To: N.H. Supreme Court Advisory Committee on Rules
From: David Peck
Re: Suggestions for Amendments to Court Rules
Date: June 14, 2020

Pursuant to Supreme Court Rule 51, I respectfully submit this memorandum with the following suggestions for amendments to the court rules.

I. Superior Court Rule 41

Superior Court Rule 41 governs dismissal of actions, and states:

> 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.

Unlike Federal Rule of Civil Procedure 41 and several other state court rules, e.g., Me. Rule Civ. P. 41, Superior Court Rule 41 does not address the effect of a voluntary or involuntary dismissal of an action, claim, or party. Recently, the New Hampshire Supreme Court decided an appeal that turned on the question of whether the dismissal of a case was with or without prejudice, where the order of dismissal was silent on the issue. Riverbend Condo Assoc. v. Groundhog Landscaping & Prop. Maintenance, ___ N.H. ___ (decided June 5, 2020). The supreme court's analysis revealed that this issue has arisen before the court not infrequently. The court reminded trial courts "that appeals such as this one will be avoided if, when dismissing a case, courts specify whether the dismissal is issued with or without prejudice," and cited a 1993 case in which the court had issued a similar reminder. Foster v. Bedell, 136 N.H. 728 (1993) (noting that "an express indication in the first suit that it was dismissed with prejudice would have prevented much of the confusion in this case"). The court concluded that by specifying the effect of a dismissal, trial courts would "eliminate uncertainty as to the issue of prejudice and the need for further litigation."

In addition, as part of its analysis, the Supreme Court noted and seemingly approved the reliance by the trial court, in determining whether the prior dismissal order should be construed as being with or without prejudice, upon Federal Rule of Civil Procedure 41. The opinion notes that there is no New Hampshire court rule similar to Federal Rule 41, and further notes that the Supreme Court in the past had "consulted" 1Federal Rule 41 in giving an advisory opinion on the effect of a dismissal. See Opinion of the Justices, 131 N.H. 573, 580-81 (1989).

Federal Rule 41 provides default rules that govern the effect of voluntary and involuntary dismissals in those cases in which the court does not specify the effect of the dismissal in the dismissal order. Thus, adoption of a similar rule in New Hampshire would achieve the Supreme Court's stated goal of eliminating uncertainty as to the issue of prejudice and the need for further litigation without the need to rely upon trial judges always specifying the effect of every order of dismissal they issue. It would also provide better notice to litigants and counsel as to the effect of such orders.

The language of the Federal Rule follows:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

One state that has based its rule upon the Federal rule is Maine. Maine Rule of Civil Procedure 41 states:

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e) 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, after notice to the parties, and in the absence of a showing of good cause to the contrary, shall dismiss an action for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance.

(2) On Motion of Defendant. For failure of the plaintiff to prosecute for 2 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 under Rule 19, 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.

My suggestion is to model a new Superior Court Rule 41 upon Maine's rule, substituting "Rule 16(k)" for "Rule 23(e)" in the first paragraph (in Maine, Rule 23(e) addresses dismissal of class actions; the comparable rule in NH is Rule 16(k)), and reworking subsection (b)(1) to reflect the current language of Superior Court Rule 41 (that is, the current rule that provides for dismissal by the court after three years of inaction). If the Committee should determine that such a rule for the superior court ought to be recommended, it may wish to consider whether to recommend a similar rule or rules for the circuit court. See District Division Rule 1.27 (dismissal of cases pending 3 years without action); Probate Division Rule 172 (dismissal of cases pending 2 years without action); Family Division Rule 1.32 (dismissal of cases pending 2 years without action).

II. Technical Amendments

Recently I reviewed a number of court rules while assisting in the preparation of an upcoming volume of the state court rules. This review led me to make the following suggestions for technical amendments.

A. District Division Rule 1.8-A is entitled "Continuances and postponements," and the Rule is listed in the Table of C ontents as "Rule 1.8-A. Continuances and postponements." See Supreme Court Order dated October 29, 2019 (Appendix H). Most of the contents of Rule 1.8-A relate to continuances, but paragraph H of the rule provides:

> All grounds for recusal that are known or should reasonably be known prior to trial or hearing shall be incorporated in a written motion for recusal and filed promptly with the Court. Grounds for recusal that first become apparent at the time of or during the hearing shall be immediately brought to the attention of the judge. Failure to raise a ground for recusal shall constitute a waiver as specified herein of the right to request recusal on such ground. If a record of the proceedings is not available, the trial judge shall make a record of the request, the Court's findings, and its order. The Court's ruling on the motion shall issue promptly. If the motion is denied, the Court's ruling shall be supported by findings of fact with respect to the allegations contained in the motion.

