

1995

# Re-Evaluating Federal Civil Justice Reform in Montana,

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

---

## Recommended Citation

Carl Tobias, *Re-Evaluating Federal Civil Justice Reform in Montana*, 56 Mont. L. Rev. 307 (1995)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# RE-EVALUATING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias<sup>†\*</sup>

I assessed evaluation of the experiments that the Montana Federal District Court and additional federal district courts have conducted under the Civil Justice Reform Act (CJRA) of 1990 in the most recent issue of this journal.<sup>1</sup> In that essay, I included two important observations that subsequent developments have modified. First, I suggested that it was a particularly propitious time to examine evaluation in the Montana federal district because the district had concluded the initial annual assessment of the CJRA's implementation which the 1990 Act requires.<sup>2</sup> At the time that the essay went to press in June 1994, issuance of the annual assessment appeared imminent. However, the Montana Federal District Court ultimately decided to delay publication of its annual assessment principally because the Civil Justice Reform Act Advisory Group, created under the legislation,<sup>3</sup> reported to the court that automatic disclosure was the major area involving statutory implementation and was very controversial.

The second observation that I made in the essay that later developments changed involved the deadlines for the RAND Corporation's completion of a comprehensive study of experimentation in the pilot districts and for the report and recommenda-

---

† Copyright © 1995, Montana Law Review; Carl Tobias.

\* Professor of Law, University of Montana. I am a member of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the District of Montana; however, the views expressed here are my own. I wish to thank Tracey Baldwin and Peggy Sanner 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 Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994) [hereinafter Tobias, *Evaluating*]. This is the most recent installment of a series of articles which document and analyze developments in federal civil justice reform in Montana. See Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994) [hereinafter Tobias, *Recent*]; Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993) [hereinafter Tobias, *More*]; Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993) [hereinafter Tobias, *Updating*]; Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992); Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992); Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 438-51 (1991).

2. See Tobias, *Evaluating*, *supra* note 1, at 449 n.1; see also 28 U.S.C. § 475 (Supp. V 1993).

3. See 28 U.S.C. § 478 (Supp. V 1993).

tion on that program to Congress by the Judicial Conference of the United States. I stated that the RAND study was due in mid-1995 and that the Judicial Conference Report and suggestions were due by the end of 1995.<sup>4</sup> Congress has since passed the Judicial Amendments Act of 1994, which extended both of these deadlines for an additional year.<sup>5</sup>

I accept responsibility for including the information that was eventually altered; however, this is apparently one of the pitfalls of attempting to report on developments that are quite current and constantly in flux. These changes and new developments in civil justice reform, especially respecting evaluation of the experimentation that has transpired, warrant clarification and assessment. This essay undertakes that effort.

Part I of this piece initially affords an update of relevant developments relating to civil justice reform nationally and in the Montana Federal District Court. It emphasizes the congressional decision to extend the deadlines governing analysis of experimentation in the pilot districts and recent developments that led the Montana district to delay the preparation of a written annual assessment. Part II of this paper then glances into the future.

## I. CIVIL JUSTICE REFORM UPDATE

### A. *National Developments*

Relatively few developments have occurred in federal civil justice reform at the national level since I reported on reform in the last issue of this journal.<sup>6</sup> All of the thirty-four Early Implementation District Courts (EIDC), including the Montana District, and all of the sixty districts that are not EIDCs, have continued to experiment with procedures for reducing expense and delay in civil litigation and have continued to evaluate the effectiveness of those experimental measures.<sup>7</sup>

---

4. See Tobias, *Evaluating*, *supra* note 1, at 451.

5. See Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4343, 4345, § 4.

6. See Tobias, *Evaluating*, *supra* note 1, at 451-53.

7. All districts had to issue civil justice expense and delay reduction plans by December 1993. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, §103(b)(1). The thirty-four districts, which promulgated civil justice plans by December 31, 1991, qualified for designation as Early Implementation District Courts (EIDC) and were officially so designated in July 1992. See, e.g., Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Earl E. O'Connor, Chief Judge, United States

Most of the Circuit Review Committees, comprised of the chief circuit judge and all chief district judges in every circuit, and the Judicial Conference of the United States, which are statutorily required to review civil justice expense and delay reduction plans and to make suggestions for improvement, as indicated, have completed their reviews of the plans that the non-EIDCs prepared.<sup>8</sup> The Circuit Review Committees and the Judicial Conference seemed to scrutinize these courts' procedures for reducing expense and delay with somewhat less rigor than they reviewed those measures adopted by the EIDCs. This comparatively lenient oversight is understandable because numerous non-EIDCs developed less ambitious plans than did the EIDCs.

