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Civil Justice Planning in the Montana Federal District

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CIVIL JUSTICE PLANNING IN THE MONTANA FEDERAL DISTRICT

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The Montana Federal District Court recently finalized its civil justice expense and delay reduction plan under the Civil Justice Reform Act (CJRA) of 1990.[1] In April, 1992, the Montana District essentially adopted whole cloth, and made effective, the civil justice plan that it had issued in December, 1991 to qualify for designation as an Early Implementation District Court (EIDC).[2] Relatively few members of the Montana Bar exhibited much interest in the planning effort that preceded promulgation of the civil justice plan. Because the new procedural regime that the Montana District instituted could significantly change the character of federal court practice, all attorneys who litigate in the court must become acquainted with that system. This essay first briefly explores the history of federal civil justice reform at the national level and in the Montana District. It then analyzes recent developments in civil justice reform nationally and locally. The essay next provides a glance into the future of this important reform.[3]

I. HISTORY OF CIVIL JUSTICE REFORM

A. National

Congress passed the Civil Justice Reform Act in December, 1990, because it wished to reduce what was perceived as increasing expense and delay in federal civil litigation and decreasing access

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* Professor of Law, University of Montana. I wish to thank Sally Johnson, Derik Pomeroy and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Cowley Endowment and the Harris Trust for generous, continuing support. Errors that remain are mine.

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. 1992)). *See also* United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan (Dec. 1991) [hereinafter Plan].

2. *See* Civil Justice Expense and Delay Reduction Plan and Related Amendments to the Rules of Procedure of the United States District Court for the District of Montana (Apr. 1992) [hereinafter Final Plan]. *See also* Plan, *supra* note 1. EIDCs "may apply to the Judicial Conference for additional resources . . . necessary to implement" the plans. Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(c)(2).

3. I have previously analyzed the report and recommendations of the Montana Advisory Group and the plan that the Montana Federal District Court issued in December, 1991. *See* Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 438-51 (1991) [hereinafter *Procedural Reform*]; Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992) [hereinafter *Plan*]. The effectuation of the Montana Plan and developments at the national level warrant another look.

to the federal courts.[4] Since the 1970s, the federal judiciary had evinced growing concern over a litigation explosion and over increasing abuse of the civil litigation process, particularly during discovery.[5]

The statute requires every federal district to promulgate a civil justice plan by December, 1993.[6] "The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[7] All of the districts must adopt plans after taking into account the reports and recommendations of local advisory groups.[8] Ninety days after the Act's passage, the chief judge in every district appointed the groups that were to be "balanced" and to include attorneys and others who appear in the court.[9] Each group must evaluate the district's docket and recommend procedural changes that the court, in consultation with the group, must consider and may adopt.[10]

Thirty-five advisory groups submitted reports to their districts during 1991, and thirty-four of the districts issued plans before the end of that year to qualify for EIDC status.[11] Circuit committees in all of the courts of appeal have now reviewed these plans, and a few committees have suggested comparatively minor changes in some plans.[12] The United States Judicial Conference Committee

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4. *See* Senate Comm. on Judiciary, Judicial Improvements Act of 1990, S. REP. No. 416, 101st Cong., 2d Sess. 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804-05. *See generally* Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (Summer 1991).

5. *See, e.g.*, National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975); Dissent From Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980). *See generally* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-89 (1989).

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

7. *See* 28 U.S.C. § 471 (Supp. 1992).

8. *See* 28 U.S.C. § 472 (Supp. 1992).

9. *See* 28 U.S.C. § 478(b) (Supp. 1992).

10. *See* 28 U.S.C. § 472(c)(1) (Supp. 1992).

11. *See* Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992).

12. *See* Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans By Early Implementation Districts and Pilot Courts, at 4-6 (June 1, 1992) [hereinafter Report to Congress]. *See, e.g.*, United States District Court for the District of Alaska, Civil Justice Expense and Delay Reduction Plan, Miscellaneous General Order No. 698, Amendment No. 1 (Apr. 27, 1992); Report to Congress, *supra*, at 4 (Southern District of Texas amended plan to provide for stricter controls on discovery). The Ninth Circuit Committee apparently conducted the most rigorous review. *See* Report to Congress, *supra*, at 5-6. *See also* Report of Ninth Circuit Review Committee (Apr. 14, 1992) [hereinafter Ninth Circuit Report]. *But see* Report of Eighth Circuit Review Committee (Mar. 1992). *See also* 28 U.S.C. § 474(a)(1) (Supp. 1992) (statutory provision

on Court Administration and Case Management has recently concluded its independent analysis of these plans and has recommended additional modifications in numerous plans.[13] Once the districts comply with the proposals for alterations, they will be officially designated EIDCs, which entitles the courts to certain federal assistance.[14] On June 1, the Conference also submitted an essentially descriptive report to Congress regarding EIDC implementation of the CJRA.[15]

