Constraining Minnesota's Hip-Pocket Regime: Too Much or Not Enough? (or Both?) (or Neither?)

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CONSTRAINING MINNESOTA’S HIP-POCKET REGIME:
TOO MUCH OR NOT ENOUGH?
(OR BOTH?) (OR NEITHER?)

Joe Muchlinski†

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I. INTRODUCTION

A distinctive feature of Minnesota civil procedure is the mode of commencing an action. In the vast majority of U.S. states, a civil action is commenced by filing documents with a court. This is not the case in Minnesota. Per a largely foregone legal tradition dating back to the early days of U.S. civil procedure, a party in Minnesota commences an action by serving a summons upon the defendant(s). No filing need be made. This practice is affectionately termed "hip-pocket service," and it comes with its share of benefits and drawbacks.

In 2009, the Minnesota Supreme Court undertook reform of the civil justice system with an eye toward efficiency and cost-control. This occurred in the broader context of a national movement addressing widely acknowledged deficiencies in state court systems. The Minnesota Supreme Court convened a Civil Justice Reform Task Force, which proposed (among other things) a number of amendments to the Minnesota Rules of Civil Procedure.

Among the amendments approved by the court, and ultimately put into effect, is one conditioning Minnesota's distinctive hip-pocket system. Prior to this amendment, there was no requirement that a civil action be filed with a court within any set period of time. Parties could bring suit, conduct formal discovery for years, and eventually settle without ever actually involving the court system. Under the amended Minnesota Rule of Civil Procedure 5.04, however, a party must file an action within one year of commencing it. Failure to file within one year triggers automatic involuntary dismissal of the action, unless the involved parties sign a stipulation extending the deadline.

This consequence for failing to file is undeniably harsh, especially in light of the fact that the filing requirement applied to

1. See infra Part II.
2. See infra Parts II–III.
3. See infra Parts II–III.
4. See infra Part IV.
5. See infra Part VIII.A.
6. See infra Part IV.
7. See infra Part V.
8. See infra Part II.
9. See infra Part V.
10. See infra Part V.
actions pending as of the date the amendment took effect. Attorneys not apprised of the new requirement could easily find themselves with a stale case and an unhappy client. The specter of automatic involuntary dismissal raises a number of concerns, which this Note addresses in depth. What about the usual substantive prerequisites for involuntary dismissal? What is the procedure for appealing such a dismissal? Can a party seek relief under rule 60.02 or 86.01(b) of the Minnesota Rules of Civil Procedure? Finally, is it constitutionally questionable to strip away a party’s cause of action so hastily and irrevocably?

Setting aside the issue of automatic involuntary dismissal, this Note moves to a discussion of the national civil justice reform movement at large. It then focuses on New York for a case study on what it means to transition from commencement-by-service to commencement-by-filing. This Note concludes by returning to Minnesota’s new one-year filing requirement to evaluate its propriety going forward.

II. COMMENCEMENT OF THE ACTION IN MINNESOTA

In Minnesota, a civil action is commenced in one of three ways: (a) by serving a summons directly upon the defendant, (b) by serving a summons through the mail and receiving an acknowledgement from the defendant, or (c) by delivering a summons to the sheriff in the county where each defendant resides (provided that the sheriff then serves the summons within sixty days).

11. See infra Part V.
12. See infra Part VII.A.
13. See infra Part VII.
14. See infra Part VIII.A.
15. See infra Part VIII.B.
16. See infra Part VIII.C.
17. MINN. R. CIV. P. 3.01. If a plaintiff elects to serve process by mail, the date of commencement against a defendant is the date at which that defendant acknowledges service. Id. “If no acknowledgement is signed and returned, the action is not commenced until service is effected by some other authorized means.” Id. advisory committee’s note (1985 amendment). Counterintuitively, if a plaintiff delivers process to a sheriff, the action is commenced upon delivery to the sheriff (not upon delivery to the defendant). Prior to 1985, Rule 3.01 vaguely provided that commencement could be accomplished by delivery to any “proper official.” The 1985 amendment specified that it had to be a sheriff, thus dispelling any confusion as to what constituted a “proper official.”

DAVID F. HERR & ROGER
Remarkably, none of these alternatives involves actually filing suit with the court. That is to say, a lawsuit becomes real without regard to whether the State has any notice of its existence. The applicable statute of limitations is tolled, and the defendant must serve an answer within twenty days.

This is anomalous. The Federal Rules of Civil Procedure provide that an action is commenced by, and only by, filing a complaint with the court. Only then may the plaintiff serve process. The summons will bear the court's seal and be signed by a court clerk.

The vast majority of states mirror this procedure. In forty-one states, filing necessarily precedes service and is the only way to commence an action. Six states permit service prior to filing as long as the suit is filed shortly thereafter. In Colorado, an action may be commenced by filing or by serving a summons and

S. Haydock, Minnesota Practice Series: Civil Rules Annotated § 3.3 (5th ed. 2009).

18. 1 Herr & Haydock, supra note 17 ("[T]he summons can be served, and returned to the plaintiff, and the court never advised of the action. In fact, many civil actions in Minnesota are resolved without filing any papers with the court.").

19. See, e.g., Enervations, Inc. v. Minn. Mining & Mfg. Co., 380 F.3d 1066, 1068 (8th Cir. 2004) ("[T]his action was commenced for statute of limitations purposes on March 17, 2003, when Enervations served the complaint on 3M.").

20. Minn. R. Civ. P. 12.01. But see 1 Herr & Haydock, supra note 17, § 12.3 ("Rule 12 permits a party to serve certain motions in the place of an answer or other responsive pleading. If a party serves a proper Rule 12 motion within the 20 day time period permitted for a responsive pleading, the time for filing a responsive pleading is automatically extended until the hearing and decision on the Rule 12 motion.").

21. Fed. R. Civ. P. 3. The rule is concise: "A civil action is commenced by filing a complaint with the court." Id.

22. Id. R. 4(b). Per subsection (m) of this same rule, the plaintiff has 120 days after filing a complaint to serve the relevant defendants. Id. R. 4(m).

23. Id. R. 4(a)(1) ("If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant."); Id. R. 4(b).


25. These states are Colorado, Connecticut, New Hampshire, Utah, Vermont, and Washington. The period after service within which the suit must be filed ranges from ten to ninety days. Glover, supra note 24, at 1119.
complaint, as long as the complaint is filed within fourteen days of service.\textsuperscript{26}

Minnesota is an outlier. In three states and three states only—Minnesota, North Dakota, and South Dakota—it is possible to commence an action, conduct lengthy discovery, and reach a settlement without ever filing.\textsuperscript{27} The parties thus circumvent court filing fees altogether and consume precisely zero judicial resources.\textsuperscript{28}

The act of serving a summons and complaint without filing is referred to as “hip-pocket service” or “pocket service.”\textsuperscript{29} District Court Judge Joan N. Ericksen explains the term: “This is colloquially referred to as ‘pocket service’ because a plaintiff may serve one or more defendants and keep the complaint ‘in his pocket’ rather than making a public filing.”\textsuperscript{30}

III. HISTORY OF THE HIP-POCKET QUIRK

Commencement-by-service is a practice traceable back into Minnesota’s days as a territory. Chapter 70, section 44 of the Minnesota Territorial Statutes of 1851 provided, “Civil actions in the several district courts of this territory, must be commenced by the service of a summons . . . .”\textsuperscript{31} In fact, many of the finer

\textsuperscript{26}. COLO. R. CIV. P. 3(a). Subject to the court’s discretion and to waiver by the defendant, failure to file within fourteen days renders service “ineffective and void . . . .” \textit{Id.}

\textsuperscript{27}. Glover, \textit{supra} note 24, at 1120 (“Minnesota and the Dakotas are an extreme minority. In nearly every other state, a defendant has a legitimate expectation that a lawsuit not filed is not real.”); \textit{see} N.D. R. CIV. P. 3; \textit{see also} S.D. \textit{Codified Laws} § 15-2-30 (West, Westlaw through the 2014 Reg. Sess., 2014 general election results, and Supreme Court Rule 14-10).

