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STUDYING MONTANA STATE CIVIL JUSTICE REFORM

Carl Tobias^{†*}

Several years ago in the pages of this journal,¹ I asked and attempted to answer the question whether the 1993 session of the Montana Legislature should adopt a civil justice reform act. The article initially afforded a brief analysis of the problems in federal civil litigation that prompted the United States Congress to pass the Civil Justice Reform Act (CJRA) of 1990.² I next evaluated whether the state legislature in Montana should enact similar legislation which would govern civil litigation in the state court system. Because there were relatively few important reasons for adopting a measure covering civil justice reform in the Montana courts, I suggested that the 1993 legislature act cautiously in the controversial, unsettled field of civil justice reform.

The 1993 Montana Legislature appropriately decided against enacting any civil justice reform statute during its legislative session. The legislature did, however, adopt House Bill 525 which established a Judicial Unification and Finance Commission and directed that entity to study the organizational and financial structures of the Montana judiciary.³ The legislation more specifically instructed the Commission to consider the judiciary's possible unification, present and future funding for the judiciary, issues relating to the standards and selection of judges and additional matters regarding the judiciary's efficient operation.⁴

During the ensuing two years, nothing of sufficient consequence has happened in Montana to warrant the passage of comprehensive civil justice reform legislation, although numerous developments have occurred in federal civil justice reform

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1. See Carl Tobias, *Should Montana Adopt a Civil Justice Reform Act?*, 53 MONT. L. REV. 233 (1992).

2. See 28 U.S.C §§ 471-82 (Supp. V 1993).

3. See 1993 MONT. LAWS Chap. No. 632; see also JUDICIAL UNIFICATION AND FINANCE COMMISSION, LAYING A FOUNDATION FOR THE FUTURE OF MONTANA'S JUDICIARY: A STUDY OF COURT FINANCE AND ADMINISTRATION (1994) [hereinafter LAYING A FOUNDATION].

4. See 1993 MONT. LAWS Chap. No. 632, § 4.

and in state civil justice reform in a number of jurisdictions. These recent developments deserve evaluation to ascertain whether they compel reexamination of the earlier decision not to pass civil justice reform legislation in Montana.

The assessment of what has happened at the federal and state levels leads to the conclusion that enactment of a broad reform statute for the Montana state court system remains unnecessary, although the 1995 Montana Legislature should probably accord serious consideration to several suggestions which are principally aimed at conducting additional study of the Montana state courts. That examination should evaluate whether problems involving civil litigation in the state courts are sufficiently severe to warrant consideration of actions for remedying or ameliorating the difficulties.

My earlier exploration of the Montana state civil justice system revealed few of those types of complications that fostered the adoption of civil justice reform legislation for the federal or other state civil justice systems.⁵ The Montana state courts seemed to be experiencing comparatively little discovery or litigation abuse. Most civil cases were being resolved relatively expeditiously and inexpensively, and attorneys and parties enjoyed rather unrestricted access to the state court forum. Indeed, some recent anecdotal evidence suggests that numerous Montana federal court practitioners prefer to file or to have their cases remain in state, rather than federal, court for reasons principally relating to the expedition with which lawsuits can be resolved there.⁶

The experiment with civil justice reform at the federal level has been proceeding for an additional two years since I examined civil justice reform in Montana. Nonetheless, it remains very difficult today to draw conclusions which are much more definitive. For example, it now appears that certain procedures in the general areas of judicial case management, discovery, and alternatives to traditional dispute resolution (ADR) will prove effective in reducing delay and perhaps expense in district courts.⁷ Even in the districts where it is possible to identify with the requisite specificity those measures which will be efficacious, it is difficult to ascertain with sufficient certainty whether the

5. See Tobias, *supra* note 1, at 234-35.

6. See Carl Tobias, *Opt Outs at the Outlaw Inn*, 14 REV. LITIG. No. 1 (forthcoming Jan. 1995).

7. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1630 (1994).

mechanisms will apply as effectively in the state court systems where the districts are situated.

The experience with experimentation that is most directly relevant to the Montana state court system is equally inconclusive. The Montana Federal District Court recently released its first annual assessment of the procedures included in its civil justice expense and delay reduction plan.⁸ This evaluation indicates that the district has achieved some delay reduction, particularly through the use of the co-equal assignment procedure in the Billings division.⁹ The evaluation also suggests that time to disposition has declined for civil cases, partly because the court has instituted differentiated case management and an expedited case track.¹⁰ Mandatory, or automatic, pre-discovery disclosure, the most important discovery reform instituted, however, remains the most controversial aspect of the civil justice reform experiment in the Montana District.¹¹

I have encountered difficulty ascertaining whether the Montana state courts have experienced increased expense or delay since I wrote on Montana civil justice reform in 1992. It seems likely that judicial districts which encompass areas that are undergoing significant population growth, but which have received no additional district judges, such as Flathead, Gallatin and Missoula Counties, are encountering more cost or delay resolving civil cases.¹² One important complication is that most data collection has ceased because of lack of funding.¹³ The collection, analysis and synthesis of relevant information on civil cases in the state courts are critical, and the Montana Legislature should promptly reinstitute and continue supporting such efforts.

