Does It Have to Be This Hard? Rule 401(e) in Montana

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DOES IT HAVE TO BE THIS HARD?

RULE 41(e) IN MONTANA

Cynthia Ford*

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* Professor, University of Montana School of Law. This article is dedicated to those in the trenches every day, Montana's litigators. I want to thank the law school and my colleagues there for their general support, and Anna Steucek, Charlotte Wilmerton, and Greg Munro in particular. Anna is a third year student who provided invaluable research assistance and editing on what some students might view as a rather technical and dry subject. Charlotte knit the final version with her incomparable word processing skills and patience. Greg served, once again, as a thoughtful and supportive sounding-board. Finally, thanks to my students, whose lively class discussions and fresh perspective enrich my work every day.

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Montana's rule of civil procedure about the timing of the issuance, service, and return of process is very different from the federal rule and from the rules of most other states. Montana's rule is difficult to find and, once found, is much more complicated to read and to use than it needs to be. Numerous cases in recent years bear witness to the confusion of the bar on this seemingly simple aspect of beginning a civil lawsuit.

This article has three purposes. First, for practitioners currently dealing with Rule 41(e) issues, it clarifies the current requirements of the rule and makes some straightforward practice suggestions. Second, the article examines the case law in detail. The Montana Supreme Court has interpreted Rule 41(e) in 24 cases over the past 34 years, but the rule is so complex that this judicial guidance itself contains numerous contradictions and about-faces. With this understanding of the Rule's history in Montana, I recommend several changes to the rule and formulate three possible revisions. The Civil Rules Commission recently approved one of the revisions proposed in this article and forwarded it to the Montana Supreme Court. The third purpose of this article is to assist the bar in commenting on the proposed amendment.

II. BACKGROUND

A. Rule 4 and Rule 41(e)

The purpose of both the Montana and Federal Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action." In the change from code pleading and practice, the federal rules model greatly reduced the role of pleadings and increased the emphasis on trial on the merits. Montana's rules are largely based on the federal model, and most of them are similar, if not identical, to the

1. MONT. R. CIV. P. 1; FED. R. CIV. P. 1.
corresponding federal rules. Pleadings are supposed to be “short and plain,” containing just enough information to give notice, so that the parties can get to the merits of the case easily and quickly. Technical defects such as insufficiency of process and insufficiency of service of process are disfavored and easily waived if not raised at the beginning of the action.

A plaintiff needs to accomplish two steps at the beginning of every lawsuit. First, the plaintiff must commence the action by filing a complaint with the clerk of the court. When the complaint is filed and a docket opened, the court becomes aware that there is a pending civil action which will eventually need attention. Filing the complaint also stops the running of the statute of limitations. However, the mere filing of a complaint does not notify the defendants that they have been sued and that the court intends to render judgment on the dispute which is the subject of the lawsuit. The mechanism which accomplishes these purposes is the summons, and having it issued is the second step every plaintiff must complete.

“The purpose of serving a summons is to give notice to the defendant and thereby afford him the opportunity to defend himself or his property—an essential to due process of law.” Service of process also provides the court with jurisdiction over the person or entity sued. Actual knowledge is not a substitute for valid service.

Rule 4 is entitled “Persons Subject to Jurisdiction—Process—Service.” Rule 4 does deal with the issuance of the summons and the manner in which it is to be served. Rule 4(b)(2) provides that “[j]urisdiction may be acquired by our courts over any person through the service of process as herein provided.” Rule 4 then goes on to specify the route a plaintiff must follow in order to achieve this service of process: the plaintiff (or plaintiff’s attorney) presents a summons to the clerk for issuance. The clerk issues the summons by signing it,

2. See infra note 442.
3. MONT. R. CIV. P. 8(a)(1), (b); FED. R. CIV. P. 8(a)(1), (b).
4. See MONT. R. CIV. P. 12(b), (g), (h)(1); FED. R. CIV. P. 12(b), (g), (h)(1).
8. See MONT. R. CIV. P. 4C(1).
attaching the court seal, and delivering it back to the plaintiff.\textsuperscript{9} It then is the responsibility of the plaintiff to serve the defendant with the summons and complaint.\textsuperscript{10} The remainder of Rule 4 is devoted to describing the various methods for accomplishing service on various defendants.\textsuperscript{11}

Despite its plethora of detail on who serves whom in what manner, Montana's Rule 4 does not itself establish any deadlines for accomplishing that service, leaving that to another rule. Furthermore, for 36 years, Rule 4C made no mention at all of the fact that another rule did establish time limits on the issuance, service and return of process. In 1997, Rule 4C was amended to add, inter alia: "Issuance, service and filing of the served summons with the clerk shall be accomplished within the times prescribed by Rule 41(e). . ."\textsuperscript{12}

Rule 41(e) is the unlikely location of some fairly stringent requirements about the timing of issuance and service of the summons. Buried deep in the Section of the Rules labeled "Trials,"\textsuperscript{13} Rule 41 is entitled "Dismissal of Actions." The first four sections of Rule 41 deal with events which occur well after the institution of litigation: voluntary dismissal; involuntary dismissal;\textsuperscript{14} dismissal of counterclaim, cross-claim, or third-party claim; and costs of previously-dismissed action. Not until its fifth subsection, 37 rules after the rule governing process and service, does Rule 41 deal with the plaintiff's sprightliness at the very outset of the lawsuit.