\textsuperscript{28}. As of October 31, 2014, it cost $324 to file a civil action in Hennepin County and $327 in Ramsey County. In both counties it is an additional $102 to demand a jury. \textit{Fees, Minn. Jud. Branch}, https://www.courts.state.mn.us/fees (last visited Apr. 23, 2015).


\textsuperscript{30}. \textit{Harris}, 2012 WL 1948775, at *1. In this case, the plaintiff had commenced an action against certain large banks. \textit{Id}. The case was filed and the plaintiff subsequently served an amended complaint on the defendants. \textit{Id}. The proposed amendment was disregarded because the plaintiff failed to file her amended complaint within a reasonable time after service. \textit{Id}. The court held that hip-pocket methods are unavailable as to an \textit{amended} complaint when the case already has a docket number. \textit{Id.}

\textsuperscript{31}. MINN. TERRITORIAL STAT. ch. 70, § 44 (1851), available at https://www
procedural details remain essentially unchanged. For example, service could be accomplished through the mail or by delivering process to the county sheriff.\footnote{2}

This practice is further traceable back to the New York Field Code of 1848—the major forerunner of the Federal Rules of Civil Procedure and the successor to the “arcane and technical common law pleading” which had its roots in England.\footnote{3} Following its codification in New York, the Field Code was adopted by approximately thirty other states,\footnote{4} including Minnesota.\footnote{5} Under the Field Code, commencement of the action was accomplished by service of a summons—no filing was necessary.\footnote{6}

Although declining to adopt this practice, the Federal Advisory Committee on Rules for Civil Procedure discussed its benefits in the Committee’s April 1937 Report to the United States Supreme Court:

Several members of the Committee prefer the system in force in New York, Minnesota, South Dakota, Washington, and a number of other code states. Under that system an action is commenced by the service of summons . . . . No papers need be filed with the court . . . . The advantages of that system are that it avoids early publicity, avoids the

\footnote{1}revisor.leg.state.mn.us/statutes/?id=70&year=1851.\footnote{2}Id. ch. 70, §§ 48, 52.\footnote{3}William Nelson, Remarks: The History of New York Civil Procedure, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 659, 661 (2013) (“It was [the] separation of substance from procedure that made it possible for David Dudley Field to propose his mid-nineteenth-century procedural reforms that replaced arcane and technical common law pleading—pleading that no one really wanted—with much simpler pleading of facts. Field was merely codifying a powerful idea that most likely had already transformed legal practice.”).\footnote{4}Id. at 659 (remarking that “the Field Code had much greater national influence than the [New York Civil Practice Law and Rules] has had”).\footnote{5}ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, at 5 (1937), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf (referring to Minnesota as a “code state”).\footnote{6}One incarnation of this rule is section 582 of New York’s 1850 Code of Civil Procedure: “An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest, with him.” N.Y. CODE CIV. P. § 582 (1850), available at https://archive.org/stream/codecivilproced00fielgoog#page/n355/mode/2up. Unfortunately, the text of the original 1848 Field Code is vexatiously difficult to track down.
accumulations in the clerk’s office of a vast number of actions which are eventually settled or abandoned, lessens the fees paid by litigants in actions which do not reach the stage where court action becomes necessary, and . . . reduces the necessity of travelling great distances to file papers . . . . Probably the novelty of such a practice among many members of the bar is, at the present time, the only serious obstacle to its adoption. 37

Despite these purported benefits, the Federal Rules of Civil Procedure rejected hip-pocket service in favor of commencement-by-filing. 38 Rule 3 is succinct and has remained substantively unchanged since its adoption: “A civil action is commenced by filing a complaint with the court.” 39

The Federal Rules became effective on September 16, 1938. 40 Since this date, twenty to thirty states have adopted the Federal Rules or a slight variation thereof. 41 Consistent with the assimilation of the Federal Rules, the vast majority of states abandoned hip-pocket service and adopted commencement-by-filing. As stated earlier, only three states retain this vestige of the past—Minnesota and the Dakotas. 42

Incidentally, Minnesota’s Rules of Procedure for the District Courts are otherwise “a replica of the FRCP [Federal Rules of Civil Procedure].” 43 The hip-pocket quirk is an important exception to Minnesota’s assimilation of the Federal Rules. In 1986, the Washington Law Review dubbed it “one of the nation’s most progressive systems of code pleading.” 44

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37. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, supra note 35, at 5–6.
The reader will note that this text evidences an era when hip-pocket service was alive in more than three states. See id. at 5.
38. FED. R. CIV. P. 3.
39. Id.
40. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2014).
41. Nelson, supra note 33, at 660. This considerable range is due to the malleability of the term “adopted.” Id.
42. Glover, supra note 24, at 1119.
44. Id.
IV. HISTORY OF THE 2013 AMENDMENTS

In fall 2009, the Minnesota Supreme Court established a Civil Justice Forum. Its task was to propose changes that would facilitate "more cost effective and efficient civil case processing." The Forum produced a list of initial proposals and recommended that a task force be convened to more thoroughly investigate the matter.

Chief Justice Lorie Gildea established such a body in November 2010. The Minnesota Supreme Court Civil Justice Reform Task Force consisted of members drawn from the bar, the business world, the public sector, academia, and so on. Its official charge was to consider both the Forum's report and initiatives undertaken in other jurisdictions, and to develop recommendations of its own aimed at cost effectiveness and efficiency.

The objectives of cost effectiveness and efficiency arose out of concern that too many cases were being resolved out of court. The Task Force worried that delay and expense had rendered the civil justice system a less-than-viable forum for resolving disputes. Cases would too often settle, and settlements would be based on 

46. Id.
47. Id.
49. Louise Dovre Bjorkman & David F. Herr, Reducing Cost & Delay: Minnesota Courts Revise Civil Case Handling, BENCH & B. MINN., May/June 2013, at 26, 27 ("In addition to the diversity of practice settings, Task Force members hailed from all corners of Minnesota and represented a wide variety of constituents, including MSBA, Minnesota Association for Justice, Minnesota Defense Lawyers Association, American Board of Trial Counsel, Legal Aid, and city and county attorneys."). A complete list of appointed members may be found at Order Establishing Civil Justice Reform Task Force, supra note 48.
52. Id. ("[C]ases settle not based on their merits but due to the cost of the litigation. Discovery, in particular, has become a war of attrition.").
the resources and patience of the parties rather than the merits. As stated in the Task Force’s final report to the Minnesota Supreme Court, “Our courts must remain relevant to Minnesota litigants by providing a forum for just, prompt, and inexpensive resolution of civil disputes.”

The Task Force filed its final report with the Office of Appellate Courts on December 27, 2011. The report details a slew of proposed actions, ranging from amendments to Minnesota’s Rules of Civil Procedure, to the institution of an expedited case-processing program, and to the development of an educational program designed for judges and litigants alike.

Informed by these recommendations, the Minnesota Supreme Court issued an initial order adopting amendments to the Rules of Civil Procedure and General Rules of Practice on February 4, 2013. These amendments took their final form in another court order, dated May 8, 2013. This order provided that the amendments would be effective as of July 1, 2013, and that (with

53. **RECOMMENDATIONS**, *supra* note 45, at 11 (“High litigation costs cause parties to forgo claims that do not exceed the litigation expenses. The most commonly cited monetary threshold for pursuing a case is $100,000. Some task force members feel that the local threshold may be closer to $200,000. The surveys and studies also present evidence of agreement that litigation costs also drive cases to settle for reasons unrelated to the substantive merits of the claims or defenses.”).

54. *Id.* at 4.

55. *Id.* at 1.

56. *Id.* at 17–35. Arguably the most momentous proposed change to Minnesota’s Rules of Civil Procedure was the adoption of an all-encompassing “proportionality consideration requirement” for discovery. *Id.* at 17. This change was ultimately implemented by way of an amendment to Minnesota Rule of Civil Procedure 1, and will undoubtedly provide great fodder for future law review notes. See **MINN. R. CIV. P.** 1.


conditions) they would apply to pending cases as well as cases commenced after this date. 59

V. THE ONE-YEAR FILING REQUIREMENT

With these amendments, a small but consequential paragraph was added to Minnesota Rule of Civil Procedure 5.04:

Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period. This paragraph does not apply to family cases governed by rules 301 to 378 of the General Rules of Practice for the District Courts. 60

Both the amended and pre-amendment versions of Rule 5.04 provide that “All documents after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service . . . [listing exceptions].” 61 However, there was nothing in the pre-amendment version of Rule 5.04 explicitly requiring the action to be filed within any period of time.

