22, 1993) [hereinafter *Northern Dist. of Texas Plan*].

13. *New Mexico Plan*, *supra* note 12, at 12.

14. See United States District Court for the Eastern District of Tennessee, Report of the Advisory Group on Litigation Cost and Delay 83-84 (Dec. 1992). See also Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 141-43 (1993) (discussion of Court's controversial pre-discovery disclosure proposal that critics claim is unclear and would impose an additional layer of discovery).

the court's authority under the CJRA,<sup>15</sup> which is important because numerous courts acting under the CJRA have raised difficult issues of authority.<sup>16</sup>

Two developments on which I reported in the last issue of this journal warrant updating. The Western District of Missouri has evaluated its ambitious "early assessment program," which apparently has achieved considerable success, particularly in terms of encouraging use of alternative dispute resolution (ADR).<sup>17</sup> The Northern District of Texas did not adopt its Advisory Group's recommendation that the court impose presumptive numerical restrictions on interrogatories and depositions—limitations that can be too inflexible in complex cases.<sup>18</sup> The district observed, however, that these restrictions do appear in the Federal Rules amendments that probably will become effective in December 1993 and that judges of the court should feel free to employ the limitations.<sup>19</sup>

### B. Federal Rules Amendments

On April 22, 1993, the Supreme Court transmitted to Congress one of the most ambitious packages of proposals to amend the Federal Rules in their fifty-five year history.<sup>20</sup> Most relevant to civil justice reform is the Court's decision to forward unchanged provisions governing discovery, particularly automatic disclosure.<sup>21</sup> Automatic disclosure is especially important, because approximately twenty-five EIDCs included in their civil justice plans some form of disclosure premised on an earlier proposed Federal Rule amendment that proved to be quite controversial and has now been superseded.<sup>22</sup> If the new proposal becomes effective in De-

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15. See Advisory Group of the United States District Court for the Middle District of North Carolina, Report and Recommended Plan 109-11 (Dec. 10, 1992). See generally Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 107-08 (1993).

16. See, e.g., Tobias, *supra* note 4, at 51-53; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1416-18 (1992); Carl Tobias, *Recalibrating the Civil Justice Reform Act of 1990*, 30 HARV. J. ON LEGIS. 115, 124-27 (1993).

17. See KENT SNAPP & DAVIS LOUPE, 1992 EARLY ASSESSMENT PROGRAM REPORT (Jan. 26, 1993). See also Tobias, *Updating*, *supra* note 1, at 90-91. See generally Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335 (1993).

18. See Northern Dist. of Texas Plan, *supra* note 12, at 4. See also United States District Court for the Northern District of Texas, *Civil Justice Reform Act Advisory Committee Report* 37-38 (May 7, 1992); Tobias, *Updating*, *supra* note 1, at 91.

19. See Northern Dist. of Texas Plan, *supra* note 12, at 4. See also *supra* note 14.

20. See 61 U.S.L.W. 4365 (U.S. April 27, 1993).

21. See *id.* at 4372-73.

22. See Tobias, *supra* note 14, at 144-45.

ember 1993, districts that relied on the earlier draft may want to consider modification of their procedures, although the new proposal technically permits districts to adopt disclosure provisions that conflict with federal requirements.<sup>23</sup> Moreover, the remaining districts that are proceeding with preparation of their civil justice plans will have to decide whether they wish to prescribe some type of automatic disclosure and, if so, precisely what formulation.<sup>24</sup>

### *C. Executive Branch Civil Justice Reform*

The Clinton Administration has not yet made an affirmative decision about whether it will retain the executive branch reforms that the Bush Administration initiated.<sup>25</sup> It now appears that Justice Department attorneys are implementing the reforms more rigorously than other government counsel, especially those lawyers who work in United States Attorneys Offices.<sup>26</sup> Once the United States Attorneys have been appointed, the Administration's views regarding executive branch reform should become clearer.

It remains uncertain whether those members of Congress who introduced the Access to Justice Act will reintroduce that proposal in 1993, although the likelihood that Congress would pass the measure, if introduced, seems even more limited than when I wrote about it in the last issue of this journal.<sup>27</sup> However, Senator Dennis DeConcini (D. Ariz.) who introduced, late in the last session of Congress, a civil justice reform proposal that would have created a national commission on civil justice reform,<sup>28</sup> recently joined with Senator Charles Grassley (R-Iowa), who was a co-sponsor of the Access to Justice Act, in introducing the Civil Justice Reform Act of 1993.<sup>29</sup> The new proposal includes fewer controversial provisions and fewer provisions that duplicate the CJRA or Executive Order

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23. Proposed Rule 26(a) provides for a local option that can vary from the federal requirement. See 61 U.S.L.W. 4365, 4372 (U.S. April 27, 1993).

