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FEDERAL COURT PROCEDURAL REFORM IN MONTANA

Carl Tobias*

Much activity related to civil procedure recently occurred that could significantly affect practice in the Montana Federal District Court. During October 1991, the Committee to Redraft the Uniform District Court Rules (Local Rules Committee), which is charged with considering revision of the local rules, issued an *Interim Report* that includes suggested changes in those rules. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Standing Committee) distributed in August 1991 preliminary drafts of proposals to amend in varying degrees eighteen Federal Rules of Civil Procedure. The Advisory Group to Implement the Civil Justice Reform Act of 1990 (Group) also presented in August its report for consideration by the Montana Federal District Court in developing and implementing a civil expense and delay reduction plan.

Certain of these suggestions for change, if adopted as recommended, could have important impacts on federal court practice in Montana. Many members of the bar may be unaware of these recent developments involving procedure. It is necessary, therefore, to examine the procedural proposals that the various entities responsible for procedural revision have made. This essay undertakes that effort.

Because the recommendations for modifying the local rules and the Federal Rules are comparatively straightforward, this essay primarily describes both sets of proposals. The suggestions regarding civil justice reform are rather complex, may be far-reaching, and could prove relatively controversial. Moreover, much future activity relating to civil justice reform apparently will affect work on the local rules. Furthermore, members of the bar will have greater opportunity to influence the development and implementation of the expense and delay reduction plan than revision of the Federal Rules.¹ This essay, accordingly, descriptively analyzes the recommendations for civil justice reform and offers some caution-

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Scott Mitchell for helpful research, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. An article in this issue of the *Montana Law Review* addresses the proposal to revise one of those Federal Rules, Rule 11. See Sanner & Tobias, *Recent Work of the Civil Rules Committee*, 52 MONT. L. REV. 307 (1991).

ary observations.

I. LOCAL RULES

Congress passed the Judicial Improvements and Access to Justice Act in November 1988.² This legislation provides that local court rules may be adopted only after affording the public appropriate notice and an opportunity for comment, that copies of the rules shall be provided to the judicial council of the circuit in which the court sits, and that the rules are to "remain in effect unless modified or abrogated" by that judicial council.³

The Montana Federal District Court has twenty local rules, most of which include multiple subparts, that govern civil litigation.⁴ The Local Rules Committee recently issued an *Interim Report* encompassing both some suggestions for change that it placed in a draft prepared for the bench at a hearing held on December 10, 1990, and certain new recommendations that have not been drafted.⁵ Few of the proposals are substantial or are likely to prove controversial.

Perhaps the most important suggestions implicate discovery. The Local Rules Committee intends to limit the number of interrogatories to twenty-five, including subparts, and to impose the burden for seeking an increase on the party seeking to propound more interrogatories.⁶ A significant minority of the Local Rules Committee would restrict the number to fifty with subparts while placing the burden on the recipient to object to the number of interrogatories.⁷ The imposition of a precise numerical limitation may be insufficiently flexible to treat the varied civil caseload of the Montana District, especially actions that are complex or otherwise require substantial discovery. The Local Rules Committee also would require that litigants filing motions to compel discovery include affidavits indicating that the lawyers have attempted to resolve all disputed questions.⁸

2. See Pub. L. No. 100-702, 102 Stat. 4642.

3. 28 U.S.C. § 2071(b)-(d) (Supp. 1990).

4. See *Rules of Procedure of the United States District Court for the District of Montana*, in MONTANA RULES OF COURT STATE AND FEDERAL 837-84 (1991). See generally Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 999 (1989).

5. See COMMITTEE TO REDRAFT THE UNIFORM DISTRICT COURT RULES, SUGGESTED CHANGES TO THE UNIFORM FEDERAL DISTRICT COURT RULES, INTERIM REPORT (Oct. 1991) (copy on file at Law Review office) [hereinafter INTERIM REPORT].

6. INTERIM REPORT, *supra* note 5, Rule 200-5, at 2.

7. *Id.* at 2-3. Cf. *id.*, Rule 200-4, at 2 (similar recommendation that briefs be limited to 25 pages).

8. See *id.*, Rule 200-5, at 3.

There are several other interesting, but apparently less important, recommendations. The Local Rules Committee proposes that there be a new rule that would proscribe filing by facsimile transmission because the courts are unable to handle bulk filings of this nature.⁹

The Committee also suggests the adoption of certain requirements regarding summary judgment motions that will assist the litigants in focusing on what is disputed and reduce the burden on the court to glean factual issues from substantial records. Parties filing motions would separately submit a "statement of uncontroverted facts" setting forth in serial, not narrative, form the particular facts on which the movant relies and referring to the specific part of the record that includes the fact.¹⁰ Litigants opposing motions would file a "statement of genuine issues" controverting or treating the specified facts in a serial manner. "Facts that are not specifically controverted [would] be deemed admitted."

Moreover, the Local Rules Committee plans to draft prescriptions governing settlement conferences.¹¹ It will make additional changes in strictures covering the disclosure of experts.¹² The Local Rules Committee generally agreed that experts should be fully disclosed but was sharply divided on the issue of staged disclosure. It generally felt that there should be "simultaneous disclosure of experts and subject matters" while permitting rebuttal filing to eliminate experts or the naming of experts in fields not initially anticipated by the parties.