In fact, Minnesota Rule of Civil Procedure 41.02(a) was the only rule addressing this, and it was in the context of a failure to prosecute: “The court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute or to comply with these

59. Id. at 3.

These amendments apply to all actions or proceedings pending on or commenced after the effective date provided that: (a) no action shall be involuntarily dismissed pursuant to Minn. R. Civ. P. 5.04 until one year after the effective date; and (b) amendments to Minn. R. Civ. P. 26 apply only to actions commenced on or after the effective date provided that the court may in any case direct the parties to comply with all or part of the rule as part of a pretrial order.

60. MINN. R. CIV. P. 5.04; Final Order, supra note 58, at 14.

61. MINN. R. CIV. P. 5.04 (emphasis added). Exceptions include “disclosures under Rule 26, expert disclosures and reports, depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto . . . .” Id. These documents need not be filed unless the court orders such, or a party wishes to use the document in a proceeding. Id.

62. See Final Order, supra note 58, at 14 (underlining the added language).
rules or any order of the court.\textsuperscript{63} Short of an outright failure to prosecute, there was no rule imposing a time limit for filing after commencement.

Thus, the amendment introduced something entirely new: irrespective of its merits, a case would be \textit{automatically deemed dismissed with prejudice} if not filed within one year (granted, the parties can stipulate otherwise). Although this amendment applied to cases pending as of the effective date (July 1, 2013), the Minnesota Supreme Court provided that no case would be involuntarily dismissed under the new rule until a full year after this date.\textsuperscript{64} Therefore, cases pending as of July 1, 2013, would be involuntarily dismissed on July 1, 2014 if not yet filed.

\textbf{VI. AN ANALOGY: COMPULSORY COUNTERCLAIMS}

Involuntary dismissal by rule may seem unprecedented and drastic, but it bears at least a passing resemblance to the sort of estoppel resulting from failure to assert a proper counterclaim pursuant to Minnesota Rule of Civil Procedure 13.01.\textsuperscript{65} If, during the course of litigation, a party fails to bring a claim that she or he has against any opposing party, and the claim arises out of the same transaction that is the subject matter of the existing litigation, this party is estopped from bringing this claim in a later suit.\textsuperscript{66} Notably—because the language of the rule is “transaction,” and not “transaction or occurrence”—this does not apply to tort claims.\textsuperscript{67}

Granted, the new Rule 5.04 does not operate in terms of estoppel, but claim preclusion under Rule 13.01 may be one of the

\begin{itemize}
\item \textsuperscript{63} MINN. R. CIV. P. 41.02(a).
\item \textsuperscript{64} See Final Order, \textit{supra} note 58, at 3.
\item \textsuperscript{65} MINN. R. CIV. P. 13.01. The author would like to thank Mr. Herr for sharing this analogy. Interview with David F. Herr, Of Counsel, Maslon Edelman Borman & Brand, LLP, Member, Minn. Supreme Court Civil Justice Reform Task Force, in St. Paul, Minn. (Oct. 17, 2014) (audio recording and partial transcript on file with author and available by request).
\item \textsuperscript{66} House v. Hanson, 245 Minn. 466, 470, 72 N.W.2d 874, 877 (1955) (“We are . . . confronted with a bar created by rule, Rule 13.01, which logically is in the nature of an estoppel arising from the culpable conduct of a litigant in failing to assert a proper counterclaim.”).
\item \textsuperscript{67} \textit{Id.} at 472-73, 72 N.W.2d at 878 (“[T]he word ‘transaction’ as used in Rule 13.01 does not embrace claims in tort and that therefore the failure of a defendant to assert as a counterclaim any claim he has against the plaintiff does not estop him from asserting such claim in an independent action against the plaintiff.”).
\end{itemize}
only other mechanisms in Minnesota law by which a litigant’s cause of action is automatically incinerated. As with dismissal under Rule 5.04, no inquiry is made into the merits of the claim. Both Rules 5.04 and 13.01 may have justifications, but the repercussions for failure to conform are harsh. Involuntary dismissal or estoppel in such cases would seem contrary to the ordinary reluctance to deny persons their day in court.

VII. INSTITUTING THE CHANGE: PANIC IN THE OFFICE

A. The Hapless Attorney

It is easy to see how this could get ugly. A veteran Minnesota attorney commences an action in hip-pocket fashion, per usual. He knows the rules like the back of his hand and sees no reason to regularly consult them. For whatever reason—perhaps it has been difficult to schedule depositions, or the defendant has been dragging its feet—a year passes and the plaintiff’s attorney has not thought to file the action. One day, the plaintiff’s attorney receives a letter from the defendant: “Pursuant to the newly-amended Rule 5.04, this action is deemed dismissed with prejudice and we will be closing our file.” Without consideration of the merits, the case is over. The defendant walks away scot-free, and the plaintiff successfully sues her attorney for malpractice.

B. The Purpose of the Court System

This certainly does not seem to be the portrait of justice. After all, the ultimate purpose of courts is not to play procedural games. Minnesota Rule of Civil Procedure 1 provides that procedural rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” The primary goal is justice—procedural strictures are merely the means of arriving at this goal. It is right to be concerned when a procedural rule

68. Indep. Sch. Dist. No. 273 v. Gross, 291 Minn. 158, 165, 190 N.W.2d 651, 656 (1971) (“[W]e must . . . be guided by the principle that rules of civil procedure are designed to effect the settlement of controversies upon their merits rather than to terminate actions by dismissal on technical grounds.”).

69. MINN. R. CIV. P. 1 (emphasis added). “These goals should guide all aspects of judicial administration . . . .” Id. advisory committee comments (1996 amendments).

70. See Love v. Anderson, 240 Minn. 312, 314, 61 N.W.2d 419, 421 (1953)
appears to put another objective above justice, especially when such a rule utterly forecloses the possibility of adjudication on the merits.

C. The Problem with "Deemed Dismissed"

1. Selecting a Means of Enforcement

A rule is toothless if there are no adverse consequences for failure to conform to it. The Civil Justice Reform Task Force contemplated a number of alternative mechanisms to enforce the new one-year filing requirement. The proposed consequences for failure to comply included:

- loss of the ability to file non-dispositive motions, dismissal without prejudice subject to monetary sanctions to reinstate the case, dismissal without prejudice but filing is required to reinstitute the case, a rebuttable presumption of failure to prosecute which requires a motion to dismiss and court action granting the motion, and dismissal with prejudice after one year unless parties within that year sign a stipulation to extend the filing period.

Initially, the subcommittee handling this area of reform recommended outright dismissal with prejudice, but a majority of the task force considered such a penalty to be "too harsh." The final report proposes two alternatives, each of which received a comparable number of votes from the committee at large. Alternative number one, with sixteen out of twenty-one votes, is dismissal with prejudice unless the involved parties sign a stipulation. This is the alternative that was ultimately codified. Alternative number two, with fourteen votes, is dismissal without prejudice but mandatory filing to reinstate.

(“The Rules of Civil Procedure provide that they shall be so construed as to secure the just, speedy, and inexpensive determination of every action. They reflect a well-considered policy to discourage technicalities and form.”).

71. RECOMMENDATIONS, supra note 45, at 23–24.
72. Id. at 23.
73. Id.
74. Id.
75. Id.
76. MINN. R. CIV. P. 5.04.
77. RECOMMENDATIONS, supra note 45, at 23–24.
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Selecting alternative number one would seem inconsistent with the majority’s sentiment that dismissal with prejudice is “too harsh.” To be sure, the chosen penalty is conditioned by a stipulation exception. However, it is unlikely that a defendant would voluntarily re-open a case against herself or himself. A stipulation is a realistic possibility only in situations where two or more parties to the action want to mobilize the justice system. In many practice areas, such as personal injury, this is almost never the case.

