

1992

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Recommended Citation

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

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140 F.R.D. 49

Federal Rules Decisions

1992

JUDICIAL OVERSIGHT OF CIVIL JUSTICE REFORM ^{a1}

CARL TOBIAS ^{aa1}

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***49** Congress intended that the Civil Justice Reform Act of 1990 (CJRA) institute a nationwide experiment aimed at reducing expense and delay in the civil justice system.¹ In early 1991, all ninety-four federal district courts appointed advisory groups that were to “be balanced and include attorneys and other persons who are representative of major categories of litigants in the courts.”² The CJRA instructs each advisory group to analyze thoroughly the state of the court's civil and criminal dockets, to “identify trends in case filings and in the demands being placed on the court's resources,” and to delineate the “principal causes of cost and delay in civil litigation” in the district.³ The Act also states that every advisory group, in developing recommendations, must consider the specific needs and circumstances of the court, its litigants, and their counsel while guaranteeing that all three contribute significantly to “reducing cost and delay and thereby facilitating access to the courts.”⁴ Between June 30 and December 31 of last year, thirty-five of the advisory groups submitted reports and recommendations to the district courts for formulating “civil justice expense and delay reduction plans.”

Thirty-four of the district courts which received the advisory group reports and recommendations employed them to complete the development of their civil justice plans by December 31, 1991, thus enabling the courts to become eligible for designation as Early Implementation District ***50** Courts [EIDC].⁵ The CJRA provides that 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.”⁶ Most of the plans require modification of the applicable local rules to be implemented fully. Some plans purportedly became effective upon issuance, and nearly all of the plans will become effective by mid-1992. Relatively few courts have clearly provided for public comment on their revisions in local rules or their plans before they take effect.

The next important phase in this civil justice planning process that the Civil Justice Reform Act mandates is review of the district courts' action. Section 474 of Title 28 of the United States Code provides that the “chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee, review each plan and report submitted ... and make such suggestions for additional actions or modified actions ... as the committee considers appropriate for reducing cost and delay in civil litigation” in each district.⁷ That section also states that the “Judicial Conference of the United States shall review each plan and report submitted ... and may request the district court to take additional action if it determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.”⁸

The Judicial Conference Committee on Court Administration and Case Management, which Chief Judge Robert Parker of the Eastern District of Texas chairs, has been delegated oversight responsibility for discharging the statutorily-assigned duties of the Judicial Conference.⁹ The Committee has requested that the circuit committees complete their reviews and submit reports to it by March 31, 1992. The Committee on Court Administration and Case Management will be simultaneously reviewing

the plans and is scheduled to finish that task and its analysis of the circuit reviews and reports by April 30, 1992. The Judicial Conference then must prepare a report for submission to Congress by June 1.

***51** I have recently evaluated a significant number of the civil justice expense and delay reduction plans that the districts seeking Early Implementation District Court status have developed. I found that all of the districts conducted the type of critical self-analysis, and adopted the type of procedures, that the CJRA envisioned. Numerous plans, however, included a number of provisions that seem debatable as a matter of policy for reducing expense and delay in the civil justice system and some provisions that appear problematic as a matter of judicial authority.

Quite a few district courts have prescribed various forms of mandatory discovery disclosure,¹⁰ most of which apparently are modeled on the proposal to amend Federal Rule of Civil Procedure 26 that the Committee on Rules of Practice and Procedure of the Judicial Conference issued for public comment in August, 1991.¹¹ An important difficulty with the nascent proposal to revise Federal Rule 26 is that it would significantly change traditional notions of discovery and, thus, is highly controversial.¹² The Committee's proposal, therefore, may well be substantially altered before Rule 26 is actually amended, and, in any event, whatever change is adopted could only become effective in December, 1993 at the earliest.¹³