The legislation required the Judicial Conference to submit by December 31, 1995, a report on the results of the pilot program in which ten districts were to implement six principles and guidelines of litigation management and cost and delay reduction prescribed by section 473 of the statute.<sup>9</sup> The report was to include an assessment of how substantially cost and delay were decreased in the ten pilot districts by comparing any reduction with that in ten comparable districts in which the procedures' application was discretionary.<sup>10</sup> The comparison was to be based on a study conducted by an "independent organization with expertise in the area of federal court management,"<sup>11</sup> and the RAND Corporation has been undertaking that work.

The most significant change has occurred in the area of

---

District Court for the District of Kansas (July 30, 1992); Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana (July 30, 1992); see also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing EIDCs).

8. See 28 U.S.C. § 474 (Supp. V 1993). See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1406-11 (1992).

9. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1); see also 28 U.S.C. § 473 (Supp. V 1993).

10. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1). The ten pilot courts experimenting with the procedures are the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. The ten comparison courts are the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York and the Middle District of Pennsylvania.

11. Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1).

evaluation. On October 7, Congress passed the Judicial Amendments Act of 1994 that extended both the Judicial Conference and RAND study deadlines for an additional year.<sup>12</sup> Completion of the RAND analysis had been delayed principally because unanticipated problems slowed implementation of the measures being evaluated in numerous pilot and comparison districts.<sup>13</sup> RAND thought that twenty percent of the cases which it was assessing would not have ended by the statutory deadline and that these are exactly the kind of complicated suits that are most difficult to resolve and at which the CJRA is aimed.<sup>14</sup> RAND estimated that fewer than eight percent of the cases would not conclude at the end of an additional year.<sup>15</sup> Congress wisely determined to extend this deadline. Having spent substantial resources on this national experiment with expense and delay reduction procedures, it was eminently sensible to capture the group of cases that is most likely to inform future reform endeavors.

The statute also requires that the Judicial Conference submit to Congress by December 31, 1995 a report on the results of the demonstration program.<sup>16</sup> The demonstration program requires that the Western District of Michigan and the Northern District of Ohio experiment with systems of differentiated case management and that the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri experiment with various methods of decreasing expense and delay, including alternatives to dispute resolution (ADR). Congress did not extend this deadline in the 1994 Judicial Amendments Act, and the Federal Judicial Center is assisting the Judicial Conference in compiling relevant information so that the report will be tendered on time.

Section 475 of the CJRA commands each district court to assess annually the condition of its civil and criminal dockets and to determine whether additional procedures can be implemented to reduce cost and delay in civil cases and to improve the

---

12. See Pub. L. No. 103-420, 108 Stat. 4343, 4345, § 4 (1994).

13. See Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1322 (1994).

14. See 140 CONG. REC. S12,104, 12,105 (daily ed. Aug. 18, 1994) (statement of Senator Heflin).

15. See *id.*

16. I rely substantially in this paragraph on the Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(c).

district's litigation management practices.<sup>17</sup> The courts, when performing these annual assessments, are to consult with their advisory groups.<sup>18</sup> Districts have completed comparatively few annual assessments since I last reported on these evaluations.<sup>19</sup>

### B. Montana Developments

The Montana Federal District commenced compiling its initial annual assessment in 1993.<sup>20</sup> The Office of the Clerk collected and tendered to the Court's Advisory Group a statistical evaluation beginning on the April 1992 date when the civil justice expense and delay reduction plan took effect. The statistical material indicated that the district's Billings division, which assigns civil cases co-equally to Article III judges and magistrate judges under an opt-out system, was obtaining more consents than those divisions that use discretionary case assignments and voluntary consents.