David F. Herr, of counsel at Maslon Edelman Borman & Brand and a member of the Civil Justice Reform Task Force, opined that the supreme court chose dismissal with prejudice, rather than dismissal without prejudice, to avoid statute-of-limitations complications that would inevitably arise under the latter option. “The problem with that approach,” he noted, “is that it has a sort of superficial lenity to it. It isn’t really without prejudice. It’s without prejudice in some cases. In other cases, the passage of time means that the case cannot be filed.” In other words, reinstatement by filing a case would only work if the applicable statute of limitations had not already tolled. In cases where the statute of limitations had tolled, the dismissal would in effect be with prejudice.

2. Procedural and Substantive Requirements for Involuntary Dismissal

Minnesota Rule of Civil Procedure 41.02 governs involuntary dismissal. It provides that a court may, upon its own initiative, dismiss an action for failure to prosecute or failure to comply with a procedural rule or court order. It is unclear whether this rule authorizes automatic dismissal—it would be difficult to argue that a

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78. The author would like to thank Mr. Herr for taking the time to meet and for purchasing breakfast. Mr. Herr’s professional profile and contact information may be found at http://www.maslon.com/dherr.
79. Interview with David F. Herr, supra note 65. Specific time limitations for commencement of actions are set out in MINN. STAT. §§ 541.01–36 (2014).
80. Interview with David F. Herr, supra note 65.
81. See MINN. STAT. § 541.01 (“Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues . . . “)(emphasis added)).
82. MINN. R. CIV. P. 41.02.
83. Id. R. 41.02(a); see supra Part V.
court took any initiative when an action is simply deemed dismissed by rule.

In *Firoved v. General Motors Corp.*, the Minnesota Supreme Court stressed that involuntary dismissal is drastic and should not be hastily employed.\(^\text{84}\)

An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances.\(^\text{85}\)

Eleven years later, in *Scherer v. Hanson*, the supreme court laid out two prerequisites for involuntary dismissal on the ground of failure to prosecute: “(1) that the delay prejudiced the defendant, and (2) that the delay was unreasonable and inexcusable.”\(^\text{86}\) Clearly, no such prerequisite is made with dismissal under Rule 5.04—there are no questions of prejudice or the cause of delay.\(^\text{87}\) Rule 5.04 does not inquire into the circumstances surrounding a delay in filing.\(^\text{88}\)

Historically, Minnesota courts have granted involuntary dismissal only upon a fact-specific showing of prejudice and inexcusable delay. In *Dvoracek v. Lovely*, a widow sued her insurer for wrongfully urging her now-deceased husband to cancel his life insurance policies.\(^\text{89}\) The complaint was never filed in district

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\(^{84}\) See 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967).  
\(^{85}\) Id.; see Minn. R. Civ. P. 41.02(c) (“Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01 . . . operates as an adjudication upon the merits.”).  
\(^{86}\) 270 N.W.2d 23, 24 (Minn. 1978). In this case, plaintiff Wilfred Scherer brought an action against defendants Hanson and Richards for damage allegedly caused to his property when defendants conducted a blasting operation nearby. *Id.* Plaintiff did nothing to pursue the action for over seven years. *Id.* Defendants moved to dismiss the case for failure to prosecute, but the court denied this motion on the grounds that: (1) the delay did not significantly prejudice defendants, and (2) plaintiff’s failure to prosecute was due to the neglect of his former attorney. *Id.* at 24-25.  
\(^{87}\) Minn. R. Civ. P. 5.04.  
\(^{88}\) Id.  
\(^{89}\) 366 N.W.2d 391, 392 (Minn. Ct. App. 1985). There were six named defendants—salesman Richard Lovely, the brokerage firm that employed him, and
The plaintiff conducted preliminary discovery but quickly abandoned the pursuit. Seven years passed, during which the primary defendants' attorney stopped practicing law, and several material witnesses fell out of contact. A trial court granted the defendants' motion to dismiss for failure to prosecute, finding that the defendants had "obviously been prejudiced by the seven-year delay," and the plaintiff had offered no reasonable excuse for the delay. The Minnesota Court of Appeals held that the trial court did not abuse its discretion by granting the dismissal.

In Modrow v. J.P. Foodservice, Inc., a former employee served a summons and complaint on her former employer alleging discrimination and sexual harassment. She filed the complaint over four years later. The court issued a scheduling order, and the deadline for discovery passed without the plaintiff requesting any discovery. The court granted the defendant's "motion to dismiss for failure to prosecute" when "eight material witnesses had become unavailable" and the plaintiff had engaged in no significant discovery for a seven-year period. The Minnesota Supreme Court agreed the defendant had been prejudiced, but held dismissal was inappropriate because the delay was not

four insurance companies. Id. Lovely was the alleged wrongdoer, and the remaining defendants were implicated as principals. See id.

90. Id.
91. See id. at 393.
92. Id. ("[T]he trial court was provided a letter from former counsel for Lovely and Consolidated in which he informed counsel for Occidental that he was no longer practicing law, that there was no listing for Lovely in the telephone book, and that he had no idea how to reach him.").
93. Id. The trial court acknowledged that Plaintiff had retained a new attorney two to three years after commencing her action but held that "even a five-year delay in prosecuting this action is inexcusable." Id.
94. Id. at 394. The court stated that "a trial court has the discretion to dismiss a suit where the plaintiff's failure to exercise reasonable diligence is unexcused, and the nature of the claim requires the exercise of such diligence." Id. at 393–94 (quoting DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501, 504 (Minn. 1977)).
95. 656 N.W.2d 389, 392 (Minn. 2003). This "continuous, management-sanctioned discrimination and sexual harassment" purportedly drove the plaintiff at one point to attempt suicide. Id.
96. Id.
97. Id. at 393. There was conflicting testimony as to whether the plaintiff had pursued discovery during this four-year period, but the district court concluded that she had not. See id. at 397.
98. Id. at 393.
unreasonable or inexcusable. The court stated, “A Rule 41.02 dismissal may be improper, even when there has been prejudice, if the delay causing the prejudice was reasonable or excusable.”

Both of these cases centered their inquiries on (1) the prejudice caused to the defendant, and (2) whether the delay was “unreasonable and inexcusable.” In fact, this two-factor inquiry is apparently present in every notable Minnesota case concerning involuntary dismissal. The author has found no pre-2013 Minnesota precedent supporting involuntary dismissal as a matter of law.

3. Right to Appeal

Automatic dismissal furthermore raises questions of appealability. Minnesota Rule of Civil Appellate Procedure 103.03 enumerates what a party can appeal. All ten enumerated items

99. *Id.* at 395–98. The court reasoned that the delay could be attributed, at least in part, to the conduct of the defendant: “While it is appropriate for a district court to consider prefiling delay caused by the nonmoving party, the court should not consider such delay in isolation. Post-filing activity and any actions on the part of the moving party that may have contributed to the delay should also be considered.” *Id.* at 396.

100. *Id.* at 395. In addition to citing the defendant’s role in the delay, the Minnesota Supreme Court rejected the notion that mere failure to pursue discovery could serve as sufficient grounds for dismissal. *Id.* at 396–97.

101. *Id.* at 394 (quoting Scherer v. Hanson, 270 N.W.2d 23, 24 (Minn. 1978)); Dvoracek v. Lovely, 366 N.W.2d 391, 393 (Minn. Ct. App. 1985).

102. See, e.g., Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc., 355 N.W.2d 138, 144 (Minn. 1984); see also Ed H. Anderson Co., v. A.P.I., Inc., 411 N.W.2d 254, 256 (Minn. Ct. App. 1987). However, in the latter case the Minnesota Court of Appeals noted that the movant need not necessarily make a showing of “particular” prejudice: “Although [movant] has not shown it will suffer particular prejudice if [plaintiff] is allowed to proceed, the need to search for concrete and identifiable examples of prejudice diminishes after several years of unnecessary delay.” *Ed H. Anderson Co.*, 411 N.W.2d at 257. This suggests that the marked presence of one factor (here, inexcusable delay) may make up for the relative absence of the other factor (here, prejudice).