Most of the federal district courts, when publishing their plans, have correspondingly proposed modifications in, or in fact revised, certain local rules to implement the plans.¹⁴ Numerous districts have acted as if they possess authority to promulgate local rules, or enforce provisions in their plans, that conflict with the Federal Rules of Civil Procedure. The civil justice plan for the Eastern District of Texas flatly proclaims that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."¹⁵ Indeed, in ***52** commendable candor, the plan's author states that the "court recognizes that provisions of this plan," including the section regarding the "relationship between the Rules Enabling Act and the Civil Justice Reform Act," could "ultimately be the subject of judicial review in the Courts of Appeal."¹⁶

A number of other federal districts, albeit with varying degrees of clarity, have inserted in their civil justice plans provisions that could prove equally problematic as a matter of policy or authority. For example, the Western District of Missouri intends to sort one-third of its civil cases automatically to a mandatory, non-binding Alternative Dispute Resolution (ADR) program and to sanction parties who do not participate in good faith in ADR.¹⁷ The Montana District intends to create a peer review committee that will review the litigation behavior and discovery practices of attorneys who practice in the court.¹⁸ The committee members will be federal court practitioners "appointed by majority vote of the Article III judges of the district in active service."¹⁹ The committee will review litigation conduct or discovery practices at the behest of any judicial officer, who will afford it a statement delineating the questionable practice. The committee, after considering the record, will "present the judicial officer with an advisory opinion stating whether the practice or conduct falls within the bounds of accepted discovery or litigation practice."²⁰ The Montana District provides few procedural prescriptions, especially in terms of due process. For instance, there is no provision for oral testimony, evidentiary presentation, or the right to challenge allegations in the paper record. The plan does not state how many of the committee's members must agree, whether the committee's advisory opinions are to be written and how they are to be supported, and what action the judicial officer will take if the committee determines ***53** that the conduct or practice certified is not acceptable.²¹

The provisions that have already been considered OK are afforded principally for illustrative purposes, although they may be representative. The authority issues raised above and numerous others that the plans implicate could prove critical to the success of civil justice reform. These issues include whether the CJRA authorizes any of the three types of courts seeking EIDC status to promulgate procedures that vary from the Federal Rules and, if so, to what extent. Are the civil justice plans self-executing and enforceable against lawyers and litigants or can procedures in them only be implemented through revisions of the local rules?

More specifically, can district courts in the Seventh Circuit adopt procedures that conflict with circuit precedent in *Strandell v. Jackson County*?²²

These, and numerous other, questions of authority should be promptly resolved for a number of reasons. Some reasons are as theoretical as maintaining appropriate separation of powers among the branches of government and preserving the authority of Article III judges. Certain reasons are as pragmatic as the need to avoid delayed implementation of plans that their legal challenge will necessitate. Others are largely symbolic, such as preventing the erosion of respect for the federal judiciary that could result from the enforcement of procedures which appellate courts reject.

These factors suggest that the circuit committees and the Judicial Conference should closely analyze and expeditiously resolve the most problematic authority issues. Nevertheless, it is unclear that the circuit committees intend to scrutinize or resolve these questions. This view is premised on the assumption that most committees will closely follow guidance for their review of reports and plans that the Judicial Conference recently issued.²³ The guidance states that the “review guidelines ask for a simple assessment of whether each advisory group, in preparing its report, and each court, in developing and adopting its plan, carried out the tasks assigned by the statute.”²⁴ The four pages of guidelines, themselves, essentially recommend that the circuit committees determine whether the reports and plans are responsive to enumerated requirements in the CJRA.²⁵

The guidance does observe, however, that the “guidelines comprise a minimum set of standards for evaluating the reports and plans [and that] *54 a circuit committee may wish to go beyond such a basic assessment in reviewing the reports and plans.”²⁶ The critical importance of the authority issues to the success of civil justice reform makes imperative their serious consideration and resolution by the circuit committees.

The circuit committees, nonetheless, may be reluctant to assume these responsibilities. The committees could be concerned about their own power, for example, in light of the congressional grant, to scrutinize the authority questions. Individual committee members might not wish to assess the validity of plans that other judges in their circuits have formulated, although existing circuit councils frequently must take action that is equally delicate. The committees also may believe that they lack the requisite resources to analyze, research and resolve all of the pertinent authority issues or that circuit-by-circuit resolution could foster undesirable disuniformity.