The Local Rules Committee plans to modify the requirements for admission to practice in the federal court. The Local Rules Committee would require that attorneys who are not members of the Montana bar appear *pro hac vice* with a lawyer who is admitted in Montana. This requirement would afford the court direct access to a local lawyer should problems result from out-of-state representation.¹³ The United States Supreme Court, under its supervisory power, has invalidated a local rule which similarly required that members of the Louisiana bar who applied for admission to the district court live, or maintain an office, in Louisiana

9. See *id.*, Rule 120-6, at 2. "Unusual circumstances warranting facsimile filings may be accomplished on a case by case basis following some intervention by the court." *Id.*

10. The information in this sentence and the remainder of the paragraph is in *id.*, Rule 220-2, at 4.

11. See *id.*, Rule 235-5, at 6; Rule 235-9, at 7.

12. The information in this sentence and the remainder of the paragraph is in *id.*, Rule 235-10, at 7.

13. See *id.*, Rule 110, at 1.

where the court sits.¹⁴

It is unclear when the Local Rules Committee will have a complete package of draft proposals ready for submission to the District Court, in part because the Committee apparently is awaiting the District Court's implementation of a civil expense and delay reduction plan under the Civil Justice Reform Act, which may require changes in numerous local rules.¹⁵ Attorneys interested in commenting on these proposed changes should contact Stephen M. Barrett of Kirwan & Barrett, Bozeman, who chairs the Committee.¹⁶

II. FEDERAL RULES

Proposals to modify substantially Rule 26 and related rules governing discovery are probably the most important of the suggestions to alter eighteen Federal Rules of Civil Procedure.¹⁷ The Standing Committee intended that proposed Rule 26 institute a scheme of comprehensive disclosure that would be self-executing.¹⁸ Litigants would be required to disclose without a request, thirty days after the answer is served, essential factual information that otherwise could be discovered.¹⁹ This includes, for example, the identification of individuals who have relevant information about the lawsuit and copies or descriptions of all important documentary material.²⁰ Litigants subsequently, but at least thirty days before trial, would have to disclose information regarding evidence that they will introduce at trial.²¹ This material would encompass, for instance, the names of the parties' witnesses and the identification of the documents and exhibits that will be presented.²² Opponents would have fourteen days to object to the admissibility of any of the evidence, and failure to object would constitute a

14. See *Frazier v. Heebe*, 482 U.S. 641 (1987).

15. Conversation with Professor Greg Munro, University of Montana Law School, member of Local Rules Comm. (Oct. 17, 1991). See also *infra* notes 30-126 and accompanying text.

16. His address is 215 West Mendenhall, P.O. Box 1348, Bozeman, MT 59771-1348.

17. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Rules*, 137 F.R.D. 53, 53-55, 63-155 (1991) [hereinafter *Proposed Rules*]. See also *Federal Rules: Major Changes Sought By Judicial Conference Working Group*, 60 U.S.L.W. 2158 (Sept. 10, 1991) (condensed summary of changes).

18. See Proposed Fed. R. Civ. P. 26 Comm. Notes, in *Proposed Rules*, *supra* note 17, at 99-100. See also Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989).

19. See Proposed Fed. R. Civ. P. 26(a), in *Proposed Rules*, *supra* note 17, at 87-91.

20. See Proposed Fed. R. Civ. P. 26(a)(1)(A), (B), in *Proposed Rules*, *supra* note 17, at 87-88.

21. See Proposed Fed. R. Civ. P. 26(a)(3), in *Proposed Rules*, *supra* note 17, at 90-91.

22. See *id.*

waiver.²³

The Standing Committee made significant recommendations for change in Rule 56, which governs motions for summary judgment. The proposal to revise Rule 56 is meant to improve the efficacy of summary judgment as a mechanism to avoid the costs of discovery, trial preparation and trial for issues that have only one outcome while simultaneously ensuring that litigants have a fair opportunity to demonstrate that trial is necessary to resolve these questions.²⁴ The proposal expressly provides that summary adjudication is proper only if it "is warranted as a matter of law because of material facts not genuinely in dispute."²⁵ The standards that govern "whether a fact is genuinely in dispute are essentially those developed over time."²⁶ Movants can file motions only after their opponents have had reasonable opportunity to discover pertinent information.²⁷

Written public comments on the Standing Committee's preliminary draft are due on February 15, 1992, while the Advisory Committee on the Civil Rules conducted a public hearing on the draft in Los Angeles on November 21, 1991.²⁸ The Advisory Committee intends to reconsider the draft in February 1992, and the Standing Committee will examine in June the proposal that the Advisory Committee submits to it.²⁹ Should the Standing Committee approve the Advisory Committee's work product, the Judicial Conference would consider that version in its September session. The Judicial Conference will tender the proposed modifications to the Supreme Court, which must submit its suggestions to Congress before May 1, 1993. The recommended changes could become effective 210 days thereafter, if Congress does not act on them.

23. See *id.* The proposal also requires the court's permission to seek discovery that is out-of-time while imposing on litigants a continuing duty to supplement disclosures and responses. See Proposed Fed. R. Civ. P. 26(d), (e), in *Proposed Rules*, *supra* note 17, at 95-97.

