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AN UPDATE ON THE 1993 FEDERAL RULES AMENDMENTS AND THE MONTANA CIVIL RULES

Carl Tobias*

One year ago in the pages of the *Montana Law Review*, I reported that the Montana Advisory Commission on Rules of Civil and Appellate Procedure was considering whether to recommend that the Montana Supreme Court adopt for application in the Montana state courts thorough amendments in Federal Rule of Civil Procedure 11, which covers sanctions, and Federal Rule 26, which prescribes mandatory pre-discovery or automatic disclosure.¹ The changes in these two provisions, which took effect on December 1, 1993, were the most controversial components of the most ambitious group of modifications in the Federal Rules of Civil Procedure during their fifty-seven year history.²

The 1993 amendment in Rule 11 significantly altered the 1983 version of the Rule, an amendment which was the most controversial change ever promulgated. The 1993 modification substantially reduced the incentives for invoking Rule 11. For instance, the 1993 amendment prescribes safe harbors, whereby parties who are notified that they may have violated the Rule are afforded twenty-one days to withdraw or alter the allegedly offending paper.³ The 1993 revision correspondingly entrusts to judicial discretion the imposition of sanctions when litigants or lawyers contravene Rule 11 and admonishes judges that the principal purpose of sanctions is deterrence, while suggesting that monetary sanctions should rarely be levied.⁴ Some attorneys and additional interests opposed the amendment principally because they believed that it would undermine the 1983 revision's effect as a deterrent to frivolous litigation.⁵

* Professor of Law, University of Montana. I wish to thank 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, *The 1993 Federal Rules Amendments and the Montana Civil Rules*, 55 MONT. L. REV. 415 (1994).

2. See Supreme Court of the United States, *Amendments to the Federal Rules of Civil Procedure and Forms*, reprinted in 146 F.R.D. 402 (1993).

3. See FED. R. CIV. P. 11(c)(1)(A), reprinted in 146 F.R.D. at 421-23; see also Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1784-85 (1992).

4. See FED. R. CIV. P. 11(c)(2), reprinted in 146 F.R.D. at 421-23; see also Carl Tobias, *supra* note 3, at 1783-88.

5. See Supreme Court of the United States, *Amendments to the Federal Rules of Civil Procedure and Forms*, Dissenting Statement, reprinted in 146 F.R.D. 402,

The 1993 change in Rule 26, providing for automatic disclosure, was the most controversial proposal to amend the Federal Rules of Civil Procedure in the Rules' half-century history. The 1993 modification requires that plaintiffs and defendants divulge, prior to discovery, "discoverable information relevant to disputed facts alleged with particularity in the pleadings."⁶

Nearly all elements of the organized bar and a number of other interests strongly opposed the disclosure revision.⁷ These attorneys and interests were uncertain about what they must disclose, thought that the amendment would impose an additional layer of discovery and believed that disclosure might conflict with certain aspects of the American judicial process that depends on "adversarial litigation to develop the facts before a neutral decisionmaker."⁸ The 1993 change authorizes each of the ninety-four federal districts to alter or reject completely the Federal Rule amendment and quite a few courts, including the Montana District, have done so.⁹

Several factors led me to suggest that the Montana Supreme Court incorporate into the Montana Rules of Civil Procedure the 1993 revision in Federal Rule 11. First, the 1993 modification in Rule 11 represents a significant improvement in the 1983 amendment and constitutes a workable compromise.¹⁰ Promulgation of the 1993 federal amendment would foster intrastate

507-09 (1993) (Scalia, J., dissenting) [hereinafter Dissenting Statement]. Justice Clarence Thomas joined this dissent.

6. See FED. R. CIV. P. 26 (a)(1), reprinted in 146 F.R.D. 431-32 (1993); see also Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 35-39 (1992).

7. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1612-13 (1994).

8. Dissenting Statement, *supra* note 5, at 510-11.

9. See FED. R. CIV. P. 26(a)(1), reprinted in 146 F.R.D. at 431-32; see also Letter from Paul G. Hatfield, Chief Judge, U.S. Dist. Ct. for the Dist. of Mont., to Members of the Federal Bar (Jan. 25, 1994) (on file with author) (advising bar that court has temporarily modified automatic disclosure provision prescribed in April 1992 civil justice plan to conform more closely with federal amendment); Carl Tobias, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539 (1995) (indicating that court has proposed reverting to 1992 disclosure rule).

