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Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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THE 1993 FEDERAL RULES AMENDMENTS AND THE MONTANA CIVIL RULES

Carl Tobias*

On December 1, 1993, the most comprehensive package of amendments to the Federal Rules of Civil Procedure (Federal Rules) in their half-century history became effective.¹ Although the revisions include a number of changes that are relatively innocuous, modifications in Rule 11 governing sanctions and Rule 26 requiring mandatory pre-discovery or automatic disclosure were and remain controversial. The amendment to Rule 11 altered the 1983 revision of that Rule which had proved to be the most controversial amendment ever developed. The amendment to Rule 26 prescribing automatic disclosure was the most controversial formal proposal changing the Rules in their history.

These two modifications, therefore, are quite controversial. Moreover, the Montana Supreme Court adopts nearly all of the Federal Rules amendments soon after the United States Supreme Court promulgates the revisions, and the Montana Advisory Commission on Rules of Civil and Appellate Procedure is currently considering the advisability of recommending the adoption of the 1993 modifications. The changes in Federal Rules 11 and 26, accordingly, warrant analysis to ascertain whether they should apply in the Montana state district court system. This essay undertakes that effort.

The paper first briefly examines the developments that led to the 1993 amendments in Federal Rules 11 and 26. The essay then assesses the changes that the United States Supreme Court instituted in Rules 11 and 26 and evaluates whether the Federal Rules amendments should be incorporated into the Montana Rules of Civil Procedure.

I. DEVELOPMENT OF THE 1993 AMENDMENTS

The developments that prompted the 1993 amendments to Federal Rules 11 and 26 deserve relatively terse treatment in this

* Professor of Law, University of Montana. I wish to thank Jeff Renz and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. I am especially grateful to Ann and Tom Boone for their generous gift recognizing scholarship's value. Errors that remain are mine.

1. See Supreme Court of the U.S., Amendments to the Federal Rules of Civil Procedure and Forms, *reprinted in* 146 F.R.D. 402 (1993) [hereinafter Amendments].

essay, as they have been comprehensively considered elsewhere.² After examining the 1993 alteration of the 1983 revision of Federal Rule 11, this essay discusses the 1993 change in Federal Rule 26 that imposed automatic disclosure.

A. Federal Rule 11

The Supreme Court amended Rule 11 in 1983 as one of several revisions that were intended to address the litigation explosion and litigation abuse.³ The Justices adopted the Rule 11 amendment, although the Court had minimal empirical data on either the litigation explosion or litigation abuse or on the operation of Rule 11, which had remained unchanged since its inclusion in the original 1938 Rules.⁴

In 1991, the federal Advisory Committee on the Civil Rules (Advisory Committee) published a preliminary draft proposal to revise the 1983 version.⁵ Nearly all affected parties were critical of it. For example, resource-poor parties opposed the proposal's imposition of a continuing duty to withdraw small parts of papers when they have lost merit, while the litigants were concerned about the possibility that courts could levy substantial monetary sanctions for Rule violations.⁶ Defense counsel correspondingly criticized the Advisory Committee's inclusion of denials as components of pleadings that must conform to Rule 11 and the reduced prospect of recovering attorneys' fees when the provision is contravened.⁷ Ambiguous terminology employed in the draft troubled many attorneys and litigants who are involved in federal court actions.⁸ There was much criticism of the preliminary draft, although

2. See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

3. See FED. R. CIV. P. 7, 11, 16, 26, reprinted in 97 F.R.D. 165 (1983). See generally ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984).

4. See, e.g., Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 455-59 (1993); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989).

5. See Judicial Conference of the U.S. Comm. on Rules of Practice & Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, reprinted in 137 F.R.D. 53, 74-82 (1991) [hereinafter *Preliminary Draft*].

6. See Carl Tobias, *Rule Revision Roundelay*, 1992 WIS. L. REV. 236, 237; see also Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 484-86 (1991).

