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From: David Peck <skipwdx@yahoo.com>
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To: RulesComment
Subject: Superior Court Civil Rule 4(b)

Please accept this as my comment on the proposal to amend Superior Court Civil Rule 4(b). The proposal now provides:

(b) To initiate a civil action, including an action authorized by law to be initiated by writ or petition, the plaintiff files with the court: (i) the Complaint; (ii) an Appearance (indicating the plaintiff's representative by name, address, email address, telephone number, and New Hampshire Bar Association identification number); and (iii) **[either]** the filing fee **[or a motion to waive the filing fee]**. See Rule 201. For purposes of complying with the statute of limitations **[or analogous time limit]**, an action shall be deemed commenced on the date the Complaint is filed.

This proposal was originally made, along with a proposal to amend Rule 1(f), as a result of an instance in which a party attempted to timely file a "complaint" in the superior court, but failed to include the filing fee. The complaint was returned by the clerk pursuant to Rule 1(f), and by the time the party corrected the deficiencies and refiled the complaint, it was untimely. The original proposal, I believe, contained language that would have required such cases to be treated as having been timely filed, consistent, I also believe, with the practice in the Supreme Court. My understanding is that this language was removed because, at least in part, of a fear that it would be overly burdensome to administer, as it might require, for example, that a docket be opened whenever a complaint was not accepted for filing so that a court record of the date the complaint was received would be available should it be refiled.

My suggestion today is my attempt to reconcile the competing interests. I believe that justice will be better served if there is a way in which a plaintiff whose complaint is not accepted for filing due to a technical defect, and who thereby is unable to file within the limitations period, can obtain relief. I also understand the need to avoid creating additional administrative burdens on the court staff. Accordingly, I suggest the Rule 4(b) be amended as follows:

(b)**[(i)]** To initiate a civil action, including an action authorized by law to be initiated by writ or petition, the plaintiff files with the court: (i) the Complaint; (ii) an Appearance (indicating the plaintiff's representative by name, address, email address, telephone number, and New Hampshire Bar Association identification number); and (iii) **[either]** the filing fee **[or a motion to waive the filing fee]**. See Rule 201.

[(2)] For purposes of complying with the statute of limitations **[or analogous time limit]**, an action shall be deemed commenced on the date the Complaint is filed. **[Provided, however, that if a Complaint is received by the court within the statute of limitations or other applicable time limit but is not accepted for filing in accordance with Rule 1(f), and thereafter is filed after the expiration of the statute of limitations or other applicable time limit, the court may, as justice may require, treat the Complaint as having been filed prior to the expiration of the statute of limitations or other applicable time limit, but only if the Plaintiff makes a showing that: (i) the Plaintiff acted promptly to address the reasons why the Complaint was not originally accepted by the clerk; and (ii) the Complaint was originally received by the court within the statute of limitations or other applicable time limit.]**

This proposal places the burden on the plaintiff to prove that the deficiencies that caused the Complaint to be rejected were promptly addressed, and that it was originally received within the limitations period. The latter should not be difficult to prove, as my understanding is that when the clerk returns a complaint to a party under Rule 1(f), the complaint will have been date-stamped by the clerk's office showing when it was received. (The date of the Rule 1(f) notice rejecting the complaint may also suffice in many cases to demonstrate that the complaint was timely received.) Thus, the clerk's office need not open any docket or create any new records when complaints are not accepted for filing — the clerk's office can simply continue what I assume is the current practice of date-stamping

documents as they are received, and returning the date-stamped document along with the letter of explanation required by Rule 1(f) if the complaint is not filed. Furthermore, the rule provides discretion to the court — if, for example, the original complaint was returned because it was a blank piece of paper, the court might conclude that the deficiencies were so great, or that it is clear that they were intentional, such that justice would not require that a later-filed complaint be allowed to "relate back". But in what I expect would be the more typical case, a party whose complaint is returned for a technical or inadvertent deficiency will have the ability under my proposed amendment to promptly fix the deficiencies and have the merits of his or her complaint considered. Unless I am mistaken as to how things are done in the superior court, I do not see that my proposal creates any additional work for the clerk's office.

Our system of pleading and procedure is the legacy of Chief Justice Doe, "about whom Professor Reid observed, 'It is doubtful if there was ever a presiding judge in American history who demonstrated less sympathy with legal technicalities and niceties than Doe.'" In re Proposed New Hampshire Rules of Civil Procedure, 139 N.H. 512, 515 (1995). Indeed, our supreme court has stated that "[i]t still is practically impossible to lose an action because of a "procedural technicality." Id. at 516. My suggested amendment is intended to be in keeping with that spirit. A plaintiff with a meritorious case whose complaint is rejected due to a technical deficiency and who **as a** result is unable to file within the applicable time limit (which can be as short as 30 days or fewer) would lament that today still, it does remain possible to lose an action because of a procedural technicality. I hope the committee will consider my proposal, or itself craft a better alternative, to prevent such a plaintiff from being denied the opportunity for the merits of his or her case to be heard in the future.