The sixty districts that did not qualify for designation as EIDCs are proceeding apace with their civil justice planning. The advisory groups in approximately one-half of those districts are attempting to complete the compilation of their reports and recommendations by the end of 1992, although it currently appears that comparatively few of these districts intend to adopt plans before the statutory deadline of December, 1993.

B. Montana District

1. Advisory Group Report and Recommendations

The background of civil justice planning in Montana warrants only brief treatment here, as that history has been chronicled elsewhere.[16] The Montana District appointed the Advisory Group (Group) in early 1991, and the Group held several meetings, studied the court's docket and other relevant aspects of the local legal culture, and issued its report and recommendations in August, 1991.[17]

The Group's recommendations emphasized case assignment procedures, alternative dispute resolution (ADR), pretrial activity, and judicial control of discovery.[18] The Group asserted that the ex-

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prescribing circuit committee review). *See generally* Carl Tobias, *Letter from Zagreb*, 18-20 (1992) (copy on file with author).

13. *See, e.g.*, Letter from Judicial Conference of the United States, Comm. on Court Administration and Case Management to United States District Court for the Southern District of Indiana (July 1992); Letter from Judicial Conference of the United States, Comm. on Court Administration and Case Management to Clarence A. Brimmer, United States District Court for the District of Wyoming (July 1992).

14. *See supra* note 2.

15. Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans By Early Implementation Districts and Pilot Courts (June 1, 1992).

16. *See* Tobias, *Procedural Reform*, *supra* note 3, at 441-51; Tobias, Plan, *supra* note 3.

17. *See* Report of the Civil Justice Reform Act of 1990 Advisory Group for the United States District Court for the District of Montana (Aug. 1991) [hereinafter Report]. *See generally* Tobias, *Procedural Reform*, *supra* note 3, at 441-42.

18. *See* Report, *supra* note 17, at 42-50, 55-65, 73-80, 89-92. *See generally* Tobias,

panded employment of magistrate judges throughout the process of civil litigation would be the best mechanism available to guarantee effective case management and to reduce expense and delay in civil litigation.[19] Moreover, it suggested that the court prescribe the co-equal assignment of civil cases to Article III judges and magistrate judges with a waiver provision for lawyers and pro se litigants who fail to make timely requests for assignment to Article III judges.[20]

The Group correspondingly called for re-affirming the District's commitment to use of magistrate judges as the principal alternative means for disposing of civil lawsuits.[21] It also recommended the increased use of settlement conferences, which the judicial officers can order and at which they may preside.[22] The Group considered the referral of civil cases to magistrate judges for settlement purposes preferable to the establishment of a courtwide ADR program,[23] suggested that the district create and maintain a list of judicially-approved mediation masters,[24] and found early neutral evaluation beneficial but too expensive to warrant institution of a mandatory program.[25]

The Group suggested that the judicial officers assertively manage the pretrial process through direct involvement in creating, supervising and enforcing a case-specific plan governing discovery and disposition.[26] Moreover, the Group called for the officers to hold timely preliminary pretrial conferences and to draft with counsel such plans for discovery and resolution of cases commensurate with their particular needs.[27] It also recommended that the court set dates certain for concluding important pretrial matters and for monitoring the progress of cases.[28]

The Group offered five suggestions covering discovery.[29] The most significant recommendation called for mandatory discovery

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Procedural Reform, supra note 3, at 442-49.

19. *See* Report, *supra* note 17, at 46.

20. *See id.* at 42-43. *See generally* Tobias, *Procedural Reform, supra* note 3, at 442-43.

21. *See* Report, *supra* note 17, at 89.

22. *Id. See generally* Tobias, *Procedural Reform, supra* note 3, at 443-44.

23. *See* Report, *supra* note 17, at 91.

24. *See id.* at 90.

25. *Id.*

26. *Id.* at 55.