24. See Proposed Fed. R. Civ. P. 56 Comm. Notes, in *Proposed Rules*, *supra* note 17, at 146.

25. Proposed Fed. R. Civ. P. 56(a), in *Proposed Rules*, *supra* note 17, at 141.

26. See Proposed Fed. R. Civ. P. 56 Comm. Notes, in *Proposed Rules*, *supra* note 17, at 147.

27. See *id.* at 148. The Standing Committee also suggested considerable change in Rule 11 covering sanctions. See also Sanner & Tobias, *supra* note 1, *passim*.

28. See *Proposed Rules*, *supra* note 17, at 56.

29. The material in this sentence and the remainder of the paragraph appears at 60 U.S.L.W. 2158 (Sept. 10, 1991).

III. CIVIL JUSTICE REFORM

A. *Civil Justice Reform Act of 1990*

Congress passed the Civil Justice Reform Act of 1990 out of growing concern about delay in resolving civil disputes in the federal district courts.³⁰ The statute requires that each federal district implement a civil justice expense and delay reduction plan that may be created by the district or be premised on a model plan developed by the Judicial Conference.³¹ The purposes of the plans "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."³²

The district court must develop or select the plan to be implemented after considering the recommendations of an advisory group.³³ That entity, which the court was to have appointed within ninety days of December 1, 1990, was to be balanced, including lawyers and other individuals "who are representative of major categories of litigants" in the court.³⁴

The Advisory Group was to prepare and submit to the court a report which includes information relating to many factors. The report was to provide an assessment of the state of the court's criminal and civil dockets,³⁵ the premise for the Advisory Group's recommendation that the court develop a plan or rely on a model plan, suggested measures, rules and programs, and an explanation of how the plan recommended complies with certain statutory requirements governing the plans.³⁶ The Group, when developing its recommendations, was to consider the specific "needs and circumstances" of the court, of parties in that court, and of their lawyers.³⁷ The Group was to ensure that the actions it proposed encompassed significant contributions by the court, litigants and parties' attorneys to reducing delay and cost and, thus, facilitating court access.³⁸

The district court, when formulating its plan in consultation with the Group, must consider and may include numerous guide-

30. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. 1990)).

31. See 28 U.S.C. § 471 (Supp. 1990).

32. *Id.*

33. See 28 U.S.C. § 472 (Supp. 1990).

34. 28 U.S.C. § 478 (Supp. 1990).

35. 28 U.S.C. § 472(c)(1)(A) (Supp. 1990).

36. 28 U.S.C. § 472(b)(2)-(4) (Supp. 1990).

37. 28 U.S.C. § 472(c)(2) (Supp. 1990).

38. 28 U.S.C. § 472(c)(3) (Supp. 1990).

lines and principles of litigation management and delay and cost reduction.³⁹ One guideline is to promote the “systematic, differential treatment” of civil actions, tailoring the level of case-specific management to criteria, such as complexity, reasonable time to prepare the case for trial, and resources needed and available to resolve the case.⁴⁰ Another is the early and continuing control of the pretrial process with active participation by a judicial officer in numerous new matters, such as analyzing and planning the case’s progress, setting early, firm dates for trial, and closely controlling discovery and motion practice.⁴¹ A third guideline is that, for all lawsuits which the court finds complex and others deemed appropriate, there be deliberate, careful monitoring with discovery-case management conferences.⁴² At those conferences, a presiding judicial official is to explore litigants’ receptivity to, and the propriety of, settlement or continuing with the suit, to identify or formulate the major issues in dispute, to prepare a discovery schedule and plan, and to set as early as practicable deadlines for filing motions and time frames for their resolution.⁴³ A fourth guideline is the “encouragement of cost-effective discovery” through cooperative discovery techniques and the voluntary exchange of material among parties and their counsel.⁴⁴ Another principle is the “conservation of judicial resources” by proscribing consideration of discovery motions that are not accompanied by certifications that movants made good faith efforts to resolve the issues with opposing counsel.⁴⁵ A final principle is “authorization to refer appropriate” suits to programs for alternative dispute resolution (ADR) that the court has designated for use or may make available, such as mediation, mini-trials, and summary jury trials.⁴⁶

The court, when formulating its plan in consultation with the Group, also is to take into account and may include a number of techniques for managing litigation and for reducing costs and delay.⁴⁷ One such technique is a requirement that the attorneys for all litigants present together a “discovery-case management plan” for the suit at the initial pretrial conference or explain why they

39. 28 U.S.C. § 473 (Supp. 1990).

40. 28 U.S.C. § 473(a)(1) (Supp. 1990).

41. 28 U.S.C. § 473(a)(2) (Supp. 1990).

42. 28 U.S.C. § 473(a)(3) (Supp. 1990).

43. 28 U.S.C. § 473(a)(3)(A)-(D) (Supp. 1990).

44. 28 U.S.C. § 473(a)(4) (Supp. 1990). *See also supra* notes 18-23 and accompanying text.

45. 28 U.S.C. § 473(a)(5) (Supp. 1990). *See also supra* note 8, *infra* notes 108-09 and accompanying text.

46. 28 U.S.C. § 473(a)(6) (Supp. 1990).

