

1994

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### Recommended Citation

Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 Mont. L. Rev. 235 (1994).

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# RECENT FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

The Montana Federal District Court has continued to experiment with nearly all of the procedures that the court included in the civil justice expense and delay reduction plan which it officially adopted during April 1992 under the Civil Justice Reform Act (CJRA) of 1990. The most important procedures are automatic disclosure, co-equal assignment of cases to Article III judges and magistrate judges located in Billings, and rather close judicial case management.

The judicial officers, who include three active and one senior Article III judges and three full-time magistrate judges, and many Montana attorneys who practice in federal court have now accumulated much experience with these new procedures. The Montana District has undertaken, and will soon complete, efforts to analyze the effectiveness of many of the procedures.

A number of new developments relating to national effectuation of federal civil justice reform also have been happening. Perhaps most important, all ninety-four federal district courts have now issued civil justice plans. Significant developments in the federal reform nationally and in the Montana Federal District deserve analysis, so that judicial officers and federal court practitioners in Montana will be aware of these important reforms in federal civil practice.<sup>1</sup>

## I. NATIONAL DEVELOPMENTS

### A. *Civil Justice Reform Act of 1990*

The slow pace of national developments in federal civil justice reform which I reported in the last issue of this law review<sup>2</sup> dra-

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\* 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. 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, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357 (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 (1991).

2. See Tobias, *More*, *supra* note 1, at 357; see also Tobias, *Updating*, *supra* note 1, at

matically quickened in the last several months of 1993. Approximately forty-five advisory groups tendered reports and recommendations to federal districts, while the courts employed those reports and suggestions to promulgate final civil justice expense and delay reduction plans before the December 1993 deadline.<sup>3</sup>

Each of the thirty-four federal courts, including the Montana District, which officially became Early Implementation District Courts (EIDC) in July 1992,<sup>4</sup> has continued experimenting with the procedures that they adopted. A majority of those courts has now completed initial annual assessments of the efficacy of these procedures in reducing cost and delay,<sup>5</sup> while numerous other districts should soon be concluding their analyses. A number of the courts found that the measures were relatively effective in limiting expense or delay, and a few districts made modifications in their plans intended to reduce even more cost or delay.<sup>6</sup> Some courts prepared very thorough annual assessments,<sup>7</sup> but the majority assembled less ambitious evaluations.<sup>8</sup>

In most of the districts that were not EIDCs, the advisory groups assembled and submitted reports and recommendations between June and December 1993.<sup>9</sup> After the districts received the groups' reports and suggestions, the courts examined the documents, conferred with the groups, and published final civil justice plans.<sup>10</sup> Since I last wrote here on civil justice reform, approxi-

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89-91.

3. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1).

4. 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 District Court for the District of Kansas (July 30, 1992) (on file with author); 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) (on file with author); see also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (list of EIDCs).

5. Telephone Interview with Mark Shapiro, attorney in the Administrative Office of the United States Courts, Court Administration Division (Oct. 12, 1993).

6. See Tobias, *More*, *supra* note 1, at 358.

7. See, e.g., U.S. Dist. Court for the Dist. of Kan., Annual Assessment Under the Civil Justice Reform Act of the State of Civil and Criminal Dockets and of the CJRA Expense and Delay Reduction Plan (July 9, 1993); U.S. Dist. Court for the E. Dist. of Va., 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 (May 20, 1993).

8. See, e.g., H. Russel Holland, CJRA Plan Annual Assessment of Dockets for the United States District Court for the District of Alaska (Apr. 1993); Charles H. Haden II, Annual Assessment of the Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Southern District of West Virginia (Mar. 5, 1993).

9. See 28 U.S.C. §§ 472(a)-(c), 478 (Supp. III 1991); see also Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 508-09 (1992).

10. See 28 U.S.C. §§ 472(a), 473(a) (Supp. III 1991); see also Tobias, *supra* note 9, at

mately one-half of the advisory groups completed their reports and recommendations<sup>11</sup> and more than a majority of the districts adopted their plans.<sup>12</sup>

All of the advisory group reports and civil justice plans developed since the publication of the most recent issue of this journal included certain provisions that I found advisable. Each report and plan also had fewer provisions that were less advisable and other provisions which had advisable and less advisable features. An illustration of the third idea is the rather rigorous judicial case management that employs multiple tracks tailored to case complexity that the Maine District's plan apparently contemplates.<sup>13</sup> Close judicial case management and case tracking can reduce expense and delay in numerous ways. When judges closely manage cases and assign lawsuits to different tracks, courts can learn more about cases earlier in their lives and can tailor procedures to suits' particular needs, thereby effecting cost and temporal savings. That type of judicial case management can also increase expense and waste time by, for example, requiring courts to spend scarce resources learning about cases which would have settled anyway.