103. MINN. R. CIV. APPL. P. 103.03. A 1983 comment provides, “Review of any order not specifically enumerated in Rule 103.03 is discretionary only, and permission to appeal must be sought pursuant to Rule 105.” *Id.* cmt. (1983). An advisory committee comment, supplementing the 1998 amendments, contradictorily states, “[T]he Minnesota Supreme Court has recognized that there are certain instances in which an appeal may be allowed as a matter of right even though the ground for that appeal is not found expressly in the provisions of Rule 103.03.” *Id.* advisory committee cmt. (1998 amendments). Taking the latter...
are “order[s],” “judgment[s],” or “decision[s].” There is no express provision permitting appeal from something that is not an order, judgment, or decision.

Automatic dismissal under Rule 5.04 does not involve any action by the court whatsoever—there is no order, judgment, or decision effectuating the dismissal. It would therefore seem that, at least under a plain-text interpretation of the procedural rules, there is no right to appeal such a dismissal. This is due to the fact that there is nothing concrete to appeal from.

Granted, this is not the weightiest concern—it is unlikely that an appellate court would deny jurisdiction or standing because of this procedural nuance. To ensure appealability, a plaintiff would file the action late, prompting the defendant to move to dismiss under Rule 5.04, and then would seek relief under Minnesota Rule of Civil Procedure, 60.02(a), 60.02(f), or 86.01(b). If the court denied such relief, the denial would come in the form of a clearly appealable judgment.

4. Relief Under Rule 60.02

Minnesota Rule of Civil Procedure 60.02 provides for relief from a judgment in the case of mistake, inadvertence, excusable

comment to supersede the former, there appears to be some wiggle room beyond the strict letter of the rule.

104. Id. R. 103.03(a)–(j).

105. See id. That said, the accompanying advisory committee comments from 1998 and 2000 and the 1985 comment evidence an increasingly permissive conception of appeal by right. The comments respond to Minnesota Supreme Court precedent that tends to favor granting review. See id. advisory committee cmt. (2000 amendments); id. advisory committee cmt. (1998 amendments); id. cmt. (1983).

106. See MINN. R. CIV. P. 5.04. In its final report, the Civil Justice Reform Task Force lists a number of “pros” associated with the sort of dismissal ultimately codified in Rule 5.04—among them, dismissal with prejudice “[d]oes not require a motion so less burden on court and staff.” RECOMMENDATIONS, supra note 45, at 23. This seems to indicate that the task force saw automatic involuntary dismissal as a beneficial, resource-saving mode of “adjudicating” matters.

107. Because the amendment to Rule 5.04 is so new, there is little case law interpreting and applying it. It remains to be seen how the Minnesota Court of Appeals will respond to an appeal of this sort. The above statement is based not on specific case law, but rather on an optimistic view of the court of appeals as a body concerned more with justice than technical rigidity.

108. MINN. R. CIV. P. 60.02(a), (f), 86.01(b); see infra Part VII.C.4–5.
neglect, newly discovered evidence, fraud, and so on. Relevant here are the so-dubbed "Finden factors" for application of the rule in cases of attorney neglect:

[I]t is a cardinal rule that, in keeping with the spirit of Rule 60.02, in furtherance of justice, and pursuant to a liberal policy conducive to the trial of causes on their merits, the court should relieve a defendant from the consequences of his attorney’s neglect in those cases where defendant “(a) is possessed of a reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer, (c) has acted with due diligence after notice of the entry of judgment, and (d) [shows] that no substantial prejudice will result to the other party.”

In Finden, a young man and his father sued the defendant for allegedly assaulting the former. The defendant hired an attorney, who assured him that he would handle the matter. Contrary to this assurance, the attorney never answered the complaint and stopped responding to communications from adverse counsel. The trial court entered a default judgment for the plaintiffs.

109. MINN. R. CIV. P. 60.02. The rule provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or the party’s legal representatives from a final judgment . . . order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(f) Any other reason justifying relief from the operation of the judgment.

Id.

110. Finden v. Klaas, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964) (quoting Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952)).

111. Id. at 268, 128 N.W.2d at 749. At the time of the alleged incident, plaintiff Dennis Finden was nineteen years old. Id. Defendant Klaas maintained that he had acted in self-defense. Id. at 271, 128 N.W.2d at 750.

112. Id. at 268, 128 N.W.2d at 749 (“Defendant relied upon his attorney’s assurance that he was making progress with the investigation and that an answer had been filed.”).

113. Id. Several phone conferences and other correspondences were had between counsel, but the defendant’s attorney inexplicably never filed an answer. Id. More than four months after commencement, the plaintiff notified defense
Following notice of judgment, the defendant filed a "motion to vacate the judgment and for leave to answer." The trial court denied this motion on the ground that the defendant’s neglect was not excusable. On appeal, the Minnesota Supreme Court reversed and remanded. The court found that granting the motion would not have substantially prejudiced the plaintiffs, and that the defendant had acted with "reasonable diligence" upon notice of judgment.

It would seem that many cases pending as of July 1, 2013, and involuntarily dismissed pursuant to Rule 5.04, could meet the Finden factors and thus be resuscitated under Rule 60.02. Writing for Bench and Bar of Minnesota, David F. Herr and the Honorable Louise Bjorkman discuss Rule 60.02 as applied to dismissals under Rule 5.04. Notably, Judge Bjorkman served as chair of the Civil Justice Reform Task Force and Mr. Herr was a member. They surmise that Rule 60.02 may afford relief from dismissals under Rule 5.04, but follow this with a dubious cautionary note: "Counsel should not rely on this life-ring, however—Rule 60 allows for relief counsel in writing of a scheduled default hearing. Id. There was no reply. Id. at 268, 128 N.W.2d at 749–50.

114. Id. at 270, 128 N.W.2d at 750. The court awarded $30,000 to Dennis Finden and an additional $3048.09 to his father. Id. Adjusted for inflation, that amounts to over a quarter of a million dollars. See CPI Inflation Calculator, U.S. BUREAU LAB. STAT., http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Apr. 23, 2015).

115. Finden, 268 Minn. at 270, 128 N.W.2d at 750. Prior to this, the plaintiffs had made two attempts to execute the judgment. Id. The defendant claimed that he had no knowledge of his attorney’s failure to perform until the plaintiffs’ first attempt to levy execution. Id.

116. Id. The holding of inexcusability was supported by the fact that the defendant received written notice of the plaintiffs’ intent to apply for a default judgment. Id. at 269, 128 N.W.2d at 749.

117. Id. at 273, 128 N.W.2d at 751.

118. Id. at 272, 128 N.W.2d at 751 ("In plaintiffs’ opposing affidavit, [no] prejudice was claimed except delay and the added expense incurred by reason of the default proceedings.").

119. Bjorkman & Herr, supra note 49, at 28:

Rule 60 might be available to allow relief from the dismissal if the criteria of Rule 60 could be met. The most likely basis under Rule 60 would be “excusable neglect,” and the parties seeking to proceed with the case would need to establish both neglect (relatively easy to do) and excuse (perhaps not as easily established).

from an ‘order or judgment,’ neither of which would arguably exist for a dismissal by operation of Rule 5.04."\textsuperscript{121}

It is certainly worrying that members of the Task Force themselves do not know how the amended Rule 5.04 interacts with other rules.\textsuperscript{122} It is apparently left to judges to construct Rule 60.02 as they see fit, at least in the context of dismissal under Rule 5.04.\textsuperscript{123} This is similar to the above-discussed question of appealability—how can one appeal a judgment or be relieved of a judgment when there is no judgment?

