

To: N.H. Supreme Court Advisory Committee on Rules
From: David Peck
Re: Suggestions for Amendments to Court Rules (Supplement)
Date: June 26, 2020

This memo supplements my memorandum dated June 14, 2020, which addresses, among other things, amending Superior Court Rule 41. In that memorandum, I did not include the text of existing Rule 41 using strikethrough and bolding to indicate suggested changes to the rule. See Sup. Ct. R. 51(c)(1)(A). Here is suggested language for an amendment to Superior Court Rule 41 (new material is in **[bold and brackets]** and deletions are in ~~strikethrough~~):

Rule 41. Dismissal of Actions

~~All cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked "dismissed," and notice thereof sent to the parties or representatives who have appeared in the action.~~

[(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Superior Court Rule 16(k) and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, but not as to fewer than all of the plaintiffs or defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) On Court's Own Motion. The court, on its own motion, shall dismiss an action for want of prosecution at any time more than three years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance; notice of the dismissal shall be sent to the parties or their representatives who have appeared in the action.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for 3 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Effect. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.]