Practically all of the advisory groups included advisable procedures or recommendations in their reports, while nearly all of the districts promulgated advisable procedures. For instance, the South Carolina Advisory Group suggested that the court employ a fast track for cases which can be promptly resolved and that the court employ a form of "settlement week" analogous to one implemented in the South Carolina state courts.<sup>14</sup> The Advisory Group for the Middle District of Georgia correspondingly found that the excessive length of time that the local judges needed to rule on dispositive motions was a "prominent factor associated with delay" and strongly recommended that the court adopt a procedure requiring it to rule on all dispositive motions within 90 days from the date that filing of opposition papers are due.<sup>15</sup>

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509.

11. See, e.g., Final Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia (Aug. 1993); Report of the Advisory Group to the United States District Court for the Middle District of Georgia Pursuant to the Civil Justice Reform Act of 1990 (July 1993).

12. See, e.g., U.S. Dist. Court for the Dist. of Me., Cost and Delay Reduction Plan Under the Civil Justice Reform Act of 1990 (Aug. 1, 1993) [hereinafter Maine Plan]; U.S. Dist. Court for the W. Dist. of Wash., Civil Justice Expense and Delay Reduction Plan (July 14, 1993) [hereinafter Western Washington Plan].

13. Maine Plan, *supra* note 12, at App. a.

14. See U.S. Dist. Court for the Dist. of S.C., Final Report of the Civil Justice Reform Act Advisory Group on Litigation Cost and Delay 37-38, 55-56 (May 1993).

15. See Report of the Advisory Group to the United States District Court for the Mid-

Numerous groups also recommended, and a number of courts promulgated, procedures which I believe are less advisable. For example, the Western District of North Carolina adopted a procedure providing for the co-equal assignment of civil cases to Article III judges and magistrate judges that requires litigants whose cases are assigned to magistrate judges to request reassignment or waive their right to trial by an Article III judge.<sup>16</sup> This procedure is similar to the one that the Montana District employs, but the procedures of both courts may conflict with the provision in the United States Code prescribing magistrate judge jurisdiction.<sup>17</sup> The Western District of Washington will similarly "consider, following publication for comment, the adoption of a local rule" governing settlement offers that conflicts with existing Federal Rule 68.<sup>18</sup> The Rules Enabling Act and Rule 83 seem to proscribe such inconsistency, although the CJRA may authorize it.<sup>19</sup>

### B. Federal Rules Amendments

On December 1, 1993, a very comprehensive package of revisions in the Federal Rules became effective.<sup>20</sup> Most relevant to civil justice reform was Congress' determination to not delete the amendment in Rule 26(a)(1) providing for nationwide application with local variation of automatic disclosure, a procedure which requires that litigants disclose certain core information before undertaking discovery.<sup>21</sup> Automatic disclosure is particularly significant, because nearly twenty-five EIDCs, including the Montana District, and a number of additional districts adopted various forms of disclosure which differ from the national amendment.<sup>22</sup> These devel-

dle District of Georgia Pursuant to the Civil Justice Reform Act of 1990, at 19, 27 (Sept. 1993).

16. See U.S. Dist. Court for the W. Dist. of N.C., Civil Justice Expense and Delay Reduction Plan Under the Civil Justice Reform Act of 1990, at 5 (Sept. 1993); see also *infra* notes 43-44 and accompanying text.

17. See 28 U.S.C. § 636(c) (Supp. IV 1992). See also *infra* notes 43-45 and accompanying text.

18. See Western Washington Plan, *supra* note 12, at 6-7; see also FED. R. CIV. P. 68.

19. See 28 U.S.C. § 2071(a) (1988) (Rules Enabling Act); FED. R. CIV. P. 83; see also Lauren K. Robel, *Fractured Procedure, The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. No. 5 (forthcoming July 1994) (Congress may have authorized inconsistency).