When asked whether he thought Rule 60.02 will prove a life-ring for blindsided litigants, Mr. Herr responded, “The court of appeals or the supreme court will have to decide this. Personally, I think Rule 60.02 should apply, but counsel will have to show excusable neglect. There may be a change coming to clarify that Rule 60 applies or to amend Rule 60.”\textsuperscript{124}

Thus, practitioners need only wait for this issue to reach the appellate level.\textsuperscript{125} Until then, litigants relying on Rule 60.02 are at the mercy of district court judges.\textsuperscript{126}

5. \textit{Relief Under Rule 86.01(b)}

Alternatively, an attorney finding his or her case involuntarily dismissed under Rule 5.04 may attempt to invoke Minnesota Rule

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\item[121.] Bjorkman & Herr, \textit{supra} note 49, at 28.
\item[122.] While this may be a deliberate showing of deference to district court judges, it would seem to invite inconsistency between courts.
\item[123.] By way of footnote in its final report, the Task Force confusingly states, “Minn. R. Civ. P. 60 allows parties to seek relief from a dismissal order.” \textit{RECOMMENDATIONS, supra} note 45, at 23 n.9. This is apparently intended to suggest that Rule 60 would be available, but, again, in these cases there is no “dismissal order” from which to seek relief.
\item[124.] Interview with David F. Herr, \textit{supra} note 65 (quotation paraphrased).
\item[126.] There is a possibility for considerable variation in light of the fact that Minnesota currently seats 289 district court judges. \textit{District Courts, MINN. JUD. BRANCH,} http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Informational%20Brochures/QF_District_Courts.pdf (last visited Apr. 23, 2015).
\end{itemize}
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of Civil Procedure 86.01(b). This rule specifically addresses application of new amendments to pending actions, and mercifully empowers courts to exercise discretion:

Unless otherwise specified by the court, all amendments will take effect on either January 1 or July 1 in the year of or the year following their adoption. They govern all proceedings in actions brought after they take effect, and also all further proceedings in actions then pending, except as to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible, or would work injustice....

The above-emphasized language evinces a clear intention on the part of the Minnesota Supreme Court that justice not be compromised for the sake of procedure. The major case discussing this rule is Larson v. Independent School District No. 314. This case arose after a 1975 amendment to Minnesota Rule of Civil Procedure 26.02 that substantially expanded the scope of discovery. Considering whether the amended rule should apply to materials created prior to the effective date, the court focused on intent and policy: “In construing a rule the sole object of inquiry is the intent of this court at the time of promulgation.” The court continued:

127. MINN. R. CIV. P. 86.01(b). The relevant provision of this rule is substantively identical to FED. R. CIV. P. 86(a)(2)(B).

128. MINN. R. CIV. P. 86.01(b) (emphasis added).

129. See Preston v. Aetna Life Ins. Co., 174 F.2d 10, 12 (7th Cir. 1949) (“The purpose of the exception in [FRCP] 86 in the original rules was to prevent injustice during the transition period from the old procedure to the then new procedure...”).


131. Id. at 360, 233 N.W.2d at 746. Rule 26.02 was amended in conjunction with Rule 34.01, the latter of which was amended in the same year to eliminate the requirement of a showing of “good cause” to obtain unprivileged documents in discovery. MINN. R. CIV. P. 34.01 advisory committee note (1973). Rule 26.02(b), which previously “wholly immunized written work product of a party’s counsel from discovery,” was modified to permit discovery of such work product upon a showing of “substantial need” and “undue hardship” in obtaining the information by other means. Larson, 305 Minn. at 360, 233 N.W.2d at 746; see MINN. R. CIV. P. 26.02(b) advisory committee note, subdiv. (9) (1975).

132. Larson, 305 Minn. at 361, 233 N.W.2d at 747.
Rule 1, Rules of Civil Procedure, enjoins us to construe the rules so as "to secure the just, speedy, and inexpensive determination of every action." In accordance with this principle we have held that the rules are to be liberally construed so as to serve the interests of justice and so as to discourage reliance on technicalities and form.\textsuperscript{135}

The question was thus not to be answered through textual construction or blind application but, rather, through principled considerations of fairness and justice. A proper ruling required inquiry into the factual circumstances of the individual case.

Applying these considerations to the present matter, the decisive factor should be the underlying purpose of the new one-year filing requirement. Courts should be mindful of this purpose and should moreover ensure that a decision to grant or deny relief comports with the ideal of "just, speedy, and inexpensive determination of every action."\textsuperscript{134}

In its final report, the Civil Justice Reform Task Force explained its reasoning behind recommending the filing requirement.\textsuperscript{135} The Task Force began by acknowledging that Minnesota's hip-pocket regime is anomalous, but declined to recommend commencement-by-filing on the ground that such a change would cause "unwarranted" confusion and require too much energy.\textsuperscript{136} So reasons the Task Force, a one-year filing requirement preserves many of the advantages of the hip-pocket system while limiting its drawbacks.\textsuperscript{137}

Among other things, the requirement combats the evils of unreasonable delay: "When cases eventually come into court many years after service, everything is harder to accomplish at that point. Time is not a friend to litigation. It increases burdens for all participants."\textsuperscript{138} The task force furthermore reasoned that such a

\textsuperscript{133} \textit{Id.} at 362, 233 N.W.2d at 747 (citing Indep. School Dist. No. 273 v. Gross, 291 Minn. 158, 190 N.W.2d 651 (1971); Love v. Anderson, 240 Minn. 312, 61 N.W.2d 419 (1953)).

\textsuperscript{134} MINN. R. CIV. P. 1.

\textsuperscript{135} RECOMMENDATIONS, supra note 45, at 21–24.

\textsuperscript{136} Id. at 21 ("Many task force members believe it is not necessary to change the rule on commencement of actions, and that the confusion it would entail and the energy it would require to make this change is not warranted. The fact is that any party can file with the court at any time . . . .").

\textsuperscript{137} Id. at 22.

\textsuperscript{138} Id.
requirement would “help the court to know what cases are out there, and increase filing fee revenue.”

Thus, three primary reasons seem to undergird the Task Force’s recommendation: (1) controlling the problems associated with excessive delay in filing; (2) putting cases on public radar; and (3) generating revenue. The question is whether granting relief under Rule 86.01(b) (or 60.02, for that matter) subverts any of these objectives.

An answer may be quickly rendered with respect to the latter two objectives. Of course, denying relief from involuntary dismissal under Rule 5.04 does nothing to help courts “know what cases are out there” or increase filing-fee revenue. As for the first objective—preventing excessive delay—denying relief in a given case presumably accomplishes this by compelling attorneys to follow the rule in the future. Aware of the harsh consequences of failing to file within one year, attorneys will quickly straighten their act.

However, this reasoning is problematic. In the case of the “hapless attorney” who unwittingly violated the new requirement, this violation may well have been the product of understandable delay or excusable neglect. Granting relief in such cases does little to subvert the objective of having attorneys conform to the rule in the future. Once apprised of the filing requirement, attorneys will abide by it as a matter of course. Involuntary dismissal with no opportunity for relief, especially with respect to cases caught in the wake of the new amendment, would seem unnecessarily harsh.

Having conducted this analysis, it appears that an opportunity for relief under Rules 60.02 or 86.01(b) would not undermine the purposes of the new one-year filing requirement. There is no principled reason for withholding this opportunity as a matter of law.

6. Constitutional Implications

In Mr. Herr’s words, “The group that earns no sympathy from the committee, unfortunately, is those people who weren’t paying attention to the fact that the year was running.” After all, the profession of law comes with the highest of standards. Lawyers must

139. Id.
140. Id.
141. Interview with David F. Herr, supra note 65.
be held accountable for their own incompetence. Minnesota attorneys have had plenty of advanced warning as to the new filing requirement, and it is not the courts’ problem that some attorneys caught on too late. But is the punishment misplaced?

Automatic involuntary dismissal under Rule 5.04 may panic a blindsided plaintiff’s attorney, but the real injustice is visited upon the client. Granted, the client may prevail on an action for attorney malpractice; notwithstanding, Rule 5.04 punishes an attorney’s oversight by denying the client legal redress. This raises important constitutional questions.

Article I, section 8 of the Minnesota Constitution provides: “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.” This is closely tied to section 4 of article I, which begins, “The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.”

These sections are not without commentary. In 1980, the Minnesota Supreme Court abolished the doctrine of parental immunity. The court cited article I, section 8 to the effect that children have a constitutional right to recover against their parents: “A fundamental concept of our legal system and a right guaranteed by our state constitution, is that a remedy be afforded to those who have been injured due to the conduct of another.”

In the 1964 case, Landgraf v. Ellsworth, the Minnesota Supreme Court reaffirmed a party’s constitutional right to trial by jury: “Where a party has a constitutional right to a jury trial, denial of the right is reversible error.” The district court judge ruled from the bench on the plaintiff’s action against his former employer.