7. See Tobias, *supra* note 6, at 237.

8. See, e.g., *Preliminary Draft*, *supra* note 5, at 75-76 (ambiguous nature of descrip-

the Advisory Committee comprehensively evaluated the 1983 revision, sought and thoroughly analyzed many written and oral suggestions of the public before recommending revision, and developed a draft proposal that it thought would be responsive to all interests affected.⁹

The Advisory Committee eventually wrote several additional drafts of the amendment after soliciting and reviewing more public input; reexamining and reworking numerous features of the preliminary draft; and attempting to assemble the clearest, fairest, most effective revision possible.¹⁰ The Advisory Committee's efforts in crafting the final proposal to revise Rule 11 approximated the kind of open, responsive rule amendment process that Congress contemplated in recently changing the national rule revision procedures.¹¹

Despite the important improvements in the proposed amendment and the Advisory Committee's concerted efforts, a number of individuals and interests continued to criticize the modifications suggested.¹² The preeminent opponent was Justice Antonin Scalia, who dissented from the Supreme Court's transmittal of revised Rule 11.¹³ He argued that the change would eliminate a "necessary deterrent to frivolous litigation" by affording judges discretion to impose sanctions, by disfavoring reimbursement for litigation expenses, and by providing safe harbors.¹⁴ Although members of Congress introduced legislation that would have postponed the revision's effective date for one year, Congress seriously considered none of the bills, and the amendment to Rule 11 became effective on December 1, 1993.¹⁵

tion of specific conduct alleged to violate Rule 11 in provision for giving notice of violation). See also Tobias, *supra* note 6, at 238; Vairo, *supra* note 6, at 495-500.

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

10. See Amendments, *supra* note 1, at 420-24.

11. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642 (1988) (codified in 28 U.S.C. §§ 2071-2077 (Supp. 1990)). See generally Harold S. Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987).

12. I rely substantially in this paragraph and the next on Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 4 (forthcoming 1994).

13. See Supreme Court of the U.S., Amendments to the Federal Rules of Civil Procedure and Forms, Dissenting Statement, reprinted in 146 F.R.D. 402, 507-10 (1993) [hereinafter Dissenting Statement]. Justice Clarence Thomas joined this dissent.

14. See Dissenting Statement, *supra* note 13, at 507-09.

15. See S. 2979, 103d Cong., 1st Sess. (1993); see also H.R. 2814, 103d Cong., 1st Sess. (1993). See generally Randall Samborn, *Bill to Stop Change Dies: New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40.

B. Federal Rule 26

The Advisory Committee issued a 1991 preliminary draft proposal that could have significantly changed discovery, even though there had been little experimentation with, or assessment of, the automatic disclosure concept.¹⁶ The proposal would have mandated that plaintiffs and defendants disclose, prior to discovery, information that was "likely to bear significantly on any claim or defense."¹⁷

No formal proposal to amend the Federal Rules has prompted such sharp criticism from so many users of the federal courts.¹⁸ In February 1992, the Advisory Committee responded to this public opposition by jettisoning the disclosure proposal in seeming deference to experimentation with the mechanism in a number of federal districts under the Civil Justice Reform Act of 1990 (CJRA).¹⁹ During April of that year, however, the Advisory Committee revived the proposal by requiring that parties disclose "discoverable information relevant to disputed facts alleged with particularity in the pleadings."²⁰ Advisory Committee members defended their decision by arguing that discovery was not working, that lawyers' self-interest precluded constructive change, and that withdrawal of the disclosure proposal would have delayed judicially-controlled reform for the remainder of the decade.²¹

The rest of the rule revision entities—the Standing Committee, the Judicial Conference, and the Supreme Court—approved the Advisory Committee's new draft. The Supreme Court transmitted the amendment to Congress, although Justice Scalia dissented, claiming that the revision "*adds a further layer of discovery [and] does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts*

16. See Preliminary Draft, *supra* note 5, at 87.

17. See Preliminary Draft, *supra* note 5, at 87-88. See also *infra* note 20 and accompanying text.

18. See Dissenting Statement, *supra* note 13, at 512; accord Bell et al., *supra* note 2; Ann Pelham, *Forcing Litigants to Share: Judges Back Radical Discovery Rule, but Lawyers Want a Veto from Hill*, LEGAL TIMES, May 3, 1993, at 1.