20. See Supreme Court of the U.S., Amendments to the Federal Rules of Civil Procedure and Forms, reprinted in 146 F.R.D. 401 (1993).

21. See Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1993); see also H.R. 2814, 103d Cong., 1st Sess. (1993).

22. See, e.g., U.S. Dist. Courts for the N. and S. Dists. of Miss., Civil Justice Reform Act of 1990, Uniform Plan 14-17 (Oct. 1993) (providing specifically for exceptions to automatic disclosure requirements); see also Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665 (1993).

opments may ultimately prove helpful as widespread experimentation with different disclosure procedures could lead to agreement on the most efficacious type of disclosure. Until that happens, however, this experimentation will promote considerable disuniformity and confusion, which the adoption of one uniform national rule could have prevented.

### C. Executive Branch Civil Justice Reform

The Clinton Administration still has not affirmatively stated whether it intends to retain executive branch reforms that the Bush Administration instituted.<sup>23</sup> These reforms require the government to disclose core information, to promote settlement, and to introduce only reliable testimony in civil cases.<sup>24</sup> Justice Department lawyers are currently following the procedures more closely than other government counsel, particularly lawyers who work in United States Attorneys Offices.<sup>25</sup> After all of the United States Attorneys have been appointed and can implement the executive branch effort, the Clinton Administration will probably clarify its position on executive branch reform.

Those members of Congress who introduced the Bush Administration's version of civil justice reform—the Access to Justice Act—decided against reintroducing that proposal in 1993.<sup>26</sup> The Civil Justice Reform Act of 1993, which Senator Dennis DeConcini (D-Ariz.) and Senator Charles Grassley (R-Iowa) introduced, included a small number of controversial provisions and fewer provisions which duplicate the CJRA or Executive Order 12,778.<sup>27</sup> Nonetheless, members of Congress did not give the Civil Justice Reform Act of 1993 very serious consideration during the first session of the One Hundred and Third Congress.

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23. See Exec. Order 12,778, 3 C.F.R. 359 (1992), reprinted in 28 U.S.C. § 519 (Supp. III 1991). See generally Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993).

24. See Tobias, *supra* note 23, at 1531-33.

25. This assessment is premised on telephone interviews with many government lawyers.

26. See Tobias, *More*, *supra* note 1, at 361-62; Tobias, *Updating*, *supra* note 1, at 91-92.

27. See S. 585, 103d Cong., 1st Sess. (1993); see also S. 2180, 102d Cong., 2d Sess. (1992) (Access to Justice Act). For instance, the newer bill would not establish a multi-door courthouse program. Compare S. 585, 103d Cong., 1st Sess. (1993) with S. 2180, 102d Cong., 2d Sess., § 106 (1992). See generally Tobias, *supra* note 9, at 515.

## II. MONTANA DEVELOPMENTS

### A. *General Observations on Civil Justice Reform*

The implementation of civil justice reform in the Montana District is apparently continuing to proceed smoothly.<sup>28</sup> Most attorneys who litigate in federal court seem to be encountering few problems comprehending and complying with the requirements that the civil justice expense and delay reduction plan and the revised local rules impose, and the judicial officers have had little difficulty enforcing those requirements.<sup>29</sup>

The various divisions of the Montana District are still applying the disparate procedures that I reported they were using in the latest issue of this review.<sup>30</sup> Seemingly minimal change has occurred, especially in the significant area of civil case assignments among Article III judges and magistrate judges. For example, the Billings Division continues to employ co-equal assignments with the opt-out provision, while Chief Judge Hatfield is still experimenting with referrals to Magistrate Judge Holter of pretrial matters in civil actions that do not involve constitutional questions.<sup>31</sup>

I continue to believe that it is preferable to have the Article III judges and the magistrate judges apply uniform procedures in the divisions of the Montana District.<sup>32</sup> For instance, such uniformity ought to reduce the cost and delay of having to find, learn, and conform to different procedures. Most Montana attorneys who practice in federal court seem to have experienced comparatively minimal difficulty satisfying the disparate procedures, although the Montana District will be better able to ascertain this once the court completes its annual assessment.<sup>33</sup>

### B. *Observations on Specific Procedures*

#### 1. *Advisable Aspects of the Reform*

Many particular procedures incorporated in the civil justice

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28. The material in this subsection is based primarily on conversations with Montana practitioners and court personnel.