27. *Id.*

28. *Id.* at 55-56. The Group suggested that certain noncomplex lawsuits, such as those involving administrative appeals and chapter 11 bankruptcy matters, be exempted from these regular pretrial procedures, although the cases would be resolved in a timely manner. *Id.* at 56.

29. *See id.* at 73-78. *See generally* Tobias, *Procedural Reform, supra* note 3, at 447-49.

disclosure which closely resembles a controversial proposal to amend several Federal Rules of Civil Procedure.[30] The Group also suggested the creation of peer review committees that would review discovery and other litigation practices when requested by judicial officers.[31]

2. *Montana District Civil Justice Plan*

The Montana Federal District Court promulgated its civil justice expense and delay reduction plan in December, 1991.[32] The plan was basically a condensed version of the report and recommendations that the Group tendered to the court in August of that year and, therefore, warrants relatively little examination here.[33]

The Montana District observed that a scheme of differential case management focused on the informed, active involvement of a judicial officer and counsel in developing a case-specific management plan would guarantee that the process of civil litigation achieves its purpose, the equitable and efficient disposition of civil controversies.[34] The civil justice plan, therefore, would impose numerous new, relatively onerous requirements on judges and attorneys.[35] It also relies substantially on a number of comparatively inflexible time strictures and numerical restrictions.[36] Moreover, the plan adopts a number of additional recommendations of the Advisory Group. These include co-equal assignment of cases to Article III judges and magistrate judges, mandatory discovery disclosure, use of peer review committees, and most of the suggestions regarding ADR, especially the use of settlement conferences.[37]

In February, 1992, the Montana Federal District Court pro-

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30. *See* Report, *supra* note 17, at 73-75. *See also* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure 16, 26, *reprinted in* 137 F.R.D. 53, 83-84, 87-88 (1991). *See generally*, Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1.

31. *See* Report, *supra* note 17, at 77-78. *See also U.S. District Court For Montana Solicits Appointees For Peer Review Committees*, MONT. LAWYER, at 11 (June 1992), *infra* note 76. More than fifty attorneys applied to serve on the three five-member committees that the court will appoint. *See generally* Tobias, *Procedural Reform*, *supra* note 3, at 449.

32. *See* Plan, *supra* note 1. *See generally* Tobias, Plan, *supra* note 3.

33. *Compare* Report, *supra* note 17, *with* Plan, *supra* note 1. *See generally* Tobias, Plan, *supra* note 3, at 93.

34. *See* Plan, *supra* note 1, at 1. *See also supra* notes 26-27 and accompanying text.

35. For instance, the plan seems to contemplate that the judicial officers will closely manage, if not micro-manage, most cases. *See* Plan, *supra* note 1, at 3. Correspondingly attorneys will have to assemble pre-discovery disclosure statements. *See id.* at 10-13.

36. For instance, the Plan limits memoranda filed in support of motions to twenty pages and makes presumptively excessive the filing of more than fifty interrogatories. *See* Plan, *supra* note 1, at 16.

37. *See id.* at 3-4, 18, 22. *See also supra* notes 20-22, 30-31 and accompanying text.

vided a forty-five day period for public comment on its plan and the accompanying changes in local rules.[38] Upon receipt and analysis of that public comment, the court sent a pamphlet including the final plan and the amended local rules to all members of the Montana bar.[39] The district made virtually no changes in the plan or in the rules on which it sought public input. Indeed, the court made only one modification that has any significance. The plan, as adopted in December, 1991, provided that any Article III judge whose docket included greater than twenty percent more cases than the other judges would automatically not be assigned any cases during the subsequent quarter.[40] The final plan affords the court discretion to take whatever action it deems appropriate.[41]

The Ninth Circuit Review Committee generally found that most courts seeking EIDC status in the circuit issued plans which lacked particular implementation schedules and that some failed to discuss the six elements of 28 U.S.C. section 473(a) in their plans.[42] The Review Committee specifically asked about the validity of the Montana District's decision to assign civil cases co-equally and sought clarification of the provision for peer review committees.[43] The Judicial Conference, in its independent review, raised these issues, complimented the court on its work, and suggested that the court create procedures for monitoring the success of its plan.[44] Upon the conclusion of Conference review, the Montana District is officially designated an EIDC.

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38. *See Notice, Proposed Amendments to the Rules of Procedure of the U.S. District Court for Montana*, MONT. LAWYER, at 13 (Feb. 1992).

39. *See* Final Plan, *supra* note 2.