19. See Bell et al., *supra* note 2; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 268 (1992); Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 12-13. Experimentation must proceed for at least three years, and the Judicial Conference is to evaluate it and report to Congress on the experimentation by late 1995. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097 (1990).

20. See FED. R. CIV. P. 26(a)(1), reprinted in 146 F.R.D. 431-32 (1993); see also Bell et al., *supra* note 2, at 35-39. *But cf.* Winter, *supra* note 19, at 269 (revised proposal responsive to critics' legitimate concerns).

21. See Pelham, *supra* note 18; Samborn, *supra* note 19.

before a neutral decisionmaker."²²

Most elements of the organized bar and numerous additional interests attempted to persuade Congress to reject the disclosure amendment.²³ Legislation that would have postponed application of disclosure easily passed the House of Representatives in November 1993, but the Senate failed to consider the bill, and the amendment took effect on December 1.²⁴ The revision permits all ninety-four federal districts to modify or reject the Federal Rule revision, and numerous courts, including the Montana District, have done so.²⁵

II. ASSESSMENT OF WHETHER THE FEDERAL RULES AMENDMENTS SHOULD BE INCORPORATED INTO THE MONTANA RULES OF CIVIL PROCEDURE

A. Rule 11

I believe that the 1993 amendment to Rule 11 substantially improves the 1983 revision, is much clearer and fairer than the Advisory Committee's preliminary draft, and represents a workable compromise.²⁶ For example, the new version significantly decreases incentives for invoking the provision by prescribing safe harbors and by trusting sanctioning to judges' discretion.²⁷ The Advisory Committee correspondingly deleted several burdensome strictures from the preliminary draft, such as the continuing duty.²⁸ The rule revision entities instituted these changes, notwithstanding linger-

22. Dissenting Statement, *supra* note 13, at 510-11.

23. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. No. 6 (forthcoming 1994).

24. See 139 CONG. REC. H8,747 (daily ed. Nov. 3, 1993); see also Samborn, *supra* note 15.

25. See FED. R. CIV. P. 26(a)(1), 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) (advising bar that court has temporarily modified automatic disclosure provision prescribed in April 1992 civil justice plan to conform more closely with federal amendment). See generally Tobias, *supra* note 23.

Arizona is the only state of which I am aware that has prescribed automatic disclosure. 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). Alaska and Maryland have considered disclosure. See Letter from Robert D. Myers, Presiding Judge, Superior Court of Maricopa County, Arizona, to Carl Tobias (Apr. 27, 1994) (on file with author); proposed Md. R. Civ. P. 2-403, 20 Md. Reg., Issue 8 (Apr. 16, 1993).

26. I rely substantially here on Carl Tobias, *The Transmittal Letter Translated*, 45 FLA. L. REV. No. 5 (forthcoming 1994).

27. See FED. R. CIV. P. 11(c), reprinted in 146 F.R.D. at 421-23. See also Tobias, *supra* note 2, at 1783-88; *supra* note 6 and accompanying text.

28. See Tobias, *supra* note 9, at 866-71; see also *supra* note 6 and accompanying text.

ing concerns about deterring frivolous litigation which Justice Scalia so clearly articulated.²⁹

The revisors employed wording, such as "nonfrivolous" and "appropriate sanctions," that will inevitably foster inconsistent interpretation and satellite litigation.³⁰ The rule revision entities also kept some incentives for filing Rule 11 motions. For instance, the new rule permits judges to award litigants who successfully invoke the amendment the expense of so doing and to impose assessments of attorneys' fees in certain circumstances.³¹