These factors lead in turn to the possibility that the Judicial Conference will assume the responsibilities for evaluating and resolving the authority questions in the context of its review of plans and the circuit committee reports. It presently remains uncertain whether the Judicial Conference intends to undertake these duties, although Conference assumption of the responsibilities would insure uniformity and might afford the requisite resources and expertise.

When treating provisions which are debatable from a policy perspective or that may be supported by insufficient authority, the circuit committees and the Judicial Conference should closely analyze the reports that the advisory groups prepared and the plans, recommending appropriate changes in the plans. The section-by-section analysis included in the legislative history of the Civil Justice Reform Act states that “Section 474 provides a comprehensive approach to review of the civil justice expense and delay reduction plans submitted pursuant to section 472(d).”²⁷ Most of the remaining, relevant legislative history essentially tracks the language of the statute,²⁸ thereby leaving uncertain precisely what roles Congress contemplated that the circuit committees and the Judicial Conference would play. Congress obviously intended, that these entities perform the functions expressly prescribed in the statute. The circuit committees are to review the advisory group reports and the district court plans and suggest additional or modified actions that would reduce expense and delay in civil litigation.²⁹ The Judicial Conference is to review the reports and plans and may request that federal districts take additional action if the Conference finds that the courts have inadequately responded to relevant conditions of the criminal and civil dockets or to the suggestions of advisory

groups.³⁰ Moreover, Congress, in requiring the entities' participation in these activities, apparently at *55 least contemplated that the circuit committees and the Judicial Conference would review the plans and recommend changes in any provisions that clearly do not reduce, or might increase, expense or delay. Congress' fundamental purpose in passing the CJRA concomitantly supports comparatively rigorous oversight by the two entities.

There are several reasons closely related to those above why the circuit committees and the Judicial Conference should scrutinize the reports and plans and make efficacious suggestions for alterations. The adoption of provisions that are inadvisable as a policy matter or insufficiently supported by judicial authority could well thwart the CJRA's purpose—reducing expense and delay in the civil justice system. District courts have applied certain mechanisms prescribed in the CJRA and in plans, such as those relating to settlement, in ways that have disadvantaged litigants who lack resources, such as civil rights plaintiffs.³¹ Provisions that are unwise from a policy viewpoint may increase the cost and time needed to resolve civil litigation. Provisions that are unauthorized could violate the rights of lawyers and litigants. Challenges through litigation to these provisions could impose additional expense and delay in terms of the cost to the judiciary, attorneys and parties to litigate the issues and in terms of delayed implementation of the challenged plans. The adoption of provisions premised on debatable policy or authority could also undermine respect for the federal courts.

The circuit committees and the Judicial Conference plan to review promptly the plans that the thirty-four courts seeking to be named EIDCs submitted. Both entities should systematically analyze the plans, searching for provisions that are problematic as a matter of policy or authority. They should then inform the federal district courts of those provisions and make suggestions for improvement. For example, the Eighth Circuit might recommend that the Western District of Missouri delete the sanctioning provisions from its proposed ADR program.³² Correspondingly, the Ninth Circuit or the Judicial Conference should suggest that the Montana District reconsider the establishment of peer review committees.³³ The entire process also might be enhanced, were the Judicial Conference and the circuit committees to compare and contrast the plans developed within and among the federal circuits.³⁴ Judicial Conference participation in this exercise would concomitantly facilitate the discharge of its statutorily-mandated responsibility to develop model civil justice plans for the federal districts that choose not to develop their own plans by December, 1993.³⁵

*56 Thirty-four Early Implementation District Courts have recently taken steps to implement the Civil Justice Reform Act of 1990 by issuing civil justice plans premised on reports that their advisory groups assembled. An important component of this unprecedented nationwide examination of the condition of the federal trial courts has now moved to the phase in which circuit committees and the Judicial Conference will review the reports and the plans. If the national experiment in reform of the civil justice system is to reduce expense and delay in civil litigation, the circuit committees and the Judicial Conference must completely and carefully evaluate the reports and the plans developed and make appropriate suggestions for change.

