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Opt-Outs at the Outlaw Inn: A Report from Montana

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Opt-Outs at the Outlaw Inn: A Report from Montana

Carl Tobias*

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I. Introduction

Picture the Outlaw Inn in Kalispell, Montana, located on Flathead Lake, the largest fresh-water lake west of the Mississippi River, and situated less than fifty miles from Glacier National Park. The July air is fresh and clean, and the big sky is postcard blue. The mercury registers below sixty degrees and the humidity is no higher than 30 percent. More patrons of the Inn sport Stetson hats and cowboy boots than in any establishment outside of Texas. Kalispell would seem an unlikely venue for discussing the minutiae of civil justice reform and the 1993 amendments to the Federal Rules of Civil Procedure. Yet, the Outlaw Inn was the site of the Montana Bar Association's annual meeting, where federal court practitioners

* Professor of Law, University of Montana. I wish to thank Tracey Baldwin and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this Article, and the Harris Trust for generous, continuing support. I am a member of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Montana; however, the views expressed here, and any errors that remain, are my own.

ventilated significant concerns about the new Rules revisions and civil justice reform.

On July 14th, 1994, I participated in the meeting's Continuing Legal Education Program on the 1993 Amendments to the Federal Rules of Civil Procedure sponsored by the Montana Defense Trial Lawyers. One of my colleagues—who teaches civil procedure—and I presented an overview of the Federal Rules revisions and how those changes relate to civil justice reform under the Civil Justice Reform Act (CJRA) of 1990.¹ The Chair of the Montana Advisory Commission on the Civil Rules, which is the state analogue of the Federal Advisory Committee on the Civil Rules, then afforded the commission's views on the 1993 revisions and their possible applicability in the Montana state court system.

That morning-long session warrants discussion because the ideas expressed at the meeting provide instructive insights on the thinking of those lawyers who work with the Federal Rules on a daily basis. The attendees primarily practice with Montana's large or medium-sized defense firms (comprising five to fifty lawyers). Some of the attorneys were from smaller firms, and a few engage in practices that do not consist principally of defense work. A number of the lawyers specialize in areas, such as Indian Law, natural resources law, or water law, that require their regular participation in federal court litigation. Therefore, most of the attendees had some familiarity with the 1993 amendments and with civil justice reform.² Many Montana attorneys litigate in both federal and state court, and that practice is facilitated because the Montana state courts pattern their civil rules on the Federal Rules of Civil Procedure.³ In short,

1. 28 U.S.C. §§ 471-482 (Supp. V 1993).

2. Moreover, the attendees—and members of the Montana Bar generally—enjoy a reputation for treating other counsel with civility and respect. After all, Montana is Big Sky Country where seldom is heard a discouraging word and the skies are not cloudy all day. Carl Tobias, *Justice Stays Civil in Montana*, LEGAL TIMES, Nov. 25, 1991, at 20.

3. The Montana Federal District Court is an Early Implementation District Court (EIDC) under the CJRA, and its Civil Justice Expense and Delay Reduction Plan, which includes a relatively stringent provision for automatic or mandatory pre-discovery disclosure, has been in effect since April 1992. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1992) (implementing mandatory pre-discovery disclosure), reprinted in FEDERAL LOCAL COURT RULES, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS FOR THE UNITED STATES DISTRICT COURTS 575 (Apr. 1994)

this continuing legal education program on the new amendments and civil justice reform was probably typical of similar sessions held across the country.

II. Discussion of the 1993 Amendments and Civil Justice Reform

My colleague and I presented a broad overview of the Federal Rules of Civil Procedure and civil justice reform. We initially traced the historical background of the new Federal Rules amendments, and then considered the more important specific revisions included in the 1993 package of amendments, which are the most ambitious set of revisions ever adopted.⁴

My colleague first lectured on amended Rule 4, which governs the summons and which was intended to remedy certain problems with the 1982 congressional modification to the provision.⁵ I then spoke on Rule 11, evaluating the 1983 revision's complications—relating to inconsistent application, satellite litigation, and chilling effects—complications that led to amendment a decade later.⁶ I focused on the major 1993 changes that provided safe

[hereinafter MONTANA PLAN]. See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992) (discussing aspects of Montana's plan that may prove problematic and suggesting that some of the plan's provisions may actually increase expense and delay).

4. See COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS PURSUANT TO 28 U.S.C. 2072, H.R. DOC. NO. 74, 103d Cong., 1st Sess. (1993), reprinted in Supreme Court of the United States, *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 402 (1993) [hereinafter *Amendments*] (proposing comprehensive revisions to the Rules).

5. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527-29 (1983) (codified as amended at 28 U.S.C. § 2071 (1988)); Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 733-59 (1988) (discussing prospects for the reform of Rule 4). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 844-46 (1991) (analyzing nascent proposal to amend Rule 4); Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1194-1295 (1987) (analyzing congressional change and suggesting improvements for service of process under Rule 4(c)).

6. FED. R. CIV. P. 11; see also Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 485-489 (1988-89) (arguing that the costs of the 1983 revision of Rule 11 outweigh the benefits when the revision is applied to civil rights cases).

harbors for lawyers and parties that file deficient papers and entrusted sanctioning to judicial discretion.⁷

We next analyzed automatic disclosure, a controversial discovery technique requiring that litigants exchange important information before they may undertake formal discovery. We also reviewed the amendments imposing presumptive numerical limits on interrogatories and depositions that can be modified with leave of court.⁸ I discussed as well the local option provision that permits districts to vary all of these federal discovery requirements or to reject them completely.⁹

We then turned to the interface between the 1993 Federal Rules revisions and civil justice reform as implemented in the Montana District, which is an Early Implementation District Court. The Montana District intentionally made its automatic disclosure provision more rigorous than the Federal strictures; it demanded, for instance, that litigants reveal the factual basis and legal theory of each claim.¹⁰ The court imposed no numerical limitations on depositions, but the district considers greater than fifty interrogatories to be excessive unless their proponent can justify why the court should permit it to serve more.¹¹

We also treated the Montana Federal Court's January 1994 Uniform Order, which was meant to accommodate certain of the 1993 amendments and was intended to be temporary, pending receipt of the CJRA Advisory Group's suggestions for improving the civil justice reform effort and the district's completion of its annual assessment.¹² The court modified the automatic disclosure procedure to conform more closely to the federal requirements, while it

7. FED. R. CIV. P. 11; *see also* Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1775 (1992) (analyzing whether amended Rule 11 is improved as applied to civil rights cases)

8. *Amendments*, *supra* note 4, at 449-50, 461-62.

9. *Id.* at 431, 449-61 (authorizing the district courts to make local discovery rules).

10. *See* MONTANA PLAN, *supra* note 3, at 791-97 (explaining the automatic disclosure procedure).

11. *Id.*

12. U.S. District Court for the District of Montana, Order (Jan. 25, 1994) [hereinafter Order]; *see also* 28 U.S.C. § 475 (Supp. V 1993) (prescribing annual assessment).

retained the presumptive limit of fifty interrogatories, thus increasing the federal restriction from twenty-five.¹³

The audience expressed its concerns about the new amendments and civil justice reform throughout the program. The participants objected most often and most vehemently to the increasing complexity of federal civil practice.¹⁴ Attendees voiced concern about the growing numbers of applicable requirements that are increasingly difficult to discern.¹⁵ These requirements demand that lawyers participate in more activities, such as special discovery conferences, and draft more papers, such as documents certifying that they have conferred with opposing counsel before filing discovery motions.¹⁶ The lawyers concomitantly expressed dissatisfaction with the large number of procedural sources, including the substantive and procedural statutes in the United States Code, the Federal Rules, local rules, local individual-judge procedures, local orders, local unwritten practices, and civil justice expense and delay reduction plans.¹⁷

Conversely, those attending the meeting expressed comparatively little concern about nearly all of the substantive requirements included in specific Federal Rules amendments. The automatic disclosure revision¹⁸ was the principal exception; some lawyers remained uncertain about precisely what must be divulged and

13. See Order, *supra* note 12, at 2.

14. See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1413-18 (1992) (arguing that the CJRA further fragments an increasingly complex and nonuniform system of federal civil procedure).

15. This concern is apparently a nationwide phenomenon. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380-81 (1992) (commenting that "[t]oday, federal practice and procedure is impossibly arcane" partly as a consequence of the proliferation of local rules under the CJRA).

16. See *id.* at 392 (stating that the CJRA legislative history emphasizes "imposing greater controls on the discovery process . . . [and] reforming motions practice").

17. Tobias, *supra* note 14, at 1422-27; see also Mullenix, *supra* note 15, at 377-78 (pointing out that a "federal practitioner must know, in addition to the Federal Rules of Civil and Appellate Procedure, the existing local rules of ninety-four district courts and eleven federal circuits"); 28 U.S.C. § 473 (Supp. V 1993) (prescribing procedures that districts must consider and could include in civil justice expense and delay reduction plans).