29. See Tobias, *Updating*, *supra* note 1, at 92; see also Tobias, *More*, *supra* note 1, at 362.

30. See Tobias, *More*, *supra* note 1, at 362; see also Tobias, *Updating*, *supra* note 1, at 92-93.

31. See Tobias, *More*, *supra* note 1, at 362; see also Tobias, *Updating*, *supra* note 1, at 92-93.

32. See Tobias, *More*, *supra* note 1, at 362; see also Tobias, *Updating*, *supra* note 1, at 93.

33. See 28 U.S.C. § 475 (Supp. III 1991); see also *infra* note 46 and accompanying text.

plan and the revised local rules are apparently working well.<sup>34</sup> Mandatory pre-discovery disclosure seems to be operating effectively and assisting attorneys and litigants in preparing for trials and in settling cases in the Montana federal court, while disclosure has generated relatively few complaints from practitioners and parties. The procedure apparently functions best when the disclosure is relatively general and the case is comparatively simple.

Automatic disclosure operates less smoothly when lawyers use the mechanism for tactical advantage and in complicated litigation,<sup>35</sup> as a recent products liability suit in the Montana District illustrates.<sup>36</sup> Congress nearly rejected a revision in the Federal Rules that would have required the nationwide imposition of automatic disclosure, apparently because numerous segments of the bar persuaded lawmakers that the procedure was unworkable.<sup>37</sup> The congressional action, however, has limited relevance to the disclosure provision that the Montana District had previously adopted under the CJRA, because the court chose to modify that provision only minimally.<sup>38</sup>

The Montana District's reliance on peer review committees appears considerably less troubling than it initially did.<sup>39</sup> The magistrate judges are functioning as liaisons with the committees, whose members have now been named. Very little else has happened with the committees since I last reported on them.<sup>40</sup> The judicial officers have not referred any matters to the peer review committees.

## *2. Aspects of Reforms that Are Not Clearly Advisable or Inadvisable*

Those features of the reform effort that have afforded both benefits and disadvantages are apparently still doing so.<sup>41</sup> For in-

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34. The material in this subsection is primarily based on conversations with Montana practitioners and court personnel.

35. See Bell, *supra* note 21, at 39-42.

36. See Scheetz v. Bridgestone/Firestone, Inc., No. CV-93-006-GF, 1993 WL 555966 (D. Mont. Dec. 14, 1993). The procedure has reportedly worked well in some complex cases.

37. See *supra* note 21 and accompanying text; see also Tobias, *More*, *supra* note 1, at 360-61.

38. In an abundance of caution, the court issued an order to clarify that the court is temporarily making the language of the federal amendment "relevant to disputed facts alleged with particularity in the pleading" applicable to individuals and documents required to be identified or described. See U.S. Dist. Court for the Dist. of Mont., Order, Jan. 25, 1994.

39. See Tobias, *More*, *supra* note 1, at 363.

40. See Tobias, *More*, *supra* note 1, at 363.

41. See Tobias, *More*, *supra* note 1, at 363-64.

stance, the Article III judges are not yet certain precisely how the magistrate judges can function in ways which will maximize their efficacy in limiting expense and delay. It remains unclear whether the co-equal assignment system employed in the Billings Division is superior to the referral schemes that the judges use in the other divisions.<sup>42</sup> The setting of early, firm trial dates has correspondingly expedited the resolution of disputes but may disadvantage litigants who need more time to prepare their cases and may impose greater costs by requiring earlier preparation.

### 3. *Aspects of Reform that Are Less Advisable*

The aspect of civil justice reform that I believe continues to be most problematic is the co-equal assignment mechanism coupled with the opt-out procedure.<sup>43</sup> The judges in Billings are the only ones who are currently employing the procedure, but Chief Judge Hatfield in Great Falls is contemplating its use in the future.<sup>44</sup> I continue to believe that the federal courts have insufficient power to rely on the opt-out procedure, even though other districts have actually prescribed or are seriously considering adopting similar procedures.<sup>45</sup>

### 4. *Miscellany of New Developments*

Perhaps the most significant action that the Montana District initiated during 1993 was the compilation of its first annual assessment.<sup>46</sup> The Clerk's Office has collected and tendered to the Advisory Group a statistical analysis which dates from April 1992. The Advisory Group plans to circulate a questionnaire to the federal bar seeking its members' impressions of the effectiveness of the procedures in the civil justice plan and is scheduled to publish the annual assessment in 1994. An important issue that the assessment will address is the comparative efficacy of the various civil case assignment procedures being employed. The statistical data indicate that the division using the opt-out mechanism is securing more consents than the divisions which rely on discretionary assign-

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42. See Tobias, *More*, *supra* note 1, at 363. For example, Chief Judge Hatfield is referring pretrial matters in civil cases not involving constitutional questions to Magistrate Judge Holter, who tries the suits if litigants consent. See Tobias, *Updating*, *supra* note 1, at 92-93.