40. *See* Plan, *supra* note 1, at 4.

41. *See* Final Plan, *supra* note 2, at 4. I am indebted to Derik Pomeroy for undertaking a side-by-side comparison of the Plan and the Final Plan.

42. *See* Ninth Circuit Report, *supra* note 12, at 2. *See also* Report to Congress, *supra* note 12, at 5.

43. *See* Ninth Circuit Report, *supra* note 12, at 4. *See also* Report, *supra* note 17, at 5; *supra* notes 20, 31, 37 and accompanying text, *infra* notes 70-72, 74-78 and accompanying text. The Ninth Circuit Report states that the Montana District would retain the provision governing co-equal assignment as it was, "with rationale and other precedent for the opt-out provisions, cited by [the] Committee." Ninth Circuit Report, *supra* note 12. The Report also states that the District would provide an opportunity for attorneys to be heard by the peer review committees. *Id.*

44. Letter from Judicial Conference of the United States, Comm. on Court Administration and Case Management to United States District Court for the District of Montana (July 1992).

II. Analysis Of Civil Justice Planning

A. National Civil Justice Planning

The thirty-four federal courts that qualified for designation as EIDCs promulgated civil justice expense and delay reduction plans that are quite diverse.[45] The plans vary by length; some are less than ten pages and others exceed seventy pages. A number of plans instituted no or few changes, while several districts implemented far-reaching modifications. The plans also differ in terms of the scope, novelty and number of particular procedures adopted. This subsection emphasizes the civil justice plans rather than the advisory group reports, because procedures in those plans have actual effect and because the courts could rely on, or reject, the recommendations that groups included in their reports.

1. *Beneficial Features*

Numerous advantages attended nascent implementation of the Civil Justice Reform Act. Practically every district relied substantially on the reports and recommendations of their advisory groups while consulting with those entities. Most courts seem to have conducted the type of self-analysis, and adopted the kinds of procedures, which Congress contemplated. Nearly all of the districts appear to have followed the statutory guidance. These courts seemingly were sensitive to the Act's goals of reducing delay and cost in civil litigation, assessed their dockets carefully, took into account and prescribed, as warranted, the CJRA's principles, guidelines and techniques, and premised adoption of these mechanisms and additional procedures only on substantiating information.[46] A number of districts have closely conferred with their advisory groups or exchanged ideas with other courts, and numerous districts have fully and forthrightly responded to their groups' suggestions, explaining why they were adopted or rejected.[47]

A few districts carefully addressed certain questions of authority that civil justice reform implicates. For instance, the courts rejected some advisory group proposals, apparently determining that the districts had inadequate authority to carry out the recommen-

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45. I rely substantially in this section and this paragraph on Tobias, *supra* note 12.

46. *See, e.g.*, United States District Court for the Southern District of California, Delay and Cost Reduction Plan (Oct. 7, 1991); United States District Court for the Southern District of New York, Civil Justice Expense and Delay Reduction Plan (Dec. 12, 1991).

47. *See, e.g.*, United States District Court for the Northern District of Indiana, Civil Justice Expense and Delay Reduction Plan, at 1-2 (Dec. 31, 1991); United States District Court for the Western District of Wisconsin, Civil Justice Expense and Delay Reduction Plan, App. II (Dec. 31, 1991).

dations, or did not prescribe procedures for which they had uncertain authority.[48] A small number of courts refused to adopt procedures which might contravene the Federal Rules of Civil Procedure or that the Advisory Committee on the Civil Rules recently proposed as components of a thorough set of Federal Rules revisions which cannot become effective until December, 1993.[49]

Some districts prescribed new or innovative procedures or ones that promise to reduce cost or delay in civil litigation. For example, the Eastern District of Texas tried to limit directly the expense of civil litigation.[50] The court's plan placed ceilings on contingency fees in those cases, such as most personal injury actions, in which federal statutes do not prescribe fee-shifting.[51] The Eastern District of California is experimenting with pre-argument notification and time-tailored scheduling of motions in an effort to limit the amount of time that lawyers must spend in the courthouse waiting to argue motions.[52]

In short, nearly all of the federal district courts that sought EIDC designation apparently attempted to implement congressional intent as expressed in the Act. The districts seemed to follow closely statutory guidance and to exchange helpful information on the CJRA's implementation and specific procedures with their advisory groups and with other groups and courts. The EIDCs also prescribed a number of procedures that should achieve the Act's purposes, especially reducing cost and delay, and the courts to date apparently have been rather effective laboratories of experimentation.[53]

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48. *See, e.g.*, Western District of Wisconsin Plan, *supra* note 47, App. II, at 2, 6. *Cf.* United States District Court for the Northern District of Georgia, Civil Justice Expense and Delay Reduction Plan, at 18 (Dec. 17, 1991) (questioning whether specific authority needed to institute mandatory non-binding court-annexed arbitration).