24. The difficulty is that districts must issue civil justice plans by, and the automatic discovery proposal becomes effective on, the same December 1993 date. See Tobias, *supra* note 14, at 145.

25. See Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993). See also Tobias, *Updating*, *supra* note 1, at 91-92.

26. This assessment is premised on telephone interviews with many government lawyers.

27. See Tobias, *Updating*, *supra* note 1, at 91-92. One measure of the proposal's likely success is that it has not been reintroduced. See also *infra* notes 28-29 and accompanying text.

28. See S. 3333, 102d Cong., 2d Sess. (1992). See generally Tobias, *supra* note 15, at 97.

29. See S. 585, 103d Cong., 1st Sess. (1993). See also S. 2180, 102d Cong., 2d Sess. (1992) (Access to Justice Act).

12,778.<sup>30</sup> Therefore, members of Congress may find the Civil Justice Reform Act of 1993 more palatable than the Access to Justice Act. Nonetheless, enough controversial provisions and sufficient duplication remain that the new measure seems unlikely to pass during 1993.<sup>31</sup>

## II. MONTANA DEVELOPMENTS

### A. General Observations on Civil Justice Reform

It appears that the implementation of civil justice reform in the Montana District is continuing to proceed smoothly.<sup>32</sup> Most federal court practitioners seem to be experiencing minimal difficulty understanding and satisfying the requirements imposed in the civil justice expense and delay reduction plan and in the amended local rules.<sup>33</sup>

The divisions of the Montana Federal District are continuing to apply the dissimilar procedures which I reported that they were employing in the last issue of this journal.<sup>34</sup> There has apparently been little change, particularly in the important area of civil case assignments as between Article III judges and magistrate judges. For instance, the Billings Division is using the opt-out provision prescribing co-equal assignment, unless litigants object, while Chief Judge Hatfield is experimenting with referrals to Magistrate Judge Holter of pretrial matters in civil actions not implicating constitutional questions.<sup>35</sup>

It still seems preferable to have uniformity among those procedures that judicial officers apply in the divisions of the Montana District.<sup>36</sup> For example, that uniformity should limit expense and delay entailed in complying with disparate procedures. Most Montana practitioners apparently have experienced little difficulty conforming to the disuniform requirements, although the Advisory

30. For example, the new proposal would not create a multi-door courthouse program. Compare S. 585, 103d Cong., 1st Sess. (1993) with S. 2180, 102d Cong., 2d Sess. § 106 (1992). See generally Tobias, *Roadmap*, *supra* note 2, at 515.

31. For example, the new proposal retains a controversial proposal for fee shifting in diversity cases. See S. 585, 103d Cong., 1st Sess. § 1 (1993). Accord S. 2180, 102d Cong., 2d Sess. § 102 (1992). The new proposal correspondingly duplicates executive branch reform by mandating pre-complaint notice. See S. 585, 103d Cong., 1st Sess. § 4 (1993). Accord Exec. Order No. 12,778, § 1(a), *reprinted in* 56 Fed. Reg. 55,195 (1991).

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

33. See Tobias, *Updating*, *supra* note 1, at 92.

34. *Id.* at 92-93.

35. *Id.*

36. *Id.* at 93.

Group may want to secure the bar's opinion on this issue when assembling the court's annual assessment.

## B. Observations on Specific Procedures

### 1. Advisable Aspects of the Reform

Most of the specific procedures in the civil justice plan and the amended local rules seem to be functioning smoothly.<sup>37</sup> Compulsory pre-discovery disclosure apparently continues to be functioning rather well in the Montana District. This is true even though the Supreme Court recently transmitted to Congress a proposal to amend the federal rules requiring pre-discovery disclosure nationwide that remains very controversial.<sup>38</sup> Mandatory disclosure in Montana seems to work best when the disclosure is general and the case is not complex. In contrast, judicial officers, lawyers, and litigants apparently experience the greatest difficulty with the mechanism in complex, "national" lawsuits, such as products liability cases,<sup>39</sup> and in those actions where attorneys attempt to employ the procedure for strategic benefit.

The employment of peer review committees seems much less problematic than it first appeared.<sup>40</sup> The magistrate judges, who are serving as liaisons for the committees, have apparently done very little with the committees since I last reported on them.<sup>41</sup> It remains unclear, therefore, whether the committees will become fully operational in 1993.