One factor that deserves serious consideration in deciding whether Montana should adopt the federal revision is the value of having intrastate consistency between Federal and Montana Rule 11. Montana has adopted, often verbatim, most of the federal Rules amendments rather soon after their promulgation at the federal level. Some states, known as "replica" states, have modelled their state rules on the federal analogues.³² Indeed, the Arizona state courts have even instituted proposed federal amendments before they took effect in the federal system, in the apparent belief that it was preferable to be uniform than to be correct.³³

Another consideration that probably should be important is how Montana Rule 11 has operated. Although less formal activity has apparently occurred under the state rule than federal Rule 11, it remains unclear precisely how much and what type of informal activity, such as threats to invoke the rule, have occurred.³⁴ Moreover, much of the most detrimental activity relating to the 1983 amendment to Federal Rule 11 involved its informal use.³⁵ The Montana rule's interpretation and application by the Montana Supreme Court and district courts have not been completely consistent, and considerable satellite litigation involving the provision has occurred.³⁶

The Montana Supreme Court may also want to take into account the ways that other states have treated Rule 11. Some states had amended their equivalents of the 1983 federal provision before

29. See *supra* notes 13-14 and accompanying text.

30. See FED. R. CIV. P. 11(a)-(b), reprinted in 146 F.R.D. at 419-24. Terms such as "appropriate sanctions," however, may be the clearest, fairest phrasing that can be used.

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

32. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

33. See John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989).

34. 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).

35. See Tobias, *supra* note 9, at 861.

36. See Ford, *Unraveling*, *supra* note 34.

that version was revised.³⁷ A small number of states never promulgated provisions analogous to the 1983 amendment of federal Rule 11 because they apparently believed that the 1983 revision's disadvantages outweighed its benefits.³⁸

The questions that seem essential to deciding about the federal amendment's adoption are whether the enhanced clarity and reduced incentives to invoke that provision outweigh the potential loss in terms of deterring frivolous litigation. Additional, but less important, issues are the somewhat limited formal activity under Montana Rule 11 and uncertainty about the exact quantity and nature of informal activity. In the final analysis, the increased clarity of the federal amendment and the provision's reduced incentives for its invocation mean that the Montana Supreme Court should adopt the federal amendment.

B. Rule 26

Several factors complicate the question of whether the Montana state courts should adopt the federal Rule 26 disclosure amendment. One is the difficulty of conclusively determining whether any of the automatic disclosure mechanisms will be effective and, if so, which will be most efficacious. Few of the approximately twenty districts that have been testing disclosure for the greatest period have relied on measures like the federal revision, because the courts premised their disclosure schemes on the Advisory Committee's preliminary draft.³⁹ Even these districts have not experimented with or evaluated the technique long enough to glean definitive conclusions about its effectiveness.⁴⁰

Anecdotal evidence suggests that some Early Implementation District Courts (EIDCs) that have tested disclosure have experienced few problems implementing it.⁴¹ Disclosure seems to function well in comparatively routine, simple litigation or when the

37. See, e.g., ALASKA R. CIV. P. 11; WASH. SUP. CT. CIV. R. 11.

38. This is true of Massachusetts and New York. See MASS. CIV. R. 11; N.Y. CIV. PRAC. L. & R. 2105, 3020 (McKinney 1990 & Supp. 1994); see also MD. R. 1-311.

39. See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 143-45 (1993); see also *supra* note 17.

40. Most of the Early Implementation District Courts under the CJRA only instituted disclosure during 1992, and few have rigorously evaluated its efficacy. See Tobias, *supra* note 39, at 144-45; Samborn, *supra* note 19, at 12.

