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## EVALUATING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

The Civil Justice Reform Act of 1990 (CJRA) has reached the mid-point of its implementation nationally and in the Montana Federal District Court. At this juncture, one of the most important aspects of statutory effectuation is evaluation of the experimentation that federal district courts have conducted under the legislation. The timing is particularly propitious in the Montana federal district because the court recently completed the annual assessment of statutory implementation that the CJRA requires.<sup>1</sup> These developments in civil justice reform, particularly relating to evaluation of the experimentation which has occurred, warrant examination. This Article undertakes that effort.

The Article first considers the requirements regarding assessment that the legislation imposes. The piece then evaluates compliance with those strictures across the country and by the Montana Federal District Court. It also examines how assessment of implementation of procedures that are intended to reduce cost and delay informs understanding of civil justice reform. Finding that most of the statutory requirements relating to assessment have been satisfied, the Article concludes with a glimpse into the future.<sup>2</sup>

### I. CIVIL JUSTICE REFORM ACT OF 1990 REQUIREMENTS

The CJRA required that all ninety-four federal district courts issue civil justice expense and delay reduction plans by December 1993.<sup>3</sup> The thirty-four districts that promulgated civil justice plans

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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. See U.S. Dist. Court for the Dist. of Mont., Annual Assessment (July 1994); see also 28 U.S.C. § 475 (Supp. III 1991).

2. 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, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994) [hereinafter Tobias, *Recent*]; 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, 437-51 (1991).

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

by December 31, 1991, qualified for designation as Early Implementation District Courts (EIDCs) and were officially so designated in July 1992; the Montana district was one of those courts.<sup>4</sup>

The statute also provided for a pilot program in which ten districts were to experiment with six principles and guidelines of litigation management and cost and delay reduction that section 473 of the legislation prescribed.<sup>5</sup> The CJRA also provided for a demonstration program in which the Western District of Michigan and the Northern District of Ohio were to experiment with differentiated case management and the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri were to experiment with different methods of decreasing expense and delay, including alternative dispute resolution (ADR).<sup>6</sup>

The statute requires that Circuit Review Committees, comprised of the chief circuit judge and all chief district judges in every circuit, and the Judicial Conference review these plans and make suggestions for improvement, as indicated.<sup>7</sup> The Circuit Review Committees and the Judicial Conference, however, only review the plans' procedures for reducing expense and delay in light of certain statutory criteria and do not assess the districts' actual experimentation with those procedures.<sup>8</sup>

The legislation mandates that the Judicial Conference submit by December 31, 1995, a report on the results of the pilot program.<sup>9</sup> The report must include an analysis of how much expense and delay was reduced in the ten pilot districts by comparing those districts with ten comparable districts whose adoption of the requisite procedures was discretionary.<sup>10</sup> The comparison is to be pre-

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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. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(b) (pilot program); see also 28 U.S.C. § 473(a) (Supp. III 1991) (principles and guidelines).

6. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(b).

7. See 28 U.S.C. § 474(a) (Supp. III 1991). See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1406-09 (1992).

8. See 28 U.S.C. § 474(b) (Supp. III 1991). See generally Tobias, *supra* note 7, at 1409-11.

9. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1).

10. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1).

mised on a study performed by an "independent organization with expertise in the area of Federal court management";<sup>11</sup> the Rand Corporation is currently conducting that study. The statute also requires that the Judicial Conference transmit to Congress by December 31, 1995, a report on the results of the demonstration program.<sup>12</sup>

Section 475 of the CJRA requires that every district court annually assess the condition of its civil and criminal dockets with an eye to ascertaining appropriate additional measures that can be implemented to decrease expense and delay in civil cases and to improve the court's litigation management practices.<sup>13</sup> The districts, when conducting these annual assessments, are to consult with their advisory groups.<sup>14</sup>