43. See Tobias, *Updating*, *supra* note 1, at 95-96 (contending that (1) relevant cases cast doubt on judicial authority to adopt procedure, and (2) practical difficulties, such as parties' reluctance to challenge procedure, exacerbate problems).

44. See Tobias, *Updating*, *supra* note 1, at 93; Tobias, *More*, *supra* note 1, at 362.

45. See *supra* note 16 and accompanying text; see also *supra* note 43.

46. See 28 U.S.C. § 475 (Supp. III 1991).

ments with voluntary consents. The judges met in June to compile an approved list of mediation masters who will assist the court in mediating civil cases, however, the publication of that list has been delayed.

### III. A LOOK INTO THE FUTURE

#### A. *National*

Now that all ninety-four federal district courts have issued their civil justice expense and delay reduction plans, it is possible to secure a better sense of the national reform effort. The issuance of annual assessments by numerous EIDCs shows that a number of districts have experimented with procedures that reduce expense or delay. Most of these procedures implicate judicial case management, alternative dispute resolution, or discovery. Although many of the districts that are not EIDCs and have recently issued plans promulgated numerous procedures that will probably decrease cost or delay, most of the procedures have received insufficient experimentation and evaluation to make definitive judgments. After the federal districts have some experience applying the procedures, it should be possible to glean a clearer sense of their efficacy. Of course, insofar as the districts that adopted these procedures derived the mechanisms from other courts in which the techniques had been successfully applied, the procedures should prove effective. The Rand Corporation, which is conducting a major extra-governmental assessment of the reform,<sup>47</sup> is scheduled to issue a preliminary report in early 1994 that should enhance considerably understanding of early experimentation.

Civil justice reform has continued to spark lively, instructive debate respecting the federal courts' future, broad self-evaluation in the districts, and healthy exchange between the federal bench and practitioners, particularly when the large number of courts were completing their civil justice plans. The significant differences in the procedures that numerous districts adopted means that increased disuniformity and complexity have continued accompanying justice reform endeavors. Congress could attempt to rectify or ameliorate certain of these difficulties. It will probably want to assess the new plans issued by a majority of the districts since mid-1993 while awaiting the more definitive results of the Rand study and several additional evaluations that Congress commissioned. Congress may also want to give these districts an opportunity to

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

experiment with, and closely assess, the procedures which were recently adopted. This appears especially true of the controversial automatic disclosure mechanism. All of these factors mean that Congress is unlikely to make any significant changes in civil justice reform until 1995.

### B. Montana

Civil justice reform continues to function smoothly in the Montana District. The court should attempt to determine whether, and, if so, exactly how much, particular measures have reduced expense or delay. One helpful illustration of the need for greater information on expense and delay reduction involves the allocation of caseloads between Article III judges and magistrate judges.<sup>48</sup> Other examples include the use of automatic disclosure and summary judgment procedures. If the court finds that any of its procedures have failed to reduce expense or delay, it should modify them accordingly. The Montana District may also want to undertake a study of the procedures adopted in those districts that have recently promulgated civil justice plans and of the efficacy of procedures employed by EIDCs as indicated in their annual assessments. If the court discovers procedures that are or promise to be effective, the Montana District should seriously consider prescribing those procedures.

## IV. CONCLUSION

The pace of civil justice reform dramatically quickened nationwide in the concluding half of 1993, when a majority of the districts finalized their civil justice plans. The Montana District continued to implement civil justice reform smoothly in 1993. The court should scrutinize the effectiveness of the procedures in its plan and improve them as warranted. The court should evaluate procedures instituted nationwide and apply any that would apparently be efficacious in the Montana District.

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48. See Tobias, *More*, *supra* note 1, at 363-64; see also *supra* notes 31, 42 and accompanying text.