47. *See* 28 U.S.C. § 473(b) (Supp. 1990).

cannot do so.⁴⁸ A second is a requirement that a lawyer represent every party at all pretrial conferences and that the attorney be authorized to bind the litigant as to all questions that the court has previously identified for discussion and all reasonably related matters during the conferences.⁴⁹ Another is the imposition of a signing requirement on litigants and lawyers who request that deadlines for concluding discovery be extended or trials be postponed.⁵⁰ A fourth technique is a "neutral evaluation program" for presenting a case's factual and legal basis to a neutral court representative that the court chooses during a nonbinding conference held early in the litigation.⁵¹ A fifth is a requirement that, with notice from the court, representatives of litigants having authority to bind the parties in settlement discussions attend, or be available by telephone during, settlement conferences.⁵² The court is to consider and may include other techniques that the court finds appropriate, once it assesses the recommendations of the Group.⁵³

After the district court receives the Group's report, it is to develop or select the plan for implementation.⁵⁴ The Judicial Conference is to designate those courts that develop and implement a plan between June 30 and December 31, 1991, as "Early Implementation District Courts" (EIDC).⁵⁵ The chief judges of courts that are so designated are authorized to seek from the Judicial Conference additional resources that may include "technological and personnel support and information systems," which are needed to implement the plans.⁵⁶ The Montana District Court is attempting to be designated an EIDC, in part so that the court can develop a plan tailored to the district's perceived needs, rather than rely on a model plan.

The Civil Justice Reform Act includes numerous additional provisions which are principally technical in nature. For example, the chief judges of all district courts in a specific circuit and the chief judge of the circuit court, as a committee, are to review all plans and reports and provide recommendations for additional or modified actions that the committee deems appropriate to reduce

48. 28 U.S.C. § 473(b)(1) (Supp. 1990).

49. 28 U.S.C. § 473(b)(2) (Supp. 1990).

50. 28 U.S.C. § 473(b)(3) (Supp. 1990).

51. 28 U.S.C. § 473(b)(4) (Supp. 1990).

52. 28 U.S.C. § 473(b)(5) (Supp. 1990). This provision specifically authorizes a practice the validity of which had been sharply contested. *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

53. 28 U.S.C. § 473(b)(6) (Supp. 1990).

54. *See* 28 U.S.C. § 471 (Supp. 1990).

55. Act of Dec. 1, 1990, Pub. L. No. 101-650, tit. I, § 103(c)(1), 104 Stat. 5096.

56. Act of Dec. 1, 1990, Pub. L. No. 101-650, tit. I, § 103(c)(2), 104 Stat. 5096.

cost and delay.⁵⁷ The Act imposes similar responsibilities on the Judicial Conference as well as a host of additional obligations, such as preparing a comprehensive report on all plans submitted four years from the Act's effective date, continually studying "ways to improve litigation management and dispute resolution services," and preparing, revising and transmitting to district courts a *Manual for Litigation Management and Cost and Delay Reduction*.⁵⁸

B. Descriptive Analysis of the Group's Report

The Group for the Montana District compiled a 100-page document that includes considerable valuable information for judicial officers, federal court practitioners and court administrative personnel. One important example is that the number of civil filings in Montana has declined over the last half decade and was sharply reduced for the statistical year ending June 30, 1990.⁵⁹ Another is that Judge Shanstrom has been experimenting with Summary Jury Trials.⁶⁰ The Civil Justice Reform Act specifically authorized district courts to employ that new mechanism,⁶¹ although some judges and writers had criticized the technique's efficacy.⁶²

The *Report* is comprised of six sections covering the District of Montana, including (1) its profile, geography and divisions; (2) the court resources, including the judicial officers, clerk of court, probation department, physical facilities and automation; (3) workload of the court, including the district's total volume, civil, criminal and divisional case volumes, workload profile per judgeship, senior judges and magistrates; (4) court procedures, including assignment procedures, case monitoring and pretrial procedures; (5) recommendations to improve the civil litigation process, including case assignment procedures, case monitoring and information systems, pretrial activity, trial scheduling, control of discovery, motions practice, ADR, and final pretrial proceedings; and (6) conclusion.⁶³ The *Report* also has an appendix that includes three pro-

57. 28 U.S.C. § 474(a) (Supp. 1990).

58. 28 U.S.C. § 479 (Supp. 1990).

59. Report of the Civil Justice Reform Act of 1990 Advisory Group for the United States District Court for the District of Montana 14 (Aug. 1991) [hereinafter Report].

60. *Id.* at 39.

61. See 28 U.S.C. § 473(a)(6)(B) (Supp. 1990).

62. See, e.g., Hume v. M & C Management, 129 F.R.D. 506, 508, 510 (N.D. Ohio 1990); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-86 (1986). See generally Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 944-45 (1991).

63. See Report, *supra* note 59, at ii-iv.

posed local rules that would implement the Group's recommendations.

1. Recommendations of the Group

a. Case Assignment Procedures

The Group recommended the creation of assignment procedures for civil cases that directly integrate each magistrate judge in the process of civil litigation.⁶⁴ The Group also suggested the adoption of procedures to notify parties of the right to have an Article III judge conduct proceedings, which right could be waived by the failure to demand, in timely fashion, the assignment of cases to Article III judges.⁶⁵

The Group expressed its belief that increased use of "magistrate judges throughout the civil litigation process will prove to be the singularly most effective tool which can be implemented in the District to ensure effective case management and defeat delay and cost in the civil litigation process."⁶⁶ The Group stated that the magistrate judge in the Billings division has recently "entered into the civil case assignment system on a co-equal basis with the Article III judges stationed in that division" and that magistrate judges constitute the "cornerstone" of the District's ADR system.⁶⁷ Another justification that the Group offered is the increased flexibility that the magistrate judges would afford in servicing the needs of such a geographically large district, at two divisions of which no Article III judge is stationed.⁶⁸