Arizona is the only state which prescribed automatic disclosure before the Federal amendment became effective. See *Symposium: Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993); see also Alaska Supreme Court, Final Draft Discovery and Disclosure Rules (adopting disclosure procedure which will become effective on July 15, 1995). See generally Jill S. Chanen, *States Considering Discovery Reform*, A.B.A. J., Apr. 1995, at 20.

10. I rely substantially here on Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994).

consistency between Federal and Montana Rule 11. Moreover, Montana has prescribed many of the Federal Rules amendments promptly after their adoption in the federal courts.

I also suggested that Montana Rule 11's actual operation in practice should be relevant. It appeared that considerably less formal Rule 11 activity had occurred under the Montana Rule 11 than the federal analogue, but it has been uncertain exactly how much and what kind of informal activity, such as threats to employ the Rule, have occurred.¹¹ A significant amount of the most damaging behavior that involved the 1983 revision to Federal Rule 11 implicated its informal invocation.¹² The Montana Supreme Court and the state district courts have not construed and applied Montana Rule 11 with complete consistency, and there has been some satellite litigation under the Montana Rule.¹³

I suggested as well that the manner in which jurisdictions other than Montana have handled Rule 11 might be relevant. Quite a few states have now subscribed to the 1993 Federal Rule revision.¹⁴ It is also important to remember that a small number of jurisdictions had altered their counterparts of the 1983 federal provision before that amendment was changed.¹⁵

I ultimately concluded that the issues critical to prescribing the Federal revision for the Montana state courts were whether the increased clarity and decreased incentives to rely on that provision were greater than the possible loss in terms of deterring frivolous lawsuits. I found that the heightened clarity of the Federal modification, the amendment's limitation of incentives for its invocation, and the more balanced approach suggested that the Montana Supreme Court promulgate the federal change.

I determined that numerous considerations complicate the question of whether the Montana state court system should prescribe the Federal Rule 26 disclosure revision. One important

11. Cynthia Ford, *Unraveling Rule 11*, MONT. LAW. 3, 4-6 (Jan. 1993) [hereinafter *Unraveling*]; Cynthia Ford, MONT. LAW., *Rule 11 is Working Well in Montana* 9 (Feb. 1993).

12. See Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 861-65 (1992).

13. See *Unraveling*, *supra* note 11.

14. See, e.g., MO. R. CIV. P. 55.03; WYO. R. CIV. P. 11; see also Joel L. Selig, *The 1994 Amendments to the Wyoming Rules of Civil Procedure*, 30 LAND & WATER L. REV. 151, 156-62 (1995) (analyzing amendment to Wyoming Rule 11).

15. See, e.g., ALASKA R. C. P. 11; WASH. SUP. CT. CIV. R. 11. A few states never adopted provisions similar to the 1983 Federal Rule 11 because they seemingly thought that its disadvantages outweighed its benefits. See, e.g., MASS. CIV. R. 11; N.Y. CPLR 2105, 3020 (McKinney 1990 & Supp. 1992); see also MD. R. 1-311.

factor was the difficulty of ascertaining whether any of the automatic disclosure procedures would be efficacious and, if so, which would be most effective. A tiny number of the some twenty districts which have been experimenting with disclosure for the longest time employed mechanisms similar to the federal amendment.¹⁶

I found some anecdotal evidence indicating that a number of Early Implementation Districts Courts (EIDCs) which have been applying disclosure have encountered little difficulty implementing it.¹⁷ Disclosure apparently operates best in rather routine, simple litigation or when the disclosure is relatively general.¹⁸ Additional anecdotal material suggests that counsel are less critical of automatic disclosure after they have acquired familiarity with the measure.¹⁹

I recommended several ways in which the Montana Supreme Court could treat automatic disclosure. One approach was to wait for more definitive conclusions from the ongoing experimentation with disclosure in the federal district courts. I also suggested that the Montana state courts might implement an experimental program. For example, the Montana Supreme Court could have identified several districts for experimentation with disclosure techniques which have proved most promising in the federal system.²⁰ Moreover, the Montana Supreme Court might have revised Montana Rule 26 to require some form of automatic disclosure. I ultimately recommended that the lack of informa-

16. The districts based disclosure on the Advisory Committee's preliminary draft. See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 144-45 (1993). Even these courts have not experimented with or assessed disclosure for sufficient time to derive conclusive determinations about its effectiveness. Most of the Early Implementation District Courts under the CJRA only instituted disclosure during 1992, and few have rigorously evaluated its efficacy. See *id.* at 144-45.