142. MINN. CONST. art. I, § 8.
143. Id. § 4.
144. Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980) (adopting the “reasonable parent standard” outlined by the California Supreme Court in Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971)).
146. Landgraf v. Ellsworth, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964).
147. Id. The plaintiff served as general manager at the defendant’s restaurant supply company and received a healthy commission for his sales. Id. at 325, 126
The plaintiff appealed, and the supreme court reversed on the ground that the plaintiff was unjustly deprived of his right to a jury trial.\textsuperscript{148}

Of course, neither of these cases is a mirror of the matter at hand. Neither case involved attorney misconduct precluding a plaintiff's otherwise actionable claim. Nonetheless, these cases stand for the principle that redress at law—in the hands of a jury—is a fundamental constitutional guarantee. As with any constitutional guarantee, this right is not to be taken lightly. Even if automatic involuntary dismissal under Rule 5.04 does not outright violate this guarantee, it at least contravenes the spirit of these constitutional provisions.

\textbf{VIII. LOOKING FORWARD: THE PROPRIETY OF THE MIDDLE ROAD}

\textbf{A. The Civil Justice Reform Campaign: National Context}

Minnesota is not alone in its efforts to improve the civil justice system. In 2009, the Iowa Supreme Court established a Supreme Court Task Force for Civil Justice Reform.\textsuperscript{149} Its charge was to explore contemporary discovery practices, ADR, litigation management, court rules, and pretrial procedures, and to recommend changes aimed at fostering a system "faster, less complex, more affordable, and better equipped to handle complex cases."\textsuperscript{150} This task force tendered its report on January 30, 2012.\textsuperscript{151} The report contains numerous proposals, among them: discovery reform, certain dates for trial, and a pilot program "based on a two-tier civil justice system."\textsuperscript{152}

\textsuperscript{148} N.W.2d at 768. The plaintiff brought this action for outstanding commissions allegedly still owed to him after quitting. \textit{Id.}, 126 N.W.2d at 767.

\textsuperscript{149} \textit{Id.} at 330–31, 126 N.W.2d at 770. The court rejected the defendant's argument that the plaintiff's action was "purely equitable" and thus properly adjudicated from the bench. \textit{Id.} at 328, 126 N.W.2d at 769.


\textsuperscript{151} \textit{Id.}


\textit{Id.} at v-vi. This program would place lower-value cases on an expedited litigation track characterized by, among other things, "streamlined or limited
The Honorable Jonathan Lippman, Chief Judge of the New York Court of Appeals, Commercial Division, recently established a Task Force on Commercial Litigation in the 21st Century. This body's charge was to develop proposals aimed at "ensuring that the New York Judiciary helps [its] State retain its role as the preeminent financial and commercial center of the world." The Task Force tendered its report in June 2012. The proposals encompass docket management, procedural reform, "judicial support and engagement," and ADR.

Perhaps most reminiscent of Minnesota's undertaking is Utah's initiative to reform its rules of civil procedure. In 2010, the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure, dissatisfied with the increasing cost of civil discovery and the delay attributable to it, proposed substantial changes to Utah's rules. Among the proposed changes was the implementation of a two-tiered discovery system calling for "extraordinary discovery" in appropriate cases, an increased breadth of mandatory initial disclosures, and restrictions limiting deposition of expert witnesses.

Like Minnesota, Utah sought to advance the mandate of Federal Rule of Civil Procedure 1 (in its respective state equivalent)—that is, "to secure the just, speedy, and inexpensive discovery processes; limited motion practice; simplified rules of evidence; accelerated pre-trial deadlines and earlier trial dates; [and] possible mandatory ADR." Per the recommendations of the Minnesota Civil Justice Reform Task Force, the Minnesota Supreme Court recently instituted an "Expedited Litigation Track" pilot program of its own. See Final Order, supra note 58.


154. Id. at 1.

155. Id. at 6.

156. Id. at 2. The task force recommended early assignment of cases to judges, on the ground that "early and continued judicial involvement [would] assist in streamlining discovery by facilitating prompt resolution of disputes and monitoring compliance with discovery obligations." Id. at 15.


158. Id. at 3–29.
determination of every action." The Committee cited several empirical studies, together suggesting that delay and expense associated with civil discovery is a national problem. The Committee voiced skepticism over whether Utah's conformity with the Federal Rules of Civil Procedure was appropriate, given the differences between typical state and federal cases. Utah's Supreme Court approved the amendments in August 2011, and they became effective November 1 of that same year.

Additionally, state courts in Colorado, Massachusetts, New Hampshire, federal courts in Pennsylvania and New York, and the federal district courts in the Seventh Circuit have approved various pilot projects in pursuit of civil justice reform. Numerous states—including California, Nevada, New York, Oregon, Texas, and

159. FED. R. CIV. P. 1; UTAH PROPOSED RULES, supra note 157, at 1.

160. UTAH PROPOSED RULES, supra note 157, at 1 ("More than 80% of the respondents in the ACTL, ABA, and NELA surveys said that they or their firms turned down cases because the amount at issue did not justify the expense. The most commonly cited amount-in-controversy threshold, below which a case cannot be economically handled, was $100,000."); see THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL Sys., FINAL REPORT 1 (2009), available at http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf ("The project was conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense.").

161. UTAH PROPOSED RULES, supra note 157, at 1.

[D]uring the past 30 years or more, the Utah Rules have evolved to be increasingly consistent with the federal rules and their amendments. It was perceived that consistency with the federal rules, along with the extensive case-law interpreting them, would provide a positive benefit. The federal discovery rules are now being seriously questioned as well, but the committee has come to question the very premise upon which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable to many people because they cannot afford it.

Id.


Utah—and federal jurisdictions have considered implementing expedited trial programs or have undertaken to improve such programs that already exist.\(^\text{164}\)

The moral of the story is that, ostensibly, the whole nation is dissatisfied with civil procedure as it stands today. Evidenced by the above examples, the common complaint seems to be one of excessive cost and delay.

B. A Case Study: New York’s Transition to Commencement-by-Filing

Minnesota’s new filing requirement should be evaluated in the context of a much broader national movement intended to enhance the accessibility and efficacy of the civil justice system. The task at hand is to predict—and ultimately observe—whether this particular change will advance the broad objectives of this movement. Fortunately, this sort of change is not without precedent. Examining the petri dishes that are individual states is informative of the effects of such a change, as well as of possible alternatives.

As the birthplace of the Field Code and a state that recently transitioned from commencement-by-service to commencement-by-filing, New York would seem to be a particularly suitable petri dish. Minnesota may not have outright adopted commencement-by-filing, but studying the transition in New York will nonetheless help us understand the effects of forcing suits into court.

Prior to July 1, 1992, all civil actions in New York were commenced by service of a summons.\(^\text{165}\) This commencement action changed on the above-stated date, when section 304 of the New York Civil Practice Laws and Rules was amended to make filing—rather than service—the triggering event.\(^\text{166}\) However, New York’s civil, district, and city courts were excluded from this change. Section 304 instituted commencement-by-filing in the supreme and county courts, but these lower courts continued to mark commencement with service of a summons.\(^\text{167}\) It was not until

\(^{164}\) Id. at 2-3.


\(^{166}\) Ch. 216, §§ 3, 27, 1992 N.Y. Laws at 2783, 2790.

\(^{167}\) Siegel, supra note 165.
September 8, 2005, that New York's civil, district, and city lower courts made the switch. 168

The primary impetus for the initial 1992 conversion was an uninspiring one—money. 169 Under the amended section 304, a party bringing suit has no choice but to pay a filing fee up front. 170 This requirement eliminates the possibility that a litigant could bring suit, then settle the case outside of the courthouse walls without generating any court revenue.

Unsurprisingly, court filing fee revenue did increase. The change dislodged an additional $10 million dollars from the pockets of litigants in the first year alone—and precipitated a twenty percent increase in court filings. 171

However, not everyone is convinced that revenue hunger was the primary motivation for the change. In an article addressing the switch, distinguished New York attorney Paul Aloe writes, "Although widely cited as a revenue generating measure, its principal purpose was not to raise revenue, but rather to 'eliminate many of the pitfalls and traps that attend the commencement of an action in New York, particularly when the expiration of the statute of limitations is near.' " He continues, "[C]ourts dealing with commencement-by-filing in the lower courts would do well to keep in mind that the system is designed not for fee collection, but to avoid the fatal dismissal of lawsuits for purely technical defects." Aloe would thus seem to cast the measures in a much more aspirational light—not as a gold-mining operation but, rather, an earnest attempt to see that procedure take a back seat to justice.