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

Those dimensions of civil justice reform that have provided both advantages and disadvantages continue to do so.<sup>42</sup> It also remains unclear precisely how to employ magistrate judges in ways that will maximize their effectiveness in reducing cost and delay in the district. For example, it is uncertain whether the co-equal assignment system used in the Billings Division is more effective

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

38. See *supra* note 14 and accompanying text. See also Tobias, *Updating*, *supra* note 1, at 94.

39. Accord Griffin Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39-42 (1993).

40. See Tobias, *Updating*, *supra* note 1, at 94.

41. *Id.*

42. *Id.* at 95 (setting and maintaining early and firm trial dates prevents delay but can both disadvantage litigants who are not prepared for trial and be more costly).



than the referral systems that Chief Judge Hatfield and Judge Lovell employ.<sup>43</sup>

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

The feature of civil justice reform that seemingly continues to be most troubling is the opt-out procedure.<sup>44</sup> Although the Billings Division is the only one that relies on this mechanism, Chief Judge Hatfield could employ it in the near future. I still think that districts lack the requisite authority to use the opt-out procedure.

### 4. *Miscellany of New Developments*

One of the most important actions that the Montana District will take in 1993 is issuance of its annual assessment.<sup>45</sup> The Clerk's Office is currently assembling and will soon submit a statistical analysis from the past year. The Advisory Group will meet this summer and will probably solicit input from the bar on the effectiveness of the procedures being used under the CJRA and attempt to ascertain the procedures' effectiveness. The judges met in June to compile an approved list of mediation masters who will assist the court in mediating civil cases.

## III. A LOOK INTO THE FUTURE

### A. *National*

Civil justice reform continues to trigger lively, informative debate regarding the future of federal civil litigation, widespread self-analysis in the courts, and valuable bench-bar exchange. Increased disuniformity and complexity have continued to attend the civil justice planning efforts. The Supreme Court's transmittal to Congress of the ambitious package of proposed Federal Rules amendments has complicated these difficulties.<sup>46</sup>

Congress may attempt to remedy or ameliorate some of the problems. Congress will most likely act in the area of discovery, especially automatic disclosure and presumptive numerical limitations on interrogatories and depositions.<sup>47</sup> Because nearly all seg-

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43. See *id.* at 92-93.

44. See *id.* at 95-96 (suggesting that relevant case law casts doubt on court's authority and practical problems, such as litigants' reluctance to challenge opt-out procedure, exacerbate difficulty).

45. See 28 U.S.C. § 475 (Supp. III 1991). See also *supra* notes 5-8 and accompanying text.

46. See *supra* notes 14, 22-24 and accompanying text.

47. See *supra* notes 14, 18-19, 22-24 and accompanying text. Congress seems unlikely

ments of the organized bar have criticized the disclosure proposal, Congress probably will modify or suspend the proposal or prescribe experimentation with various forms of disclosure in fewer than all of the federal districts.<sup>48</sup> Congress seems less likely to modify civil justice reform in 1993, as the preferable course of action may be to allow the remaining districts to issue their plans by December 1993 and then evaluate implementation.

### B. Montana

Civil justice reform apparently has continued to work smoothly in the Montana District. The court should undertake a concerted effort to ascertain as accurately as possible whether and, if so, how much specific procedures have decreased cost and delay. Important examples are the employment of magistrates and their use of settlement conferences.<sup>49</sup> Another example is provision for mandatory pre-discovery disclosure. Although the provision in the federal proposal for local option authorizes the court to continue using procedures that conflict with the national rule,<sup>50</sup> the Montana District may want to consider adopting the new proposal or other forms of disclosure if they appear more effective than the provision now being used.<sup>51</sup> The court should modify, as indicated, any procedures that have not reduced, or have increased, expense or delay.

The Montana District should also examine the annual assessments that other EIDCs prepare and the new advisory group reports and civil justice plans that will be issued in non-EIDCs. These documents could be invaluable sources of effective procedures. When the Montana District discovers new procedures that could prove effective in the district, the court should incorporate them into its plan and local rules.

## IV. CONCLUSION

The pace of civil justice reform will quicken nationwide during

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to act on Rule 11 because the Supreme Court transmitted a proposed revision which is palatable to most interests that the rule affects. See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992). See also Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992).

48. See Tobias, *supra* note 14, at 141 (bar opposition); Carl Tobias, *In Defense of Experimentation With Automatic Disclosure*, 27 GA. L. REV. n.24 and accompanying text (No. 3, forthcoming 1993) (discussion of similar suggestion).

49. See Tobias, *Updating*, *supra* note 1, at 92-93. See also *supra* notes 34-35, 43 and accompanying text.

50. See *supra* note 23 and accompanying text.

51. See Tobias, *supra* note 48.

the second half of 1993, as approximately fifty-five districts finalize their civil justice plans. The Montana District has continued to implement civil justice reform smoothly during 1993. The federal court should carefully evaluate the effectiveness of the procedures that it is applying and refine them, as indicated. The district should also study the procedures instituted in other districts and adopt those which promise to be effective in Montana.