APPENDIX

True Volunteer Districts

District of Alaska
 Eastern District of Arkansas
 Eastern District of California
 Southern District of Florida
 District of Idaho
 Southern District of Illinois
 Northern District of Indiana
 Southern District of Indiana
 District of Kansas

District of Massachusetts
District of Montana
District of New Jersey
Eastern District of New York
District of Oregon
Eastern District of Texas
Eastern District of Virginia
District of Virgin Islands
Southern District of West Virginia
Western District of Wisconsin
District of Wyoming
Demonstration Districts
Northern District of California
Western District of Michigan
Western District of Missouri ^a
Northern District of Ohio
Northern District of West Virginia
Pilot Districts
Southern District of California
District of Delaware
Northern District of Georgia
Southern District of New York
Western District of Oklahoma
Eastern District of Pennsylvania
Western District of Tennessee
Southern District of Texas
District of Utah
Eastern District of Wisconsin
aSee supra note 5.

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

Footnotes

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aa1 Professor of Law, University of Montana. I wish to thank Lauren Robel and Peggy Sanner for hours of conversation, Derik Pomeroy, Lucy Rudbach and Bill Slate for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, 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.1990)).

2 *See* 28 U.S.C. § 478(b).

3 *See* 28 U.S.C. § 472(c)(1).

4 *See* 28 U.S.C. § 472(c)(2)-(3).

5 *See* Judicial Improvements Act of 1990, Tit. I, Pub.L. No. 101-650, § 103(c), 104 Stat. 5089, 5096. The Western District of Missouri is being considered ineligible for designation as an EIDC, because it did not complete a civil justice plan by December 31, 1991. Congress designated five federal districts as demonstration districts, two of which are to experiment with “systems of differentiated case management,” and three of which are to experiment with “various methods of reducing cost and delay in civil litigation, including alternative dispute resolution.” *Id.* at § 104(b). Congress also provided for the Judicial Conference to designate ten districts as pilot districts, which were to adopt plans including the six “principles and guidelines of litigation management and cost and delay reduction

identified in section 473(a) of title 28.” *Id.* at § 105(b). Congress required the pilot, but not the demonstration, districts to complete plans by December 31, 1991, so that the pilot districts will be “automatic” EIDCs. The remaining twenty districts, therefore, would be “true volunteer” EIDCs. A compilation of the courts seeking to be EIDCs appears in an appendix to this article.

6 *See* 28 U.S.C. § 471.

7 *See* 28 U.S.C. § 474(a)(1). “The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge’s responsibilities under paragraph (1) of this subsection.” 28 U.S.C. § 474(a)(2).

8 *See* 28 U.S.C. § 474(b).

9 The information in this paragraph is premised on a telephone conversation with Donna Stienstra, Research Division, Federal Judicial Center (Feb. 13, 1992).

10 *See, e.g.,* United States District and Bankruptcy Court for the District of Idaho, The Civil Justice Reform Act of 1990 Expense and Delay Reduction Plan at 10 (Dec. 19, 1991); United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan at 18 (Dec.1991); United States District Court for the Eastern District of New York, Civil Justice Expense and Delay Reduction Plan at 4 (Dec. 17, 1991).

11 *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendment of Federal Rule of Civil Procedure 26(a), *reprinted in* 137 F.R.D. 87, 87-91 (1991). *See also* William W Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U.Pitt.L.Rev. 703, 721-23 (1989). *See generally* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 Rutgers L.Rev. 933, 946-48, 954-55 (1991).

12 Considerable opposition to the proposal was expressed in written public comments and at the hearings held by the Advisory Committee during November, 1991 in Los Angeles and during February, 1992 in Atlanta. *See also* Schwarzer, *supra* note 11 (changing traditional notions of discovery). *See generally* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time For Reform?*, 138 F.R.D. 155 (1991).