17. These are the Northern District of California and the Districts of Arizona, Massachusetts, and Montana. This evidence is premised on conversations with many individuals, including advisory group reporters and members, court personnel, and practitioners, who are familiar with civil justice reform in those districts. See *generally supra* note 16 and accompanying text.

18. Unfortunately, discovery presents the most significant complications and demands the most efficacious reform in complex litigation, such as civil rights class actions and products liability cases, and when parties need relatively specific information.

19. This idea is premised on the conversations, *supra* note 17. Numerous lawyers apparently have found that disclosure principally requires attorneys and their clients to participate in certain activities—especially document retrieval and labeling—earlier in litigation. This idea is based on the conversations, *supra* note 17.

20. See Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665, 666-71 (1993); see also H.R. 2814, 103d Cong., 1st Sess. (1993).

tion about how automatic disclosure in fact functions and about which of the disclosure procedures is most workable meant that the Montana Supreme Court should probably await the conclusion of experimentation that is now proceeding in a number of federal districts.

The Montana Advisory Commission on Rules of Civil and Appellate Procedure has not yet submitted its recommendation regarding the 1993 Federal Rules revisions to the Montana Supreme Court.²¹ There is apparently little inclination on the part of the members of the Commission or of the Montana Supreme Court to adopt the 1993 amendments. The Commission and the Court seem to have premised their determinations on the controversial nature of the 1993 modifications in Rule 11 and in Rule 26 and on uncertainty about how the new provisions would actually operate, believing that it is preferable to see how the procedures will function.

The positions of the Advisory Commission and of the Montana Supreme Court have much to commend them, and are defensible, although I partly disagree with the decisions of the Commission and the court. I believe that the 1993 Federal Rule amendment in Rule 11 substantially improves the 1983 revision which was extremely controversial. The 1993 version includes phrasing that is clearer, while it reduces incentives to invoke the provision. The determinations of the Commission and the court regarding Rule 11 are more justifiable because Montana Rule 11 has apparently fostered comparatively little satellite litigation and has been invoked rather infrequently, at least in formal settings. The limited use of the provision is probably attributable to the restraint and good judgment of judges, lawyers and parties who participate in civil litigation in the Montana state courts. Nevertheless, I think that amendment is now warranted, and I urge the Commission and the court to reconsider their decisions.

The decisions of the Advisory Commission and of the Montana Supreme Court respecting automatic disclosure are more defensible. Rule 26(a) remains quite controversial at the federal level, and fewer than a majority of the ninety-four districts have subscribed to the Federal Rule amendment.²² None of the vari-

21. I rely substantially in this paragraph on telephone conversations with Randy Cox, Boone, Karlberg & Haddon and member of Montana Advisory Commission on Rules of Civil and Appellate Practice (Dec. 5, 1994, Feb. 2, 1995 & May 23, 1995).

22. See Memorandum from Alfred W. Cortese & Kathleen L. Blaner, *Mandatory Disclosure Rule 26(a)(1): Not the Rule of Choice* (Oct. 28, 1994) (on file with author);

ous forms of automatic disclosure with which courts have been experimenting has clearly emerged as very efficacious. The application of disclosure in the Montana Federal District Court has apparently worked rather well, but much of this can probably be ascribed to the ingenuity and goodwill of the small, comparatively collegial federal bar. Only a few states have adopted disclosure, and many seem to be awaiting the results of federal experimentation before proceeding. The determinations of the Advisory Commission and of the Montana Supreme Court to delay the adoption and implementation of disclosure, therefore, seem advisable at this juncture.

CONCLUSION

The Montana Supreme Court should adopt the 1993 Federal Rule amendment to Rule 11 for application in the Montana state court system. The controversial nature of the revision in Rule 26 means that the court should probably continue to defer that provision's prescription while awaiting the results of experimentation in the federal districts and the tiny number of states which have adopted the procedure.