During early 1994, most members of the Advisory Group essentially agreed that nearly all of the measures prescribed in the plan were functioning effectively, especially in decreasing delay rather than expense.<sup>21</sup> Automatic disclosure was the principal exception to this proposition. The Advisory Group was unclear whether the phraseology covering disclosure in the April 1992 civil justice plan was better than the wording that the district temporarily substituted in January 1994.<sup>22</sup> For instance, the newer language, which is meant to conform more closely to the 1993 revision of Federal Rule of Civil Procedure 26(a), might be inconsistent with the notice pleading system of the Federal Rules.<sup>23</sup> The Advisory Group recommended that the district

---

17. See 28 U.S.C. § 475 (Supp. V 1993).

18. See 28 U.S.C. § 475.

19. See, e.g., Annual Report of the Advisory Group of the U.S. District Court for the Eastern District of Kentucky (Sept. 1994); Annual Assessment Under the Civil Justice Reform Act of the State of the Civil and Criminal Dockets and of the CJRA Expense and Delay Reduction Plan of the Eastern District of Virginia (Sept. 1994); see also Tobias, *Evaluating*, *supra* note 1, at 451-53.

20. I rely substantially in this paragraph on Tobias, *Recent*, *supra* note 1, at 242-43.

21. See Tobias, *Evaluating*, *supra* note 1, at 453.

22. Compare D. MONT. R. 200-5(a) with United States District Court for the District of Montana, Order in the Matter of Local Rules of Civil Procedure 2-3 (Jan. 25, 1994) (hereinafter order).

23. Compare Order, *supra* note 22 with FED. R. CIV. P. 26(a). See also *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993). See generally Carl Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357 (1994); Carl Tobias, *Public Law Litigation and the*

court seek the perspectives of the federal bar on the terminology employed in the automatic disclosure procedure.<sup>24</sup> Members of the group suggested that the court return to the April 1992 language because it was clearer and engendered fewer disputes.<sup>25</sup>

Some Advisory Group members, court personnel, and federal court practitioners think that one of the major changes effected by civil justice reform has been a decrease in filings attributable to uncertainty involving disclosure in diversity cases.<sup>26</sup> This phenomenon is illustrated more specifically by the reluctance of repeat litigants, such as insurance company defendants, to remove from state to federal court cases that qualify for removal.

Given the factors examined above, the Advisory Group's belief that the civil justice reform procedures were not clearly having a dramatic effect on delay or much impact on cost, and the relatively small number of cases to which those procedures have applied, Chief Judge Paul Hatfield initially decided that a written annual assessment was unnecessary at this juncture and chose to rely on an oral report from the Advisory Group. Upon reflection, the Chief Judge apparently concluded that it was preferable to compile a written annual assessment, which was completed in October 1994.<sup>27</sup> The analysis was premised principally on information derived from the district's evaluation of its criminal and civil dockets, comments of the judicial officers, and reports by the Advisory Group to Chief Judge Hatfield.<sup>28</sup>

The first section of the annual assessment included an overall assessment.<sup>29</sup> That part stated that the court's civil justice plan was grounded upon differentiated case management (DCM), focusing on the active, informed involvement of judicial officers and attorneys in developing a case-specific management plan, and that extensive reliance on the magistrate judges had proved to be the most effective mechanism in enabling the district to

---

*Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 296-301 (1989).

24. See Tobias, *Evaluating*, *supra* note 1, at 453.

25. Donald Molloy, Remarks at the Montana Defense Trial Lawyers Continuing Legal Education Program on the 1993 Federal Rules Amendments, Kalispell, Mont. (July 14, 1994).

26. The assertions in the remainder of this subsection are premised on conversations with numerous individuals who are knowledgeable about civil justice reform in the Montana District.

27. Annual Assessment of the Civil Justice Expense and Delay Reduction Plan of the United States District Court for the District of Montana (Oct. 1994) (hereinafter Annual Assessment).