49. *See, e.g.*, Western District of Wisconsin Plan, *supra* note 47, App. II, at 2. *Cf.* United States District Court for the District of Alaska, Civil Justice Expense and Delay Reduction Plan, at 4 (Dec. 13, 1991) (district favorably inclined toward automatic, compulsory disclosure and will experiment with it but considers counterproductive an effort to predict discovery modifications in federal rules or local rules). *See also* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure, *reprinted in* 137 F.R.D. 53 (1991). *See generally* Samborn, *supra* note 30, at 1, 12.

50. *See* United States District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan (Dec. 20, 1991).

51. *See id.* at 7-8.

52. *See* United States District Court for the Eastern District of California, Civil Justice Expense and Delay Reduction Plan (Dec. 31, 1991). *See also* Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the Eastern District of California, at 81, 95, 97 (Nov. 21, 1991).

53. It is too soon to determine conclusively how efficacious the districts will be. This judgment will not be possible until the procedures actually have been implemented and

2. Less Advisable Aspects

Some features that appear less advantageous accompanied the statute's early implementation in the federal district courts. Certain districts apparently have relied little, if at all, on the efforts of their advisory groups or consulted minimally with those entities. Moveover, the courts may have failed to undertake the kind of introspection, or to implement the types of procedural provisions, which Congress intended.

A number of districts have exercised quite broad authority under the Act to adopt procedures which conflict with the Federal Rules or provisions in the United States Code. Some have even claimed that the statute affords them a roving commission to prescribe any procedures that will reduce delay or expense, regardless of whether the provisions deviate from federal requirements. The Eastern District of Texas specifically proclaimed in its plan that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."[54] The court instituted an offer of judgment concept that seems inconsistent with Federal Rule 68,[55] and the district placed caps on contingency fees which may invade the legislative province to allocate the expenses of litigation.[56]

An additional problematic area of inconsistency has involved mandatory discovery disclosure. Approximately twenty EIDCs have adopted procedures which are similar to proposed revisions of the federal rules that the Civil Rules Committee suggested in August 1991.[57] These proposals significantly alter traditional notions of discovery, and many components of the bar, including much of the organized plaintiffs, defense, and public interest bars, strongly opposed the recommendations.[58] The Civil Rules Committee changed course twice on the proposals in a two-month period this spring and ultimately settled on language similar to that which it

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have been rigorously assessed. *See* Tobias, *supra* note 12, at 14-26.

54. *See* Eastern District of Texas Plan, *supra* note 50, at 9.

55. *Compare id.* at 10 *with* FED. R. CIV. P. 68. *See also* Tobias, *supra* note 12, at 31.

56. *See* Eastern District of Texas Plan, *supra* note 50, at 7-8. *See also* Kaiser Aluminum & Chem. Corp. v. Bonjourno, 110 S. Ct. 1570, 1576 (1990).

57. *See, e.g.*, United States District Court Western District of Oklahoma, Civil Justice Expense and Delay Reduction Plan, at 11-12 (Dec. 31, 1991); United States District Court for the Eastern District of Pennsylvania, Civil Justice Expense and Delay Reduction Plan, at 13-14 (Dec. 31, 1991).

58. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure 16, 26, *reprinted in* 137 F.R.D. 53, 83-84, 87-88 (1991). *See also* Samborn, *supra* note 30 at 1 (bar opposition).

had originally suggested.[59] Attorneys in EIDCs throughout the nation, however, apparently are employing the discovery disclosure requirements, often for strategic benefit.[60]

The phrasing of the Civil Justice Reform Act and the accompanying legislative history evince little congressional intent that courts exercise expansive authority to prescribe procedures that conflict with the United States Code or the Federal Rules of Civil Procedure.[61] The Rules Enabling Act specifically provides that local rules are to be "consistent with Acts of Congress" and the Federal Rules.[62] Currently applicable Federal Rule 83 concomitantly provides that, "in all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with" the Federal Rules.[63]