18. *Amendments*, *supra* note 4, at 431-32.

expressed concern about possible satellite litigation over the amendment and potential expense and delay.

Finally, some attorneys indicated that the growing complexity, cost, and delay of federal practice had led them to prefer state court over federal court. An important irony of the federal civil justice reform effort is that the endeavor has had very different effects than those Congress intended in passing the CJRA;¹⁹ statutory implementation has apparently increased cost and delay and reduced court access.²⁰

III. Lessons

This examination of the Montana program on the 1993 Federal Rules amendments and civil justice reform should increase professional understanding of modern civil procedure. The insights derived enhance appreciation of numerous theoretical aspects of that procedure and of the practice of civil litigation and have important implications for the future of civil process.

On a theoretical level, the information reported provides a telling snapshot of a procedural system in disarray, if not in decline. A number of the 1993 Federal Rules revisions individually and synergistically with developments in civil justice reform have contributed substantially to the continuing disintegration of the national, uniform, simple system of federal civil procedure that the drafters of the original Federal Rules intended to institute in 1938.²¹

Several 1993 amendments and significant aspects of the CJRA have encouraged federal districts to adopt and apply local procedures

19. See 28 U.S.C. § 471 (Supp. V 1993) (expressing the congressional intent that expense and delay should be reduced through the CJRA); see also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1601-02 (1994) (discussing the motivation behind the enactment of the CJRA).

20. See Tobias, *supra* note 14, at 1426 (arguing that the growing balkanization adversely affects the civil justice system).

21. E.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-39 (1975) (commenting that drafters envisioned uniformity and cohesion in the structure of the Federal Rules of Civil Procedure); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986) (arguing that the drafters of the Federal Rules of Civil Procedure intended to institute a national, uniform, and simple system of procedure).

that deviate from the Federal Rules or from provisions in the United States Code. For example, the local option mechanism²² expressly invited districts to promulgate and enforce inconsistent local requirements and even to reject completely the applicable Federal Rule revision.²³

The CJRA's major purpose is to foster experimentation with local procedures for reducing expense and delay in civil litigation in all ninety-four districts.²⁴ The eleven statutorily-prescribed principles, guidelines, and techniques that districts were to consider adopting, and the twelfth provision authorizing courts to apply any other procedures that would decrease cost and delay, explicitly encouraged districts to implement local procedures that depart from the Federal Rules and United States Code provisions.²⁵

Once the national Rule revision entities and Congress had stamped their imprimatur on inconsistency, it was predictable that many courts, including the Montana District, would accept these invitations. Indeed, the Montana court has relied on the CJRA to institute a system for the co-equal assignment of civil cases to Article III judges and magistrate judges, although that regime apparently conflicts with the provision of the United States Code that governs magistrate judge jurisdiction.²⁶ Montana federal civil practice is additionally complicated because the judicial officers in all divisions of the Montana District do not apply, or apply different-

22. The mechanism can be seen not only in Rule 26 (governing disclosure) but also in Rules 30 and 33 (imposing presumptive limits on interrogatories and depositions), Rule 16 (covering pretrial conferences), and Rule 54 (relating to costs).

23. Indeed, approximately 20 of the 94 federal districts now subscribe to the Federal Rule amendment governing automatic disclosure. DONNA STIENSTRA & WILLIAM G. YOUNG, IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1994); Randall Samborn, *Districts Discovery Rules Differ*, NAT'L L.J., at A1, A25 (Nov. 14, 1994).

24. 28 U.S.C. §§ 471-473 (Supp. V 1993).

25. *Id.* § 473.

26. *Id.* § 636; DELAY REDUCTION PLAN, *supra* note 3, reprinted in MONTANA PLAN at 575. The requirement in the Montana Civil Justice Plan that litigants request timely reassignment or suffer waiver of the right to object to assignment to a magistrate judge seems inconsistent with 28 U.S.C. § 636(c) (1988), which states that the "rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." Tobias, *supra* note 14, at 1417.

ly, the co-equal assignment procedure and other important measures governing pretrial matters, such as disclosure.²⁷

The drafters of the 1938 Federal Rules also intended that the Rules serve as a model for the states, and they hoped that state court systems would adopt requirements identical or similar to the Federal requirements, thereby fostering intrastate uniformity and simplifying the practice of law.²⁸ Insofar as the controversial nature of the substantive provisions—including those in the Federal Rules amendments and those adopted pursuant to the CJRA—discourages states from subscribing to similar changes, this intrastate uniformity is diminished and civil practice is complicated.