The advisability, and perhaps the necessity as a policy matter, of this recommendation appear persuasive. Nonetheless, several rather convincing policy ideas argue against the suggestion. Pro se litigants could be especially disadvantaged by their inability to appreciate the potential significance of waiver. Moreover, lawyers and litigants may feel improperly pressured to accede to having their cases assigned to magistrate judges. Attorneys and parties may understandably be concerned that their requests for assignment to an Article III judge could offend either that judge or the magistrate judge in the specific case or future cases, as many lawyers and some litigants will appear before the same judges and magistrate

64. See *id.* at 42-49.

65. See *id.* at 43.

66. *Id.* at 46. The Group stated that such use would be crucial to the differential case management system that it contemplated and would alleviate increased burdens imposed on district judges to participate actively in pretrial proceedings. See *id.* at 46-47.

67. *Id.* at 45-46.

68. *Id.* at 48.

judges subsequently.⁶⁹ This could happen, even though the provision of the *United States Code* that prescribes magistrate judges' duties and jurisdiction and provides for them to conduct civil proceedings with the consent of parties, specifically states that litigants are to be advised "that they are free to withhold consent without adverse substantive consequences."⁷⁰ The suggestion also could foster delay by imposing a disproportionate amount of the total caseload on magistrate judges by virtue of the other responsibilities, such as hearing prisoner and certain social security cases, that they must discharge.⁷¹

b. Alternative Dispute Resolution

Closely related to the Group's recommendations regarding case assignment procedures are its suggestions relating to ADR.⁷² The Group recommended that the Plan affirm the district's commitment to employing magistrate judges as the primary alternative means for resolving civil cases and that timely reference of every suit to a magistrate judge for settlement assistance be treated as an essential component of each case management plan.⁷³ It also recommended that the Plan prescribe the creation and "maintenance of a list of court-approved mediation masters" who would help litigants formally mediate civil controversies.⁷⁴ The Group analyzed the possibility of early neutral evaluation and found that it would prove advantageous but concluded that there currently are inadequate resources to sustain a mandatory program.⁷⁵

The Group suggested that its recommendations be implemented through adoption of local rules requiring that ADR be considered during the preliminary pretrial conference and prescribing settlement conferences.⁷⁶ The local rule governing settlement con-

69. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

70. 28 U.S.C. § 636(c)(1)-(2) (1988 & Supp. 1990).

71. See Letter from Gene R. Jarussi, Esq., to Richard F. Cebull, Chairman, Advisory Group, at 2 (Aug. 28, 1991) (copy on file with author). See also 28 U.S.C. § 636 (1988 & Supp. 1990).

72. See Report, *supra* note 59, at 89-92. These recommendations are considered here because they are closely related to the case assignment procedures. The report's discussion of the "case monitoring and information system" and "trial scheduling" are not analyzed here because they are less important to the issues treated in this essay. See *id.* at 49-55, 66-72.

73. *Id.* at 89.

74. *Id.* at 90.

75. *Id.* It urged the Federal Practice Section to develop, and work with the judiciary to implement, such a program. *Id.* See generally Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISPUTE RESOLUTION 1.

76. See Report, *supra* note 59, at 89. See also *infra* note 97 and accompanying text.

ferences would provide for Article III judges or magistrate judges who are assigned a case to order that litigants participate in settlement conferences upon written request of a party or upon the initiative of the judicial officer.⁷⁷ Each litigant or a party's representative having "authority to participate in settlement negotiations and effect a complete compromise of the case" must attend the settlement conference over which the judicial officer in the exercise of discretion may preside.⁷⁸

The Advisory Group justified these recommendations by observing that the "District has successfully utilized the settlement conferences before magistrate judges" as a mechanism for ADR and that the process of referral for settlement "is reputed among members of the bar as well as regular litigants, to be effective and cost efficient."⁷⁹ The "[p]roven proficiency of the present practice" also led the Group to express a preference for continued employment of the referral process, rather than creation of a "court-wide" ADR program.⁸⁰ The Group admitted that so restricting available ADR techniques significantly burdens the magistrate judges, but it asserted that the district's size and the number of magistrate judges make feasible the ongoing use of the process, while the timely disposition of cases through settlement ultimately saves judicial resources by reducing the quantity of cases actually tried.⁸¹ Moreover, the Group suggested that cases be referred to mediation masters when the burdens of onerous settlement negotiations do not justify the time commitment by magistrate judges.⁸²

Nearly all of the recommendations relating to ADR seem advisable, although several observations already made seem applicable to the suggestions regarding ADR.⁸³ The substantial reliance placed on magistrate judges may impose overly onerous burdens on them.⁸⁴ It also may be inadvisable to leave the question of presiding at settlement conferences to the discretion of the judicial officer who is assigned the case.⁸⁵ Litigants and lawyers may ask whether a judicial officer whose overtures to settle they have rejected will accord the parties and lawyers fair treatment in subse-

77. See Report, *supra* note 59, at 89.

78. *Id.*

79. *Id.* at 90-91.

80. *Id.* at 91.

81. *Id.* at 91-92.

82. *Id.* at 92.