Another possibility that the legislature should consider is the prescription and implementation of a "futures commission"

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

9. See Annual Assessment, *supra* note 8, at 2-4.

10. See Annual Assessment, *supra* note 8, at 2-4.

11. See Annual Assessment, *supra* note 8, at 5-6. See generally Carl Tobias, *In Defense of Experimentation With Automatic Disclosure*, 27 GA. L. REV. 665 (1993).

12. See, e.g., OFFICE OF COURT ADMINISTRATOR, ANNUAL REPORT OF THE MONTANA JUDICIAL SYSTEM CALENDAR YEAR 1993 at 23 (1993) (Flathead County). Courts in some of these areas have instituted special procedures to resolve cases. See, e.g., *id.* at 31 (stating that Department 1 of Eighteenth Judicial District in Gallatin County is continuing its "aggressive involvement with alternative dispute resolution"); see also Tobias, *supra* note 1, at 236 (recounting other experimentation).

13. See SHERI S. HEFFELFINGER, MONTANA'S COURT SYSTEM: CONFLICTS OF PRINCIPLE IN COURT STRUCTURE, ADMINISTRATION, AND FINANCE 19 (Oct. 1993).

similar to those employed in more than one-third of the states during the last twenty years, often with resources supplied by the State Justice Institute.¹⁴ These groups have typically depended on the experience and expertise of judicial officials and technical experts, such as court administrators, to survey broadly future social trends which will affect the judicial system and to enunciate a vision of the courts for the future with strategies for attaining that vision.

Over the last two years, the American Bar Association has supported a nationwide initiative which encourages states to assemble entities that will develop thorough state civil justice reform efforts.¹⁵ Most of the jurisdictions which have participated in futures planning or in analogous civil justice reform endeavors have eventually instituted programs that have been meant to improve judicial administration, management of cases, discovery control, and alternatives to traditional civil litigation.¹⁶

The Montana Legislature will be understandably reluctant to spend state resources on a futures project, given the electorate's reluctance to spend scarce tax dollars. Much of the funding, however, could come from federal sources on which other states have drawn. Moreover, successful analysis and planning for the future of the Montana courts could yield significant savings over the longer term.

It is also important to build on the foundational work which the Judicial Unification and Finance Commission has undertaken. For example, the Commission's report to the Montana Legislature included a recommendation proposing that the Montana Supreme Court develop a Judicial Advisory Council.¹⁷ The Council would be an advisory and future-planning entity affording a unified approach to judicial branch administration which could promote communication within the courts and coordinated management.¹⁸

14. See Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reform in the States*, 46 STAN. L. REV. 1553, 1554-56 (1994). The Montana Judicial Unification and Finance Commission is similar to these efforts and represents a valuable start; however, the Commission's mandate is narrower than the efforts. See *supra* notes 3-4 and accompanying text.

15. See Sherman, *supra* note 14, at 1556.

16. See Sherman, *supra* note 14, at 1554, 1561-87.

17. See LAYING A FOUNDATION, *supra* note 3, at 4.

18. See LAYING A FOUNDATION, *supra* note 3, at 4. The Commission ultimately decided that legislation was unnecessary because the Supreme Court presently possesses the power to create a Judicial Council. The Court has correspondingly taken

In sum, the 1995 session of the Montana Legislature should not pass a comprehensive civil justice reform statute that applies to the Montana state court system because such a measure now appears unnecessary. The legislature must reinstitute mechanisms for assembling, evaluating and synthesizing pertinent data on civil litigation in the state courts. The Montana Legislature may want to consider the institution of a futures commission, which would be similar to those formed in numerous states. This entity, which should capitalize on the work of the Judicial Unification and Finance Commission, could study the civil justice system and make constructive suggestions for improvement.

the lead in exploring a council's establishment by constituting a study commission to examine that possibility. Telephone interview with Patrick Chenovick, Court Administrator, Montana Supreme Court (Dec. 5, 1994). The Commission made twelve additional recommendations in the areas of court funding, court administration, court information and technology and juvenile justice. *See* LAYING A FOUNDATION *supra* note 3, at 2-7. Most of these recommendations are less germane to the issues treated here than the one discussed.