41. These include the Northern District of California and the Districts of Arizona, Massachusetts, and Montana. This evidence is based on conversations with many individuals, including advisory group reporters and members, court personnel, and practitioners, who are knowledgeable about civil justice reform in those districts. See also Samborn, *supra* note 19, at 12. See generally *supra* notes 39-40 and accompanying text.

disclosure is quite general.⁴² 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.⁴³

Other anecdotal information indicates that lawyers are less critical of automatic disclosure once they have become familiar with the procedure.⁴⁴ Many attorneys seemingly have discovered that disclosure primarily requires counsel and their clients to participate in some activities, particularly document retrieval and labelling, earlier in lawsuits.⁴⁵

The Montana Supreme Court could treat automatic disclosure in several ways. A cautious approach would be to await more definitive results from the experimentation with the concept that is now proceeding in a majority of the federal districts. A study of CJRA experimentation in the pilot districts being conducted by the Rand Corporation is scheduled for completion in mid 1995,⁴⁶ and that report should afford valuable insights on disclosure. For instance, the experimentation and its assessment should provide a better sense of the precise meaning of the federal rule's phrasing, of whether disclosure adds another layer of discovery, and of whether disclosure poses ethical problems for counsel.

A less cautious, but moderate, course of action would be to institute an experimental program in the Montana state court system. For example, the Montana Supreme Court might designate three districts to experiment in certain types of cases for several years with disclosure procedures that have proved most promising at the federal level.⁴⁷ The model employed by most of the EIDCs⁴⁸ and the new federal amendment are valuable starting points, while information regarding application could be derived from annual assessments that districts have compiled under the CJRA.⁴⁹

42. These assertions are based on the conversations *supra* note 41. See also Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 363 (1993).

43. These claims are based on the conversations *supra* note 41. Accord Bell et al., *supra* note 2, at 39-42; Winter, *supra* note 19, at 268.

44. See *supra* note 41; see also Samborn, *supra* note 19.

45. See *supra* note 41 and accompanying text.

46. See Civil Justice Reform Act of 1990, § 105(c), 28 U.S.C. 471 notes (Supp. IV 1992).

47. 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).

48. See *supra* note 17 and accompanying text.

49. See, e.g., Annual Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania 6-8 (June 1993); Report on the Impact of the Cost and Delay Reduction Plan adopted by the United States District Court for the Southern

A more dramatic approach would be the amendment of Montana Rule 26 to require automatic disclosure. One difficulty with this manner of proceeding is that it remains unclear which procedure is now preferable. Another problem is that all judges, lawyers, and cases will have been unnecessarily subjected to a failed experiment should the procedure adopted prove ineffective. If the Montana Supreme Court follows this general approach, it probably should employ a provision analogous to that applied in the Montana Federal District Court.⁵⁰ This would afford the benefits of familiarity for federal court practitioners and of having a current assessment of the procedure's efficacy.⁵¹

In the final analysis, the dearth of available information about how automatic disclosure actually works in practice and about which disclosure procedure is most effective means that the Montana Supreme Court should probably wait for the results of experimentation that is ongoing in numerous federal districts. If the court believes that an urgent need exists for discovery reform which disclosure could fulfill, it may want to prescribe experimentation with the concept.

CONCLUSION

The 1993 Federal Rules amendments are very ambitious. Whether the Montana Supreme Court should adopt their most controversial provisions relating to Rule 11 and Rule 26 remains unclear. This essay sets out numerous relevant factors that the court should consider. Montana Rule 11 probably warrants revision. Nonetheless, rather limited formal activity involving the rule, the time and energy that must be devoted to amendment, the loss of some deterrent effect that the 1983 version of Rule 11 apparently had, and the slight risk that revision might fail to improve the provision could justify maintaining the status quo. The advisability of changing Rule 26 to impose automatic disclosure is even less clear. Too little information about the procedure currently exists to make definitive judgments about its efficacy. Awaiting the results of experimentation in the federal districts, therefore, may be appropriate, although the Montana Supreme Court may want to consider providing for limited experimentation.

District of Texas 13-17 (Apr. 6, 1993); *see also* 28 U.S.C. § 475 (Supp. IV 1992) (periodic district court assessment).

50. *See supra* note 25.

51. *See* U.S. Dist. Court for the Dist. of Mont., Annual Assessment (July 1994).