Other studies of civil justice reform that are not required by the CJRA have been undertaken. Perhaps most important has been an assessment of the operation of automatic disclosure, a controversial procedure that requires information to be divulged prior to formal discovery, in the EIDCs performed under the auspices of the American Bar Association (ABA) Litigation Section.<sup>15</sup>

## II. STATUTORY COMPLIANCE

### A. *National Developments*

Practically all of the EIDCs have concluded their initial annual assessments of the effectiveness in reducing expense and delay of the procedures included in their civil justice plans, and a number of these courts should complete their second annual assessments this year.<sup>16</sup> Most of the districts determined that some of the procedures prescribed were comparatively efficacious in decreasing cost or delay. A small number of courts even made modifications in certain procedures that they had initially inserted in their plans as an attempt to realize additional savings in expense

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11. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1).

12. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(c).

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

14. See 28 U.S.C. § 475.

15. See ABA Survey of Attorneys Concerning Mandatory Pre-Discovery Disclosure for the District of Montana (Jan. 1994) (on file with author). The ABA has proscribed distribution of reports on specific districts until its report on all of the districts is completed. See Letter from Lee Cheng, Paralegal, Brobeck, Phleger & Harrison, San Francisco, Cal., to Carl Tobias (Jan. 13, 1994) (on file with author). See generally Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665 (1993) (discussing disclosure).

16. Telephone Interview with Mark Shapiro, attorney in the Administrative Office of the United States Courts, Court Administration Division (May 5, 1994).

or time.<sup>17</sup>

Several of the pilot districts found that the principles and guidelines of litigation management and cost and delay reduction covering the broad areas of judicial case management, discovery, and alternatives to dispute resolution decreased expense or delay somewhat. For example, the Southern District of Texas ascertained that differentiated case management of bankruptcy and social security appeals was having "some impact" on those actions.<sup>18</sup>

The demonstration districts also enjoyed a measure of success. For instance, the Western District of Michigan and the Northern District of Ohio realized considerable savings with differentiated case management.<sup>19</sup> It is important to realize, however, that these case management programs can be rather expensive.<sup>20</sup> Experimentation with the various forms of ADR has correspondingly proved to be effective in the remaining demonstration districts. For example, the broad menu of options, ranging from comparatively novel early neutral evaluation to the relatively traditional settlement conference, has saved money and time for lawyers, litigants, and judges in the Northern District of California.<sup>21</sup> The early assessment program instituted in the Western District of Missouri has been similarly successful.<sup>22</sup>

The Rand Corporation's study of civil justice reform in the pilot districts is currently proceeding on schedule, and the study should be completed by the summer of 1995.<sup>23</sup> If the Rand Corporation complies with this deadline, the Judicial Conference should have sufficient time to compile the report that the Conference

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17. See Tobias, *More*, *supra* note 2, at 358.

18. See U.S. Dist. Court for the S. Dist. of Texas, Report on the Impact of the Cost and Delay Reduction Plan Adopted by the United States District Court for the Southern District of Texas 11 (Apr. 6, 1993); see also U.S. Dist. Court for the E. Dist. of Penn., Annual Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania 5 (June 1993).

19. See U.S. Dist. Court for the W. Dist. of Mich., Differentiated Case Management in the United States District Court for the Western District of Michigan, Annual Assessment (Jan. 31, 1994); U.S. Dist. Court for the N. Dist. of Ohio, Annual Assessment of Civil and Criminal Docket 1-2 (Jan. 29, 1993).

20. See Telephone Interview with Fred Russillo, Administrative Office of the United States Courts, Court Administration Division (Apr. 6, 1994); see also U. S. Dist. Court, N. Dist. of Ga., First Annual Assessment of the Condition of the Court's Docket pt. II, 2-3 (July 14, 1993).

21. Telephone Interview with Richard L. Marcus, Advisory Group Reporter, Northern District of California (May 4, 1994); see also U.S. Dist. Court, N. Dist. of Cal., Civil Justice Expense and Delay Reduction Plan 9-17 (Dec. 1991).