Interestingly, the Judicial Branch website, contrary to the October 29 order, lists Rule 1.8-A in its Table of Contents as "Continuances and postponements and motions for recusal." My suggestion is to amend the title of Rule 1.8-A to include such a reference to motions for recusal, and to amend the Table of Contents to the District Division Rules to reflect that change. This will allow litigants who are looking for any rule regarding motions to recuse to more easily find the correct rule by looking at the Table of Contents. While the Table of Contents on our website contains this information now, it is unlikely to be included in published rule books, which may simply print the text as set forth in the actual rule and court order.

B. District Division Rule 3.11 (applicable to cases filed after electronic filing) is entitled "Motions-General." However, the Table of Contents to the District Division Rules, as adopted in the court's October 29, 2019 order, lists Rule 3.11 as simply "Motions." I suggest amending the Table of Contents to say "Rule 3.11. Motions-General"

C. Supplemental Rules of Circuit Court for Electronic Filing 11 and 12 each contain a Comment regarding the filing of motions to gain access to sealed court records. The Comment cites "Superior Court Rule (Civil) 203" and "Superior Court Rule (Criminal) 169-A". Those rules have been repealed. I believe the citations should now be to Superior Court Rule 13B(e) and New Hampshire Rule of Criminal Procedure 50(e).

D. District Division Rules 4.1 to 4.13, which govern small claims actions, were adopted on a temporary basis by court order dated June 2, 2014. At the time, they were pilot rules to accompany the electronic filing pilot rules for small claims actions, and they existed alongside the small claims rules that applied prior to the adoption of electronic filing. By court order dated December 29, 2014, the temporary pilot rules were amended, among other things, to remove the reference to "pilot rules." In addition, the small claims rules that applied prior to the adoption of electronic filing were repealed. But the order did not adopt the temporary rules on a permanent basis — it simply amended them. Thus, Rules 4.1 to 4.13 continue to be described in the LexisNexis rule book, for example, as temporary rules. I suggest adopting these rules on a permanent basis.

III. Obsolete Rules

A. Superior Court Administrative Rules 7-1 to 7-5 address marital and divorce proceedings in the superior court. RSA 490-D:2 appears to me to provide exclusive jurisdiction over divorce and marital proceedings in the family division (now circuit court). If that is correct, it may be that Rules 7-1 to 7-5 are obsolete and could be repealed.

B. Superior Court Administrative Rule 9-1 deals with the procedure to be followed in scheduling trials when motions are granted under Rule 13. There currently is no Superior Court Administrative Rule 13. Prior to 2003, chapter 13 of the Superior Court Administrative Rules was entitled "Regular and Special Master Program," and consisted of Rules 13.1 to 13.14, but the chapter was repealed in 2003. If there remains a need for Rule 9-1, then the reference to Rule 13 in the title should be amended to reflect the current applicable rule. (I suspect, however, that Rule 9-1 may be obsolete and can be repealed.)

C. Superior Court Administrative Rule 6-3 provides that "a petition in equity is a proper procedure fo instituting a proceeding in the Superior Court under the Uniform Act on Paternity." The Uniform Act itself states that paternity shall be established upon the filing of "[a] petition to the superior court …." RSA 168-A:2, I.

The Superior Court Rules now provide that there shall be one form of action, known as a "civil action," and that includes an action authorized by law to be initiated by petition. See Superior Court Rule 4. A civil action is commenced by filing a complaint, not by filing a petition. Superior Court Rule 4(b). Thus, it seems to me confusing at best to state that a petition in equity is a proper procedure to commence a proceeding under the Uniform Act on Paternity — the proper procedure is stated in Superior Court Rule 4. Accordingly, I suggest repealing Administrative Rule 6-3.

IV. Conclusion

Pursuant to Supreme Court Rule 51(c)(1)(B)(iii), I do not believe that expedited consideration of these suggested amendments is necessary. Pursuant to Rule 51(c)(1)(B)(iv), I do not request to be heard by the Committee on my suggestions.

Pursuant to Rule 51(c)(1)(B)(i) my work address, phone number, and email address are:

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

603 271-2646

DPeck@courts.state.nh.us