13 *See* Carl Tobias, *Environmental Litigation and Rule 11*, 33 Wm. & Mary L.Rev. 429, 430 n. 6 (1992).

14 *See, e.g.,* United States District Court for the Southern District of Illinois, Civil Justice Delay and Expense Reduction Plan at 3, 4, 11 (Dec. 27, 1991); United States District Court for the District of Kansas, Civil Justice Reform Act Expense and Delay Reduction Plan at 8-9 (Dec. 31, 1991).

15 United States District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan, at 9 (Dec. 20, 1991). It is important to appreciate that the Eastern District of Texas seeks designation as a “true volunteer,” rather than a demonstration or pilot, EIDC. Congress arguably granted courts seeking to be named demonstration and pilot EIDCs clearer authority to adopt procedures that conflict with the Federal Rules. *See infra* note 17 and accompanying text.

Were the Supreme Court to promulgate and the Congress to acquiesce in the proposed revision of Federal Rule 83(b), the problem of inconsistency would be mooted in part. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendment of Federal Rule of Civil Procedure 83(b), *reprinted in* 137 F.R.D. 152, 153 (1991). The Committee on Rules of Practice and Procedure evidenced commendable sensitivity to the problem of inconsistency in the committee note that accompanied its proposal to amend the Rule. *See id.* at 154-55.

16 Texas Plan, *supra* at Introduction. The Eastern District of Texas is one of the few courts that attempted to reduce litigation expenses directly when it prescribed a “maximum fee schedule for contingency fee cases.” *Id.* at 7-8.

17 *See* United States District Court for the Western District of Missouri, Early Assessment Program Early Implementation Project at 1-14 (Oct. 31, 1991). The District, however, provides that cases in which ADR participation does not lead to settlement will become part of the regular trial track. *See id.* at 18-19. Moreover, 28 U.S.C. § 473(a)(6) states that plans may include “authorization to refer appropriate cases to [ADR] programs,” while section 104(b)(2) of Public Law Number 101-650 provides that the Western District of Missouri, as a demonstration district, “shall experiment with various methods of reducing cost and delay in civil litigation, including [ADR].”

- 18 *See* Montana Plan, *supra* note 10, at 17. *See generally* Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 Mont.L.Rev. 433, 449 (1991).
- 19 *Id.*
- 20 *See id.*
- 21 *See id.* Another troubling example is one district's statement that the advisory group "report constitutes the 'legislative history' of the Plan and shall serve as a guide in its implementation and interpretation." Eastern District of New York Plan, *supra* note 10, at 1. Indeed, a different plan characterizes the negligent failure to comply with its requirements as behavior punishable by sanctions. *See* United States District Court for the District of Massachusetts, Expense and Delay Reduction Plan at 67.
- 22 838 F.2d 884 (7th Cir.1988). These are only a few of the more problematic authority issues, but they are representative.
- 23 Judicial Conference of the United States, Guidelines for Review of Civil Justice Reform Act Reports and Plans Circuit Review Committees (Jan.1992).
- 24 *Id.* at 7.
- 25 *Id.* at 9-12.
- 26 *Id.* at 7.
- 27 *See* Senate Comm. on Judiciary, Judicial Improvements Act of 1990, S.Rep. No. 101-416, 101st Cong., 2d Sess. 50, 59 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6839, 6848.
- 28 *See id.*
- 29 *See* 28 U.S.C. § 474(a)(1).
- 30 *See* 28 U.S.C. § 474(b).
- 31 *See, e.g.,* *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985); *Lockhart v. Patel*, 115 F.R.D. 44, 45-46 (E.D.Ky.1987). *See also supra* note 17 and accompanying text. *See generally* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buff.L.Rev. 485 (1988-89).
- 32 *See supra* note 17 and accompanying text.
- 33 *See supra* notes 18-21 and accompanying text.
- 34 The Judicial Conference seems to be contemplating similar activity. *See* FJC Guidelines, *supra* note 23, at 7-8.
- 35 *See* 28 U.S.C. § 477. It now appears that the vast majority of those sixty federal districts that have yet to adopt plans intend to develop their own plans.