Debt collectors in New York were particularly troubled by the change. In fact, it was the lobbyists with the Collection Bar who initially prevented commencement-by-filing from reaching New

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168. Id.
171. RECOMMENDATIONS, supra note 45, at 21 n.8 ("Collection firms estimate that they currently have 50,000 non-filed consumer cases that have accumulated over the past several years, and that there are approximately twice as many non-filed consumer cases as there are filed consumer cases.").
173. Id. at 534.
York's lower courts. Lobbyists argued that, of the many actions brought against consumer debtors, many were resolved long before judicial intervention was actually needed. The reasoning of this argument is that filing fees in these cases are not only uncalled for, but may also add to the mounting heap of a debtor's obligations. This argument evidently held weight, but eventually gave way to countervailing interests as lower courts made the switch in 2005.

Whatever the motivations behind New York's adoption of commencement-by-filing, three things are clear: (1) it replenished state coffers, (2) it put more cases on the court's radar, and (3) it did not make everyone happy.

C. Too Much? Not Enough? Both? Neither?

Having indulged in the national context of civil justice reform and trained a looking glass at New York, what remains is to consider the new Minnesota Rule of Civil Procedure 5.04 from a simultaneously narrow and broad vantage point. Is the measure neatly tailored to its purposes? If so, are these purposes advisable? Are there any alternatives that would better serve these purposes?

The one-year filing requirement puts Minnesota in an awkward position, if not functionally, then at least socially. Minnesota is one of only three states that have not converted to commencement-by-filing (or permitted commencement-by-service but required service shortly thereafter). Of Minnesota's two compatriots, North Dakota and South Dakota, neither has promulgated a rule like 5.04. Minnesota thus walks a lonely road—a middle road between traditional hip-pocketry and new-age commencement-by-filing.

174. Id. at 529–30.
175. Id. at 530.
176. RECOMMENDATIONS, supra note 45, at 22. This is addressed in the final report of the Minnesota Task Force:

The task force heard from consumer collection attorneys representing creditors who indicated that waiting for consumers to get back on their feet is the most common reason for waiting to file, that it is advantageous for consumers to not have the debt appear on the court record, and filing fees and attorney will only add to a consumer's debt burden.

Id.

177. Aloe, supra note 172, at 528.
178. See supra Part II.
There’s nothing per se wrong about a lonely middle road, but it would be helpful to evaluate this road in light of alternatives.

1. **Efficacy**

The new one-year filing requirement’s potential impact on the civil justice system must be evaluated. As stated earlier, the Task Force identified three major goals behind imposing the filing deadline: (1) controlling the problems associated with excessive delay in filing, (2) putting cases on public radar, and (3) generating revenue.  

The first of these three goals seems founded on the conviction that judicial supervision is an effective check on inefficient and needlessly costly pre-trial practices. As stated in the Task Force’s final report, “[M]any task force members believe that cases can only be effectively managed when a judge is assigned to the case, and that managing cases in a way that is effective for courts and parties makes a difference in reducing cost and delay.” Mr. Herr seems to share this skepticism of the ability of attorneys to handle cases themselves: “Even lawyers cannot be reliably relied on to push cases forward, even when it’s in their clients’ interests to do so. The courts shouldn’t abdicate responsibility for getting cases decided in a reasonable timeframe.”

As for goals two and three, there is no doubt that each will be exacted, at least to some degree. More cases will be filed, and more filing-fee revenue will be generated. But is the Minnesota justice system prepared for a fresh onslaught of new civil cases, in light of its “already crowded dockets?”

At the end of the day, “any party to an action may file with the court at any time.” Doing so puts the case on public radar, draws
a filing fee, and places a judge in a supervisory role. If all involved parties elect to postpone filing during the pleading stages and discovery, one of two things may happen: (1) the parties, informed by discovery and correspondences, settle without any need for court intervention; or (2) a party brings a motion that requires the attention of a judge. In the former instance, the justice system builds no revenue, but it also does not spend its limited resources on a matter that will ultimately resolve itself. In the second instance, the justice system intervenes only when it has an essential task to perform.

If the one-year filing requirement, among the many other changes proposed by the Civil Justice Reform Task Force, truly is "designed to bring the legal community back to the court system," the court system ought to make sure that it can handle the demands of this legal community. The Task Force itself acknowledges that there are "insufficient judicial resources for civil cases." Would it make sense, then, to allocate precious judicial resources to matters in which none of the involved parties want (or need) court involvement?

2. Why Not Go With the Flow?

Rather than adding an anomalous constraint to an antiquated system, one might ask why Minnesota doesn’t simply fall in line

184. RECOMMENDATIONS, supra note 45, at 21.
185. See supra Parts II, V. While a bare complaint need not command the attention of a judge, motions call for judicial decision making and thus invariably necessitate filing.
186. RECOMMENDATIONS, supra note 45, at 5.

Beginning in 2008 and extending well into the next decade, Minnesota will see a 30% jump in workers reaching the average retirement age of 62. Seniors over the age of 65 will exceed the number of school age children. The cost for government-funded social security, medical care, and public employee pensions will put unprecedented financial pressures on local, state, and federal governments. These pressures will shift government spending priorities to issues of aging and health and away from other state services, including the courts. Thus, even in relatively strong economic times, the courts will face greater competition for tax dollars.

Id.
with the vast majority of states and adopt commencement-by-filing? The Civil Justice Reform Task Force considered proposing this, but rejected it on a number of grounds. First of all, an outright switch to commencement-by-filing would require more energy, and would entail considerably more confusion, than mere implementation of a one-year filing requirement.\textsuperscript{188}

Second, adopting the federal practice would mean foregoing many of the benefits of hip-pocket filing. Under Minnesota’s current system, parties may serve, conduct discovery, and settle before the one-year mark without incurring any filing fees whatsoever. On the contrary, commencement-by-filing would force litigants to pay filing fees up front, and it would be immaterial if the matter settled the very next day. Another benefit of hip-pocket filing that would be lost is confidentiality. Many litigants are interested in keeping their matters “out of the public eye.”\textsuperscript{189} Filing with the court creates a public record of the litigants’ dispute, and many wish to avoid creating such a record until absolutely necessary.\textsuperscript{190}

Not to mention, commencement-by-filing would strain Minnesota’s limited judicial resources even further than the one-year filing requirement. The Civil Justice Reform Task Force was all too aware of this: “[A]n argument could be made that the potential impact of eliminating hip-pocket filing might be somewhere between a 20% and 100% civil filing increase.”\textsuperscript{191}

IX. CONCLUSION

Setting aside—for a moment—the troubling nature of automatic involuntary dismissal, Minnesota’s lonely middle road may reveal itself to be the high road. Holding fast to the historic practice of hip-pocket service, but constraining it with a one-year filing requirement, preserves the benefits of the hip-pocket regime while simultaneously guarding against abuses.

Notwithstanding the desirability of such a system, it is hard to ignore the fact that the federal mode of commencement has engulfed the vast majority of states. Mr. Herr, when asked if he ever

\textsuperscript{188} RECOMMENDATIONS, \textit{supra} note 45, at 21.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} MKT LAW, \textit{supra} note 183.
\textsuperscript{191} RECOMMENDATIONS, \textit{supra} note 45, at 21 n.8.
thought that Minnesota would succumb to this peer pressure, stated:

I would be hard-pressed to make that prediction. Every time we look at it, there is a tremendous resistance within the Minnesota bar. Lawyers like the ability to have cases served, and not filed. And there are a whole host of reasons. One is just general confidentiality. If it's filed, the papers become public record—accessible to the media, accessible to snoopy neighbors, etc.\textsuperscript{192}

When asked whether he thought the present rule—commencement-by-service but with a one-year filing requirement—was sustainable for the long-term or merely a stepping-stone to some other future procedural standard, Mr. Herr replied, quite succinctly, “It won't be a problem once people get used to it. Yes, I don't think this will change.”\textsuperscript{193}

\begin{thebibliography}{99}
\bibitem{192} Interview with David F. Herr, \textit{supra} note 65.
\bibitem{193} \textit{Id.}
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