83. See *supra* notes 69, 71 and accompanying text.

84. See *supra* note 71 and accompanying text.

85. See *supra* note 78 and accompanying text.

quent stages of the lawsuit, especially should the case go to trial.⁸⁶ The judicial officers in the Montana District apparently have employed few of the high-pressure settlement tactics that judges in other districts have used, while these concerns may implicate appearances more than realities.⁸⁷ Nonetheless, appearance may be as important as reality in the area of settlement, especially in terms of lawyers' and litigants' trust in the impartiality of the civil justice system.⁸⁸ It may be preferable, accordingly, for the judicial officer, Article III judge or magistrate judge, who did not conduct the settlement conferences to be assigned the case in certain of its later phases, particularly at trial, although that approach may impose costs in terms of lack of familiarity with the litigation and potential expenditure of judicial resources.⁸⁹

c. Pretrial Activity

The Advisory Group recommended that the Plan "mandate assertive judicial management of pretrial activity through direct involvement of the judicial officer to whom the case is assigned in the establishment, supervision and enforcement of a case-specific plan for discovery and disposition."⁹⁰ The Group suggested that the recommendation be implemented by promulgating a local rule.⁹¹ That rule would require the judicial officer to convene and conduct a timely preliminary pretrial conference and, in consultation with counsel, to create a plan for case discovery and disposition tailored to the particular lawsuit.⁹² The local rule also would guarantee enforcement through setting dates certain for completing crucial pretrial matters and monitoring case progress while providing exceptions from regular pretrial procedure for noncomplex litigation, which would proceed to timely disposition.⁹³

86. See generally Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 528-29, 534-35, 549-51 (1986).

87. The assertion as to judicial officers in the Montana District is based on anecdotal evidence gleaned from conversations with numerous Montana federal court practitioners. Cases that afford a sense of the high-pressure settlement tactics that judges in other districts have used are *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).

88. See generally sources cited *supra* note 86.

89. It obviously will be more efficient for the judicial officer assigned a case initially to handle it through disposition.

90. Report, *supra* note 59, at 55.

91. It recommended revision of current Local Rule 235-1. See Report, *supra* note 59, at 55-60.

92. Report, *supra* note 59, at 55.

93. *Id.* at 55-56. Noncomplex cases, including appeals from federal agencies, government debt collection and forfeiture actions, chapter 11 bankruptcy proceedings, and peti-

The local rule would include numerous important specific components. It provides that, relatively soon after a case is at issue or a complaint is filed,⁹⁴ the judicial officer would conduct a preliminary pretrial conference that attorneys who are ultimately responsible for trying the case must attend.⁹⁵ Every party would serve a predisclosure discovery statement not later than fifteen days prior to the date of the conference and must file a preliminary pretrial statement no later than seven days prior to that conference.⁹⁶ The preliminary pretrial statement would include a "brief factual outline of the case" and is to address numerous other matters, including jurisdictional issues, the identification and clarification of factual and legal issues genuinely in dispute, the propriety of ADR and prospects for settlement, and the anticipated course of discovery and time frame for its completion.⁹⁷ At the preliminary pretrial conference, the judicial officer and counsel are to discuss the matters included in the statement and discuss and schedule nine enumerated matters, including joinder of more parties, amendment of pleadings, filing of motions, identification of experts, discovery completion, and any other dates needed for proper case management.⁹⁸ Upon completion of this conference, the judicial officer must promptly enter an order that summarizes the matters discussed and the action taken while setting a schedule that restricts time for the matters mentioned immediately above and anything else needed to implement agreements made in the conference.⁹⁹

The Advisory Group offered a second, related recommendation that the Plan include requirements guaranteeing informed participation by the judicial officer and counsel in the preliminary pretrial conference.¹⁰⁰ This would be implemented by a local rule requiring that the litigants submit statements addressing matters crucial to developing an efficient, realistic plan for discovery and

tions for habeas corpus writs, would be excepted from the requirements. *Id.* at 59. The peculiar character of some of these proceedings, such as bankruptcy cases, may warrant their exemption. The routine nature of others, such as social security appeals or debt collection suits, may warrant exemption. Others, such as certain appeals of decisionmaking by public lands agencies, may not for reasons relating to their complexity or their significance.

94. "Not later than forty-five (45) days after a case is at issue, or one hundred twenty (120) days after filing of the complaint, whichever comes first . . ." Proposed Local Rule 235-1(a), in Report, *supra* note 59, at 56.

95. Proposed Local Rule 235-1(a), in Report, *supra* note 59, at 57.

96. Proposed Local Rule 235-1(b)-(c), in Report, *supra* note 59, at 57.

97. Proposed Local Rule 235-1(c), in Report, *supra* note 59, at 57-59.

98. Proposed Local Rule 235-1(a), in Report, *supra* note 59, at 56-57.

99. Proposed Local Rule 235-2, in Report, *supra* note 59, at 60.

100. Report, *supra* note 59, at 61.

for scheduling disposition of the case.¹⁰¹ The Group expressed its view that the active, informed involvement of a judicial officer and all lawyers in creating the plan would foster cooperation among counsel during discovery and prevent counsel from using that process as a tactical weapon, and the officer's continuing supervision would limit discovery abuse and ensure prompt disposition of the case while permitting its full, efficient development.¹⁰²