B. Montana Civil Justice Planning

1. Beneficial Features

A number of beneficial features attended early efforts to implement civil justice reform in the Montana District. The court, relying on the efforts of and consulting with the Advisory Group, seems to have undertaken the kind of introspection, and adopted the type of procedures, which Congress envisioned. The district appeared to follow carefully most of the guidance that the Civil Justice Reform Act provided. The court seemed sensitive to the CJRA's goals of reducing cost and delay in civil cases, closely assessed its civil and criminal dockets, considered and prescribed, when appropriate, most of the Act's principles, guidelines and techniques, and based the adopted procedures on supporting

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59. *See* Samborn, *supra* note 30, at 1. The Judicial Conference Committee on Rules of Practice and Procedure recently forwarded this proposal essentially intact to the Judicial Conference itself, which is likely to submit the proposal unchanged to the Supreme Court. Telephone Interview with Joseph Cecil, Research Division, Federal Judicial Center (July 8, 1992).

60. This is premised on conversations with numerous attorneys who practice in federal court.

61. *See* Lauren K. Robel, *Fractured Procedure* (1992) (unpublished manuscript) (copy on file with author) (thorough assessment of legislative history indicating Congress intended narrow authority). *See also* Senate Report, *supra* note 4, at 3-31, *reprinted in* 1990 U.S.C.C.A.N. at 6805-35 (no indication in pertinent legislative history that Congress meant to provide expansive authority).

62. *See* 28 U.S.C. § 2071(a) (Supp. 1992). *See generally* Tobias, *supra* note 12, at 30.

63. FED. R. CIV. P. 83. The 1991 proposal to revise Rule 83 would allow districts to experiment for not more than five years with inconsistent local rules, if the Judicial Conference approved. *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, *reprinted in* 137 F.R.D. 53, 152 (1991). *See generally* Samborn, *supra* note 30, at 1.

materials.[64] The court appeared to confer periodically with the Advisory Group and with additional districts,[65] while the court responded to many of the Group's suggestions, explaining why it employed or rejected the recommendations.[66]

The Montana Federal District Court was attentive to a number of questions that implicate implementation of the CJRA. For instance, the district expressly provided that the new procedural provisions included in its civil justice plan would become effective through revisions in the applicable local rules.[67] The court correspondingly insured that members of the Montana bar had notice and an opportunity to comment on the plan and proposed amendments to the local rules.[68]

The Montana District also included several particular provisions in its plan that are new or innovative and which probably will reduce cost or delay in civil lawsuits. The court was one of the few EIDCs to provide explicitly that the "role of the judicial officer shall be to assist counsel in developing a case management plan which will preclude the utilization of court process as a strategic weapon and facilitate resolution of civil cases in a time frame which will allow full, yet efficient, development of the case."[69] The district will deploy peer review committees consisting of members of the federal bar who will review discovery disputes and potential litigation abuse at the request of judicial officers.[70] These entities may reduce discovery controversies and litigation abuse, which will benefit the court, attorneys and parties.[71] The co-equal assignment of civil cases to Article III judges and magistrate judges should correspondingly conserve resources of Article III judges, especially if lawyers and litigants do not seek reassignment to Article III judges.[72]

2. *Less Advisable Aspects*

The features of civil justice planning in Montana that I con-

64. This is premised almost exclusively on the relevant documents, the Plan, *supra* note 1, and the Final Plan, *supra* note 2.

65. *See, e.g.*, *supra* notes 17, 30, 37 and accompanying text.

66. *See, e.g.*, *supra* notes 33-37 and accompanying text.

67. *See* Plan, *supra* note 1, at 26-38.

68. *See supra* notes 38-39 and accompanying text.

69. Plan, *supra* note 1, at 13. *See also* Report, *supra* note 17, at 62.

70. *See* Plan, *supra* note 1, at 17. *See also supra* notes 31, 37, and accompanying text; *infra* notes 75-76 and accompanying text.

71. The Article III judges and the Advisory Group are more optimistic about these prospects than I am. *See infra* notes 74-82 and accompanying text.