The new requirements for researching, writing, filing, and signing papers, attending conferences (such as specialized discovery sessions), and for discharging other, onerous responsibilities (such as participating in alternative dispute resolution (ADR)) that the 1993 revisions and the CJRA institute have seemingly disadvantaged attorneys and parties by delaying resolution and increasing costs of civil litigation.²⁹ These demands have detrimentally affected the federal judiciary in similar ways. For example, courts' duties to preside over a greater number of more complex litigation conferences and to rule on growing numbers of motions have apparently consumed scarce judicial resources.³⁰

I believe that the difficulty of locating, much less understanding and complying with, relevant requirements is partially responsible

27. Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89, 92-93 (1993); Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 362 (1993) [hereinafter *More on Montana*].

28. Tobias, *supra* note 14, at 1394, 1397 & n.27; see also Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 274-75 (1989) (arguing that the Rules' drafters intended a flexible, nontechnical approach exemplified by open-ended discovery and liberal pleading requirements, which transcend substantive lines); cf. Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650-51 (1981) (explaining the debate over the desirability of uniform procedural rules).

29. See Tobias, *supra* note 14, at 1422-23 (suggesting that the CJRA will further complicate practitioners' duties); see also Mullenix, *supra* note 15, at 380-82 (claiming that the increased complexity demanded by the CJRA will be especially detrimental to lawyers and parties that are working under budget constraints).

30. Tobias, *supra* note 14, at 1422-23.

for litigants' reluctance to pursue civil litigation in federal court.³¹ Moreover, the complexity and uncertainty created by nonuniform requirements exacerbates this reluctance. For example, anecdotal evidence indicates that both plaintiffs' and defendants' counsel find troubling the decreased uniformity, the increased complexity, and the greater uncertainty of the federal automatic disclosure requirements. Plaintiffs' lawyers specifically prefer to bring their claims in state court because the simpler procedures expedite resolution. Defense counsel similarly decide against removing cases to federal court because of concern about cost, delay, complexity, and perceived undue pressure to settle.³² These problems adversely affect all attorneys and parties, but they particularly disadvantage resource-poor litigants—such as civil rights plaintiffs—and entities that litigate in multiple districts—such as the Sierra Club, the Exxon Corporation, and the United States government.³³

In short, certain 1993 Federal Rules amendments—alone and in combination with the CJRA and its implementation—have eroded the national, uniform procedural system embodied in the 1938 Rules. These developments have adversely affected federal court practice.

IV. Suggestions

This report from Montana is meant to serve principally as an alert for those institutions that participate in procedural policymaking, including Congress, and national and local procedural revision entities, such as the Advisory Committee, federal districts, and individual judges.³⁴ If lawyers who are members of one of the most civil bars in the nation are expressing increasing dissatisfaction with the decreasingly uniform, simple regime of federal civil

31. The material in this paragraph is derived from conversations with numerous individuals who are familiar with civil practice in Montana and a number of other jurisdictions.

32. The expense and delay of complying with procedures whose ostensible purpose is the reduction of expense and delay are less than satisfactory bases on which to premise forum choices.

33. See Tobias, *supra* note 14, at 1423 (discussing how problems can disadvantage entities that litigate in multiple districts and resource-poor litigants); Carl Tobias, *supra* note 6, at 495-98 (explaining the difficulties that resource-poor litigants, such as civil rights lawyers and plaintiffs, confront).

34. Tobias, *supra* note 19, at 1627-34.

procedure, the federal court system itself must be experiencing problems. Too many requirements, many of which are unnecessarily complex and difficult to find, currently govern federal practice; thus, lawyers consider state court to be a preferable forum.

National procedural policymakers should heed these warnings. Unfortunately, it is somewhat premature to posit definitive conclusions about the effectiveness of CJRA experimentation generally or about the efficacy of specific procedures that have received experimentation. For example, numerous courts that are not early experimentation districts have been applying experimental measures for only a year,³⁵ and even experimentation in early implementation districts has not been rigorously evaluated.³⁶

Nonetheless, it is possible to posit tentative determinations primarily based on the analysis of anecdotal evidence and annual assessments undertaken to date.³⁷ The early data indicate that Congress should probably allow the CJRA to sunset in 1997 as scheduled.

The information also suggests that procedures which proved efficacious should be embodied in the Federal Rules, and that Congress ought to provide for selective, additional experimentation with promising procedures, while eliminating remaining experimental procedures, especially inconsistent ones.³⁸ It now appears that

35. Numerous districts adopted plans only in late 1993. *See, e.g.*, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 1, 1993); UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 1, 1993).