The Advisory Group has commendably attempted to make the preliminary pretrial conference function as the drafters of the 1983 amendment of Federal Rule 16 intended.¹⁰³ Moreover, were the judicial officers to engage in the type of "assertive judicial management of pretrial activity" envisioned by the Group, the time devoted to that activity might be recaptured during later phases of specific cases.¹⁰⁴ Thus, although the Group's goal of having active and informed participation by the judicial officer and counsel is admirable, that objective may be overly idealistic and even unrealistic. All of the judicial officers and many attorneys simply may have inadequate time and resources to be involved in the conferences and creation of the case-specific plans in ways that the Group contemplates.¹⁰⁵

d. Control of Discovery

The Advisory Group provided five recommendations governing discovery.¹⁰⁶ The first calls for inclusion in the Plan of procedures intended to provide management of the discovery process through

101. See *id.* See also *supra* note 96 and accompanying text. Two subjects of particular significance would be the "propriety of identifying any special procedures which should be implemented in the case," namely referring any aspect of the case to the magistrate judge, and consideration of placing the case on the expedited trial docket, which could guarantee a trial date not more than six months from the date of the preliminary pretrial conference. Report, *supra* note 59, at 63, 66.

102. See Report, *supra* note 59, at 62. The Group perceived "assertive judicial management of pretrial activity to be the most essential ingredient to the implementation of a plan which will reduce cost and delay in the civil litigation process of the district." *Id.*

103. The Group observed that the procedure proposed contemplates that the "preliminary pretrial conference will be a significant event to be participated in fully by informed counsel; a goal envisioned by Rule 16 . . ." *Id.* at 62-63. See generally FED. R. CIV. P. 16 Advisory Comm. Note, 97 F.R.D. 165, 205-13 (1983).

104. For example, more cases might settle earlier or be prepared for trial more efficiently.

105. Most important is the expedited trial docket, discussed *supra* note 101.

106. See Report, *supra* note 59, at 73-78. The Group found that the unnecessary expense and delay that attend civil litigation in the Montana District are "primarily attributable to excessive and protracted discovery disputes" and that the "lack of cooperation and increased tension among attorneys is most pronounced in the discovery process." *Id.* at 78. The Group, however, offered little empirical support for these propositions.

“assertive judicial management” of all cases, which would be implemented with promulgation of the local rule considered above.¹⁰⁷

The second recommendation suggests that the Plan mandate prompt disclosure of material in the litigants’ possession that is relevant to the issues to be resolved.¹⁰⁸ The Group suggested the adoption of a local rule similar to proposed Federal Rule 26 that would require the disclosure of certain information before any party could commence discovery.¹⁰⁹ The local rule would impose on litigants a continuing duty to disclose in writing, “to the full extent known,” the factual and legal premises of each claim or defense asserted,¹¹⁰ the identity of all individuals believed or known to possess “substantial discoverable information” regarding every claim or defense and a description of any tangible evidence or relevant document which is “reasonably likely to bear substantially” on a claim or defense,¹¹¹ “a computation of any damages claimed,” and the “substance of any insurance” contract which might cover any judgment secured.¹¹²

The proposed local rule is analogous to the proposed Federal Rule 26. Insofar as the two are similar, however, it is important to understand that the federal proposal is a preliminary draft that will prove highly controversial because it fundamentally revamps traditional notions of discovery and, therefore, may never be promulgated. Moreover, the proposed local rule would require the disclosure of certain material relating to the factual and legal bases of claims that the federal proposal does not even mandate. One reason why this could pose complications is that, at the time of required disclosure, parties may lack the requisite factual information itself or the material on which to premise formulation of legal theories.¹¹³

The Group’s third recommendation suggested that the Plan

107. See *id.* at 73. See also *supra* notes 91-102 and accompanying text.

108. Report, *supra* note 59, at 73.

109. See Proposed Local Rule 200-5, in Report, *supra* note 59, at 74-75. See also *supra* notes 18-23 and accompanying text.

110. Proposed Local Rule 200-5(a)(1)-(2), in Report, *supra* note 59, at 74. Litigants also must disclose, “where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.” Proposed Local Rule 200-5(a)(2), in Report, *supra* note 59, at 74.

111. Proposed Local Rule 200-5(a)(3)-(4), in Report, *supra* note 59, at 74. This must include the location and custodian. *Id.*

112. Proposed Local Rule 200-5(a)(5)-(6), in Report, *supra* note 59, at 74.

113. “The advisory group [was] convinced the mandatory pretrial disclosure of the listed information would prove the most effective means to accomplish an early exchange of relevant information and evidence.” Report, *supra* note 59, at 80. In fairness, the Group formulated this proposed local rule and certain others before the Federal Advisory Committee issued its proposals to amend eighteen federal rules in August.

not impose general restrictions on the employment of discovery tools, but prescribe use of "case specific discovery plan[s]." ¹¹⁴ The Group did recommend that the court adopt a local rule creating "a presumption that more than fifty (50) interrogatories," including subparts, would be considered excessive. The Group premised the suggestion on the assumption that it would refine the employment of interrogatories in discovery. ¹¹⁵ It provided an exception for proponents who can show "that the interrogatories are not unduly burdensome and have been propounded in good faith, and have been tailored to the needs of the particular case, and are necessary because of the complexity of the case or other unique circumstances" ¹¹⁶

The Group also recommended that the Plan require litigants to attempt to resolve discovery controversies informally before requesting judicial intervention. ¹¹⁷ This would be implemented with a local rule that permits litigants to present discovery motions to the court only after certifying that all counsel have participated in good faith efforts to resolve the disputed questions. ¹¹⁸ This suggestion should facilitate the resolution of discovery controversies and consume less judicial time treating the disputes.