72. *See* Plan, *supra* note 1, at 3. *See also supra* notes 20, 37 and accompanying text, *infra* notes 77-78, 81-82 and accompanying text.

sider more troubling need not be comprehensively recounted at this juncture, because I have evaluated those aspects elsewhere.[73] Nonetheless, certain dimensions that I believe are most problematic deserve re-examination here. Perhaps most important, some of the very procedures that are new or creative may also prove troubling. The peer review committees could well reduce the number of discovery disputes and perhaps decrease litigation abuse.[74] Nonetheless, it is unclear that the court possesses the requisite authority to appoint such entities.[75] Moreover, it is uncertain how the committees will discharge the duties that the district has assigned them, and it will remain difficult to ascertain whether the committees will satisfy due process, until the court clarifies how it intends that they act.[76] The co-equal assignment of civil cases concomitantly implicates questions of judicial authority.[77] This is particularly true, given that Congress revised the statute governing referral of civil cases to magistrate judges to clarify and make consents to jurisdiction more explicit, and those changes were one component of the Judicial Improvements Act of 1990, which also included the CJRA.[78] The provisions respecting mandatory discovery disclosure also could be difficult to implement and are likely to be controversial.[79] These factors may be worsened, because Montana attorneys invoked the provision as early as April of this year.[80] Additional, specific constituents of the Montana civil justice plan, such as the requirement that judicial officers, lawyers and litigants

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73. *See* Tobias, *Procedural Reform*, *supra* note 3, at 442-51; Tobias, Plan, *supra* note 3, at 93-96.

74. *See supra* notes 70-71 and accompanying text.

75. *See* Tobias, *Procedural Reform*, *supra* note 3, at 449; Tobias, Plan, *supra* note 3, at 95-96.

76. *See* Tobias, *Procedural Reform*, *supra* note 3, at 449; Tobias, Plan, *supra* note 3, at 95-96. In fairness, the judicial officers plan to meet with the peer review committees once they are appointed and to secure the members' input in developing procedural guidelines. The officers are considering having the committees function in an advisory capacity to pass on hypothetical requests.

77. *See* Tobias, *Procedural Reform*, *supra* note 3, at 442-43; Tobias, Plan, *supra* note 3, at 93-94. *See also supra* note 72 and accompanying text.

78. *See* Tobias, Plan, *supra* note 3, at 93-94. The three Article III judges plan to employ different assignment procedures in the near term, and this disuniformity will additionally complicate co-equal assignment. The Article III judges, however, may eventually use identical or similar assignment procedures.

79. *See supra* notes 30, 37, 57-60 and accompanying text.

80. This is premised on conversations with Montana federal court practitioners. The Montana District is now applying the provisions of the civil justice plan to cases filed before its effective date that have not experienced a triggering event, such as a pretrial conference, and to all cases filed after the effective date. The magistrate judge in Great Falls, however, has scheduled a number of cases filed before the effective date so that they are subject to the mandatory disclosure requirement. *See also supra* note 60 and accompanying text.

participate in a greater number of activities,[81] appear somewhat less troubling than those components examined above, although they could prove problematic.[82]

III. A Look Into The Future

Prognostication about the federal courts, federal practice, and federal procedure is always difficult. This effort is exacerbated by the rapidly-changing nature of federal court practice, by the wealth of procedural activity that is presently occurring in Congress, the federal rule-revision entities, and the courts, and by the ambitious nature of the CJRA. Nonetheless, some predictions and several suggestions can be afforded.

A. National

Civil justice planning has provided numerous benefits nationally. The reform has fostered intense, informative debate over the future of the federal courts and federal civil procedure, has promoted an unprecedented analysis of the operations of the ninety-four federal trial courts, and has facilitated much interaction between the federal bench and bar. More specifically, there now is considerable ferment over the best procedure for the twenty-first century and the place of local procedural amendment in the national scheme of federal rules revision.

Civil justice planning has concomitantly produced certain disadvantages at the national level. Nascent reform has created considerable confusion and uncertainty, especially regarding applicable procedures in the federal trial courts. Much complexity and disuniformity have attended implementation of the CJRA in the EIDCs.[83] The Civil Rules Committee's efforts to have the Supreme Court and Congress adopt one of the most thoroughgoing sets of rule revisions in history have compounded these difficulties.[84]

Thus, while Congress, in passing the Act, attempted to achieve the commendable goals of reducing cost and delay in civil litigation, it probably tried to accomplish too much at once. Congress, therefore, should institute some type of mid-course correction that

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81. *See supra* note 35 and accompanying text.

82. Additional components that could prove problematic include comparatively rigid temporal and numerical limitations and certain aspects of ADR, particularly the use of settlement conferences. *See supra* notes 36-37 and accompanying text.