22. See Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 Mo. L. REV. 335 (1993).

23. Telephone Interview, *supra* note 20; see also *supra* notes 9-11 and accompanying text.

must make to Congress.<sup>24</sup> The Judicial Conference, in conjunction with the Federal Judicial Center and the Administrative Office of the United States Courts, is presently proceeding on schedule with its report on the results of experimentation in the demonstration districts, and the Conference will apparently meet its statutory deadline.<sup>25</sup>

### B. Montana Developments

The Montana Federal District Court began assembling its first annual assessment during 1993.<sup>26</sup> The Office of the Clerk compiled and submitted to the Advisory Group appointed under the CJRA a statistical analysis dating from April 1992 when the civil justice expense and delay reduction plan became effective. This statistical information suggested that the Billings division of the court, which is assigning civil cases pursuant to an opt-out system, was securing a larger number of consents than those divisions that employ discretionary case assignments and voluntary consents.

The Advisory Group reached considerable consensus that the procedures adopted in the plan were working reasonably well, particularly by reducing delay as opposed to costs.<sup>27</sup> Automatic disclosure was the only exception. Advisory Group members were uncertain whether the language governing disclosure included in the April 1992 civil justice plan was preferable to the phrasing temporarily substituted in January 1994.<sup>28</sup> For example, the new terminology, which is intended to accommodate the 1993 amendment to Federal Rule 26(a), could conflict with the notice pleading regime of the federal rules.<sup>29</sup> The Advisory Group suggested that the judges of the Montana District solicit practitioners' views on the wording of the automatic disclosure requirements.<sup>30</sup>

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24. See *supra* note 9 and accompanying text.

25. Telephone Interview, *supra* note 20; see also *supra* note 11 and accompanying text.

26. In this paragraph, I rely substantially on Tobias, *Recent*, *supra* note 2, at 242-43.

27. See Annual Assessment, *supra* note 1.

28. Compare D. MONT. R. 200-5(a) with U.S. Dist. Court for the Dist. of Mont., Order in the Matter of Local Rules of Civil Procedure 2-3 (Jan. 25, 1994).

29. Compare Order, *supra* note 29 with FED. R. CIV. P. 26(a). See also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993). See generally Carl Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357 (1994); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 296-301 (1989).

30. See Annual Assessment, *supra* note 1.

## III. A GLIMPSE INTO THE FUTURE

A. *National*

Evaluation of civil justice reform in the EIDCs indicates that numerous federal districts have applied a number of procedures, principally involving case management, ADR, and discovery, that decrease cost or delay. More conclusive determinations must await the results of experimentation in the courts that are not EIDCs, many of which only promulgated civil justice plans in late 1993. Most of these districts, however, will have compiled annual assessments by the time that the Judicial Conference must report to Congress on experimentation in the pilot and demonstration districts. These considerations mean that Congress should be able to make informed judgments about the effectiveness of civil justice reform by 1996 and certainly by 1997 when Congress must decide whether the CJRA should be allowed to sunset.<sup>31</sup>

B. *Montana*

The Montana Federal District Court's recent issuance of its first annual assessment under the 1990 legislation enhances understanding of the reform's effectiveness. Most of the procedures adopted in the district seem to be functioning efficaciously, and some are apparently saving time. Automatic disclosure is currently the most controversial procedure, and the court seems prepared to seek bar input on how to improve the mechanism.

## IV. CONCLUSION

Much recent effort nationally and in the Montana Federal District Court has been devoted to evaluating the effectiveness of civil justice reform. Those endeavors should continue, be expanded, and be refined in an attempt to learn as much as possible about reducing expense and delay from the unprecedented nationwide experimentation that the CJRA fosters. Rigorous assessment should promote the discovery and application of procedures which most effectively reduce cost and delay in federal civil litigation.

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31. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(2).