28. See Annual Assessment, *supra* note 27, at 1.

29. I rely substantially in this paragraph on Annual Assessment, *supra* note 27, at 2.

achieve the plan's objective of case-specific management. Active judicial case management has generally been effective in fostering more efficacious discovery and timely disposition of litigation through settlement. The section also stated that median disposition time for civil litigation had declined from an average of fifteen months during 1991 to approximately nine months during 1994 and that the Advisory Group believed that this time struck an appropriate "balance between expediency and efficiency."<sup>30</sup>

The second section of the assessment evaluated major provisions of the civil justice plan.<sup>31</sup> It initially analyzed use of the magistrate judges, whose effective utilization was critical to the plan's success because of the additional burden that DCM placed upon the Article III judges. The section then described the experiment in the Billings division involving the automatic assignment of civil cases to magistrate judges with provision for litigants to demand assignment to Article III judges and found that the procedure yielded "substantially more consents than discretionary assignment."<sup>32</sup> The section then observed that the court intends to use the automatic assignment of civil actions to magistrate judges to the fullest extent possible and to integrate magistrate judges fully into case assignment district-wide.<sup>33</sup>

The second section next examined automatic disclosure and found that it seemed to operate effectively in the Montana District.<sup>34</sup> The part observed that disclosure has not fostered significant satellite litigation involving satisfaction of the procedure's requirements in specific cases, although the assessment stated that it was difficult to ascertain whether the procedure was decreasing litigation expense and expediting cases.

The section also considered the setting of early, firm trial dates.<sup>35</sup> The court has employed effectively the provision for expedited trials to guarantee prompt trial dates for lawyers and litigants who expeditiously conclude discovery and prepare cases.

---

30. See Annual Assessment, *supra* note 27, at 2.

31. I rely substantially in this paragraph on Annual Assessment, *supra* note 27, at 3-4.

32. Annual Assessment, *supra* note 27, at 4.

33. Annual Assessment, *supra* note 27, at 4; see also Chief Judge Paul G. Hatfield, Remarks at the Federal Practice Seminar, Missoula, Mont. (Nov. 18, 1994)(suggesting district-wide assignment of civil cases to Article III judges and magistrate judges).

34. I rely substantially in this paragraph on Annual Assessment, *supra* note 27, at 5-6.

35. I rely substantially in this paragraph on Annual Assessment, *supra* note 27, at 6-7.

The general trial docket has afforded flexibility to treat problems that arise in complex litigation and has functioned to insure that cases proceed to trial in an efficient, orderly way.

The annual assessment concluded that the civil justice plan seemed to be operating reasonably well in decreasing expense and delay.<sup>36</sup> The assessment found no immediate need to amend the plan substantially, apart from minor modifications regarding procedures for assigning cases to magistrate judges and automatic disclosure, but suggested that the plan would be changed if warranted to improve the process of civil litigation in the court.

After considering the observations of the Advisory Group and the input of the Local Rules Committee, and in light of the 1993 Federal Rules Amendments, Chief Judge Hatfield concluded that the court should prepare a full set of proposed changes to the local rules.<sup>37</sup> A number of these proposed modifications are perfunctory or implicate style. Two of the suggested modifications are important and substantive. One involves resolution of the question of how to treat the controversial automatic disclosure procedure.<sup>38</sup> Neither approach that the district has employed clearly appears preferable, and each has benefits and disadvantages.

The April 1992 requirements premised primarily on relevance may lead to satellite litigation over the provision's meaning and require attorneys to speculate about what is relevant to their opponents' cases. The 1994 articulation affords the benefit of uniformity by conforming to the Federal Rules revision but could reinstitute the discredited notion of elevated pleading. The district is presently considering proposing for public comment a version of the procedure that returns to the April 1992 formulation, and the court will probably base its final decision on the bar's input.