83. *See supra* notes 54-63 and accompanying text.

84. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure, *reprinted in* 137 F.R.D. 53 (1991). *See also supra* notes 30, 57-60 and accompanying text.

would scale back this massive, nationwide planning effort. Congress could rely on a number of possible models for this approach. For instance, Congress might allow the EIDCs, or the subset of those courts that are pilot or demonstration districts, to proceed and closely evaluate their work while delaying or suspending the civil justice reform efforts in the remaining sixty districts.[85] Another important complication that Congress must clarify is whether and, if so, the extent to which, it intended districts to prescribe procedures that differ from those in other districts or conflict with the Federal Rules or requirements in the United States Code.[86]

B. Montana

Civil justice reform in the Montana Federal District Court holds considerable promise for achieving the CJRA's primary goals—reducing delay and expense in civil litigation. The informed, active involvement of judicial officers and attorneys in creating case management plans and the increased use of ADR may well expedite dispute resolution.[87] The co-equal assignment of civil lawsuits probably will save resources of the Article III judges, even as it enhances the workload of the magistrate judges.[88] The employment of peer review committees could limit the quantity of discovery disputes and reduce abuse of the litigation process.[89] Mandatory discovery disclosure might save the time of judicial officers, but the dearth of experimentation with the new concept, its novel nature, the confusion that is likely to attend implementation, and the great controversy that an analogous federal proposal provoked mean that compulsory disclosure, at least initially, will probably not conserve lawyers' or litigants' resources.[90] The Montana Advisory Group, and apparently the Montana judicial officers, are considerably more optimistic about the efficacy of the procedures described above than I am for reasons elaborated in this article

85. There are ten pilot, and four demonstration, districts among the thirty-four EIDCs. *See also supra* notes 11-15 and accompanying text.

86. Congress so structured the CJRA that interdistrict disuniformity is a rather natural concomitant. *See supra* notes 10, 45 and accompanying text. Conflicts between local procedures and federal requirements are more problematic. *See supra* notes 54-60 and accompanying text.

87. *See supra* notes 21-28, 34 and accompanying text. *But see supra* notes 35, 81-82 and accompanying text.

88. *See supra* notes 19-20, 37, 72 and accompanying text. *But see supra* notes 77-78 and accompanying text.

89. *See supra* notes 31, 37, 70-71, 74 and accompanying text. *But see supra* notes 75-76 and accompanying text.

90. *See supra* notes 30, 37, 54-57, 77-80 and accompanying text.

and others.[91]

As the judicial officers are implementing the civil justice plan, they should scrutinize the effectiveness of the new procedures prescribed, particularly the ones mentioned in the paragraph above. The judicial officers should also closely monitor, detect and treat any efforts to employ the procedures for tactical benefit.[92] When the Montana District, in consultation with the Advisory Group, undertakes the statutorily-mandated annual assessment of its docket with a view to improvements, the court should rigorously analyze the efficacy of its new procedures and of those the other thirty-three EIDCs have implemented.[93] The Montana District should as well maintain and preserve all of the data pertaining to civil justice reform that it has collected for purposes of future planning and research efforts.

IV. CONCLUSION

Congress instituted an unprecedented analysis of the federal trial courts when it passed the Civil Justice Reform Act of 1990. Thirty-four districts' issuance of civil justice plans constituted the first important phase of that Act's implementation. Civil justice reform promises to reduce cost and delay in civil litigation nationwide, although caution is warranted in moving too rapidly. The Montana District, as one of the EIDCs, has complied with congressional guidance in instituting civil justice reform. The court has adopted numerous new procedures that should reduce expense and delay in civil cases. The district also has prescribed several novel or innovative concepts that are more ambitious, which may or may not limit cost or delay. If the judicial officers in the Montana District, with the assistance of the Advisory Group, rigorously monitor implementation of the civil justice plan and consider the efficacy of procedures that other courts use, the judicial officers should be able to refine civil justice reform in ways that will reduce expense and delay in civil lawsuits.

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91. *See supra* notes 74-82 and accompanying text. *See also* Tobias, *Procedural Reform*, *supra* note 3, at 449; Tobias, Plan, *supra* note 3, at 93-96.

92. *See supra* note 69 and accompanying text.

93. *See* 28 U.S.C. § 475 (Supp. 1992). *See also supra* note 85 and accompanying text.