36. For examples of districts that issued very terse assessments which included no empirical data, see UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, ADVISORY GROUP OF THE CIVIL JUSTICE REFORM ACT ANNUAL MEETING (Feb. 9, 1994); UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, CIVIL JUSTICE REFORM ACT ANNUAL ASSESSMENT REPORT (Mar. 19, 1993).

37. Most early implementation districts have performed at least one annual assessment. *See, e.g.*, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ANNUAL ASSESSMENT OF THE CONDITION OF THE COURT'S DOCKET (1993); UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET (1993) [hereinafter NORTHERN DISTRICT OF OHIO ASSESSMENT]; *see also* 28 U.S.C. § 475 (Supp. V 1993) (prescribing annual assessments).

38. *See infra* note 42 (affording a recommendation for future experimentation).

certain procedures in the broad areas of alternative dispute resolution (ADR), judicial case management, and discovery will prove effective. For instance, an early implementation program governing ADR instituted in the Western District of Missouri has fostered more and earlier settlements,³⁹ and the broad menu of options that the Northern District of California provides has apparently facilitated settlement.⁴⁰ The systems of differentiated case management implemented in the Western District of Michigan and the Northern District of Ohio also seem to have expedited the resolution of civil disputes.⁴¹

The national Rule revisers should attempt to reinstitute a national uniform system of procedure. Important to the attainment of this goal will be replacement of the Rules' local option provisions with a provision similar to the proposed 1991 amendment to Rule 83 that was retracted in deference to civil justice reform experimentation.⁴² Equally significant will be the inclusion in a Federal Rule of a single automatic disclosure procedure, as soon as ongoing application and evaluation of the plethora of disclosure measures presently in use indicates that one mechanism is superior. For example, the Southern District of Illinois' disclosure procedure, requiring that litigants exchange the names of individuals "reasonably likely to have information that bears significantly on the claims

39. See Memorandum from Kent Snapp and Davis Loupe to Judges and Magistrates in the Western District of Missouri (Jan. 26, 1993) (on file with *The Review of Litigation*); see also Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335, 352-53 (1993) (examining civil justice reform in the Western District of Missouri).

40. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ANNUAL ASSESSMENT OF THE CIVIL AND CRIMINAL DOCKETS AND OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA 11-23 (1993).

41. DIFFERENTIATED CASE MANAGEMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, ANNUAL ASSESSMENT 10-20 (1994); NORTHERN DISTRICT OF OHIO ASSESSMENT, *supra* note 37.

42. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 152-55 (1991) (authorizing districts that secure Judicial Conference approval to adopt, for not greater than five years, experimental local rules that contravene Federal Rules).

and defenses,"⁴³ has apparently been effective.⁴⁴ The Montana District's disclosure requirements also seem to have worked well both in comparatively simple, routine cases, and in cases in which the disclosure has been general.⁴⁵

Districts and individual judges should correspondingly be attentive to the problems that local procedural proliferation has created. They should abolish all inconsistent or unnecessary local requirements, include the maximum number of remaining procedures in local rules, and reduce to written form all local procedures. Those responsible for state civil procedures should also attempt to institute or reinvigorate intrastate uniformity and conform state civil procedures as closely as possible to federal requirements.

V. Conclusion

This snapshot of the 1993 Federal Rules amendments and civil justice reform shows increasing dissatisfaction with the current state of civil procedure. Entities and individuals—Congress, federal judges, the Federal Judicial Center, and state judges—who have responsibility for that procedure must act promptly and decisively to halt its additional decline.

43. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 11 (1991).

44. John F. Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critics*, CHI. DAILY L. BULL., Apr. 23, 1994, at 17 (reporting that a majority of lawyers surveyed in the Southern District of Illinois believe that the automatic disclosure requirement in the Southern District works well).

45. The original Montana disclosure requirements were more rigorous than those found in the Federal Rule; for example, Montana litigants had to reveal the factual basis and legal theory of each claim. See *supra* note 3 and accompanying text (discussing the Montana requirements); see also Tobias, *More on Montana*, *supra* note 28, at 363 (stating that "mandatory disclosure in Montana works best when the disclosure is not complex").

Unfortunately, discovery poses the greatest difficulty and requires the most effective reform in complex cases. See Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265-68 (1992) (suggesting that objections to the automatic disclosure requirement of Rule 26 apply primarily to complex litigation). For more analysis of disclosure, see generally Tobias, *supra* note 19, at 1611-16, and Symposium, *Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993).