The other significant change implicates the provision for co-equal assignment of civil cases with the opportunity to opt out and have cases initially assigned to magistrate judges heard by Article III judges.<sup>39</sup> The court has encountered the problem of demands for Article III judges being exercised relatively late in

---

36. I rely substantially in this paragraph on Annual Assessment, *supra* note 27, at 7.

37. See United States District Court for the District of Montana, Proposed Amendments to Local Rules (Oct. 1994).

38. See *id.* at 18-19.

39. See *id.* at 2-3.

the litigation, after a magistrate judge has handled the case to that point. The district now intends to propose that parties be required to exercise their option to request an Article III judge within twenty days after the litigants' initial appearance.

Chief Judge Hatfield has also been concerned that lawyers may be reluctant to demand Article III judges because of their perception that the judges or magistrate judges will unfavorably view the demand's assertion. Moreover, the Chief Judge remains concerned about how to use magistrate judges in ways that will most effectively reduce expense and delay.

Chief Judge Hatfield finalized these proposals for local rules changes and presented them to Judge Charles Lovell and Judge Jack Shanstrom in November.<sup>40</sup> The judges also sought the views on these proposed modifications of the federal practice section of the Montana Bar at a continuing legal education program held that month. Chief Judge Hatfield solicited input on the possibility of district-wide assignment of civil cases, while all of the judicial officers seemed concerned about implementing the most effective disclosure mechanism. The court intends to submit the proposed amendments in the local rules for public comment during early 1995.

## II. A GLANCE INTO THE FUTURE

### A. *National*

All ninety-four federal district courts will continue applying many procedures—principally governing case management, ADR, and discovery—that are intended to reduce expense or delay. More definitive conclusions about procedural efficacy must await additional experimentation primarily in the courts that are not EIDCs, most of which only adopted civil justice plans in the latter half of 1993. The RAND Corporation, the Judicial Conference, and Congress should capitalize on the additional year that Congress has afforded RAND for completing its study. For instance, RAND must capture the maximum possible data, while the Conference should prepare for receipt of the RAND analysis by surveying efforts in the districts. These endeavors should enable Congress to make a well-informed decision about whether the CJRA should sunset.<sup>41</sup>

---

40. See *supra* note 37.

41. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(2).

### *B. Montana*

The Montana Federal District Court correctly decided to publish a written first annual assessment under the 1990 statute, even though minimal information was available, a comparatively small number of cases have been subject to the new procedures, and civil justice reform has been relatively uncontroversial. Numerous procedures being applied in the district apparently are operating effectively, and some may be reducing delay.

Automatic disclosure is now the most controversial measure, and the district will soon solicit the bar's views on the feasibility of returning to the April 1992 formulation. Because both that articulation and the 1994 enunciation apparently afford benefits and impose disadvantages that seem rather similar, it may be advisable to retain the 1994 provision, which at least promotes procedural uniformity.

In ascertaining how to employ magistrate judges most effectively, the Montana district may want to consult reform efforts in other districts and implement measures that have proven efficacious. The proposal to require that demands for Article III judges be exercised earlier in litigation ought to foster efficiency and certainty. The court should explore potential responses to the concern that attorneys might not make demands because the judges or magistrate judges would view the lawyers less favorably. For example, the court might want to consider possible ways to preserve the anonymity of those who assert demands. The idea of district-wide assignment of civil cases is creative and seems advisable. For instance, it should save resources of Article III judges, but it may impose burdens on magistrate judges or on lawyers and litigants relating, for example, to travel expenses. The judicial officers, therefore, should scrutinize the efficacy of the approach, particularly in light of input from federal court practitioners.

### III. CONCLUSION

All federal courts, including the Montana Federal District Court, are experimenting with expense and delay reduction procedures and are assessing the measures' efficacy. Congress recently extended the deadlines for completing the study of, and report and recommendations on, the pilot program, and this should enhance their accuracy. The Montana district has decided

to compile an annual assessment and has relied on the advice of its Advisory Group to propose revisions of the local rules in light of the 1993 Federal Rules Amendments. Members of the Montana Bar should be prepared to offer constructive comments on these proposed changes, particularly those involving automatic disclosure, effective use of magistrate judges, and the co-equal case assignment procedure.