The Group strongly recommended as well that the Plan prescribe the creation of a peer review committee, comprised of practicing district bar members, which would review discovery practices and other litigation behavior of lawyers at the request of a judicial officer. ¹¹⁹ The Group stated that the committee would have to hold hearings to present suggestions to the court regarding the imposition of sanctions. ¹²⁰ This proposal may afford the benefit of having alleged misconduct judged by a jury of the charged lawyer's peers. Nonetheless, the recommendation could raise fundamental questions of fairness and advisability in light of due process, the practicing bar's small size, and judicial authority to name such a committee. ¹²¹

114. *Id.* at 75.

115. *Id.*

116. Proposed Local Rule 200-5, in Report, *supra* note 59, at 75-76. See also *supra* notes 6-7 and accompanying text.

117. Report, *supra* note 59, at 76. See also *supra* note 8.

118. Report, *supra* note 59, at 76.

119. *Id.* at 77-78.

120. *Id.* at 78.

121. For example, because nearly all of the federal practitioners know each other, they may be reluctant to suggest that their peers receive large sanctions when justified. Correspondingly, there is some risk that the committee might be too willing to use sanctions to punish attorneys who are considered overly zealous advocates or who represent unpopular clients or causes. See Cochran, *Rule 11: The Road to Amendment*, 61 *Miss. L.J.* 5, 11-13

2. *Cautionary Observations*

Numerous specific cautionary observations about particular components of the Advisory Group's report and recommendations have been provided above. Nonetheless, the potentially far-reaching nature of the recommendations warrants offering several additional general cautions.

One important difficulty is the lack of information in the report, especially to support the recommendations that the Group made. Little data in the report substantiate the propositions that the Montana District is experiencing a litigation explosion, litigation abuse, delayed case disposition or incivility among judicial officers and lawyers. Indeed, some material in the report and considerable anecdotal evidence support the opposite conclusions. For instance, the civil caseload has been steadily declining for a half-decade and recently decreased significantly, attorneys who want to resolve disputes expeditiously can secure trials within a year of filing their initial papers, and the federal bar is widely reputed to be quite civil.¹²² Of course, the Group's recommendations may be premised on anecdotal information or the personal experiences of its individual members. If that is so, it is not readily apparent from reading the report, while the material would be helpful to have. In short, the question that should be asked is whether the civil justice system in the Montana District actually is experiencing serious problems, especially ones that warrant treatment with the solutions proposed.

This leads to consideration of the advisability of the recommendations proffered. The wisdom of placing great reliance on assertive judicial management, of trusting substantially to judicial discretion, and of increasing pressures to settle cases is arguable. Dependence on these measures in numerous other districts has yielded mixed results, and the mechanisms have been abused.¹²³ The imposition of greater responsibilities on judges, lawyers, and litigants could create more points of contention, papers to be filed, satellite litigation, delay and cost. It also is important to ensure

(1991). See generally Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 110-22 (1991). The recommendations on motion practice are not discussed as they are less important to the issues treated in this piece and are similar to certain matters above. For instance, the Group suggested adoption of a local rule addressed above. See *supra* notes 91-102 and accompanying text.

122. See *supra* note 59 and accompanying text (civil caseload). The latter two propositions are based on anecdotal evidence derived from conversations with numerous Montana federal court practitioners.

123. See *supra* note 87 and accompanying text. See also *supra* note 62 and accompanying text.

that the recommendations not benefit specific classes of litigants, such as plaintiffs or defendants or parties with resources or those who lack them.¹²⁴ It presently appears that the recommendations favor defendants and litigants with greater resources, although this subject warrants more research.¹²⁵

There are several ironies in the work of the Advisory Group. First, the report appears to describe a federal district with problems more germane to an urban district like the Southern Districts of New York or California than to Montana, and it prescribes urban solutions to the urban problems thus described. Another irony is that the civil justice expense and delay reduction plan proposed could well increase costs and delay, especially by imposing enhanced responsibilities on judicial officers, attorneys and litigants.

CONCLUSION

There will soon be considerable procedural change in federal court practice in Montana. It behooves all Montana federal court practitioners to analyze these developments closely and make their views known to those who have responsibility for procedural revision. The proposed amendments in eighteen Federal Rules cannot become effective before December 1993. The Montana District's Civil Justice Plan, however, must be in place by December 31, 1991, if the District is to be designated an Early Implementation District Court and, therefore, qualify for additional federal funds. Moreover, considerable change in the local rules will follow the institution of the Plan because it will be implemented through modification of numerous local rules.

124. See Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 296-335 (1989) (same ideas as to numerous federal rules and their application); Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485 *passim* (1988/89) (same ideas as to Rule 11). *But cf.* Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795, 823-24 (1991) (questioning criticism of rule revision premised on these perspectives).

125. For example, lawyers representing litigants with greater resources are more likely to be prepared for preliminary pretrial conferences in ways that the Group contemplates, and the parties are less likely to be disadvantaged by the number of interrogatories they can ask, as they possess or have increased access to information that is relevant to their cases. See generally Tobias, *Rule 11 and Civil Rights Litigation*, *supra* note 124, at 495-98.

In addition to questions regarding advisability of the recommendations as a matter of policy, it also is important to ask whether adequate authority supports the suggestions. A few of the recommendations may be premised on limited authority. See *supra* note 113 and accompanying text.