As the professor of civil procedure in Montana, I have received frequent calls over the past 9 years from members of the bar who vaguely recall that there is a rule somewhere which

\textsuperscript{9} See MONT. R. Civ. P. 4C(1), (2). See also Busch v. Atkinson, 278 Mont. 478, 925 P.2d 874 (1996).

\textsuperscript{10} "The party requesting issuance of the summons shall bear the burden of having it properly and timely served and filed with the clerk." MONT. R. Civ. P. 4C(1).

\textsuperscript{11} MONT. R. Civ. P. 4D describes both who may serve process (basically any adult who is not a party to the action, including but not limited to sheriffs and their deputies) and, situation by situation, exactly how they are to serve different categories of defendants.


\textsuperscript{13} See MONT. R. Civ. P. Table of Rules: Part VI, Trials.

\textsuperscript{14} "For failure of the plaintiff to prosecute 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. Unless the court . . . otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits." MONT. R. Civ. P. 41(b).
limits the time in which to have summonses issued and served. These callers invariably report that they have looked long and hard in the rulebook, to no avail. The recent addition to Rule 4 of a clear reference to Rule 41(e) will go a long way, but not far enough, to help lawyers find what should be straightforward information.

It would be even better simply to relocate Rule 41(e), or at least to repeat its requirements as part of Rule 4C and deal with the subject as part of Rule 4, where it logically belongs. However, a reading of Montana's 41(e) shows that its wording, not just its mislocation in the rules, dooms the well-meaning lawyer who tries to understand and follow its dictates. Rule 41(e), in its entirety, provides:

(e) Failure to Serve Summons. No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within 1 year, or unless summons issued within 1 year shall have been served and filed with the clerk of the court within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within three years, or upon whom summons which has been issued within 1 year has been served and filed with the clerk within three years as herein required.

There is only one intelligent response to a first reading of this rule: "HUH?" Could this possibly be described as Plain English for Lawyers, much less for anyone else who might attempt to divine the requirements imposed by this rule?15 In fact, the requirements of the rules can be stated affirmatively,

15. One legal scholar laments that "[i]n particular, statutes and regulations grind on, line after line, perhaps on the theory that if readers come to a period they will rush out to violate the law without bothering to read the end." RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 33 (3d ed. 1994). "[T]he remedy is simple. Instead of one long sentence containing five thoughts, use five sentences, each containing one thought." Id. at 35. Or, in Hemingway's words, "Prose is architecture, not interior decoration, and the Baroque is over." ERNEST HEMINGWAY, DEATH IN THE AFTERNOON 191 (1932).
and turn out to be quite simple:

1. The plaintiff must have a summons issued by the clerk within one year of the time the original complaint is filed;
2. The plaintiff must serve the defendant with that summons within three years of the time the original complaint is filed;
3. The plaintiff must file the returned summons with the clerk of court, also within three years of the time the original complaint is filed; or, if conditions 1 through 3 are not met,
4. The defendant must appear in the action within three years of the time the original complaint is filed. 16

The penalty for violating these requirements also can be stated clearly. If the plaintiff misses any of these deadlines with regard to any defendant, and if that defendant does not appear within the three-year deadline, the court must dismiss the action against that defendant. The court may act on its own motion or on that of any interested party.

Compared to Montana's convolution, the Federal Rules are breathtakingly simple and deal with the subject as part of Rule 4. Fed. R. Civ. P. 4(m) is clearly and accurately entitled "Time Limit for Service." It provides:

If service of the summons and complaint is not made upon a defendant within 120 days after filing the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period . . . .

B. Legislative History of Rule 41(e)

Montana's Rule 41(e), as noted above, simply does not exist in the federal version of the Rules of Civil Procedure; Fed. R. Civ. P. 41 has only four subsections, (a) through (d). Montana added its subsection (e) to the federal rule when Montana adopted its current Rules of Civil Procedure. The Montana addition came from a pre-existing Montana statute, adopted as

16. See MONT. R. CIV. P. 41(e). See also Sinclair v. Big Bud Mfg., 262 Mont. 363, 367, 865 P.2d 264, 267 (1993) (permitting prosecution of action against defendant who appeared within three years even though the summons was not timely issued), infra Section IV.A.13.
part of Montana's original legislation at Bannock in 1895. It appears, in turn, that the Bannock version of this rule came to us from California, which continues to be the only other state in the union with a procedural oddity anything like Rule 41(e).

When Montana began to consider changing from Code pleading and practice to a federal rules model, the rules drafters originally left out the statutory deadline for service of process. Rule 41(e) did not appear in the original proposed Rules of Civil Procedure which were compiled and promulgated by the Montana Civil Rules Committee; at that point, neither Rule 41 nor Rule 4 contained any time limit for service of process. In 1963, two years after the first version of the new Montana Rules of Civil Procedure was adopted, the 38th Legislative Assembly approved a statute adding subsection (e) to Rule 41. At that time, Rule 41(e) simply established a three-year limit for service, without any specific deadline for obtaining a summons:

No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.

This rule tracks California's three year limit.

The first amendment to Rule 41(e) by the Montana Supreme Court became effective on July 1, 1965. This amendment

17. MONT. CODE CIV. P. § 1004(7) (1895) required that summons be issued within one year after filing the complaint and service made and returned within three years after filing the complaint. Later legislative histories list the California Civil Code as the source of this provision. See, e.g., MONT. REV. CODE ANN. § 9317 (Smith 1921).
18. MONT. REV. CODE ANN. § 9317 (Smith 1921).
19. See infra text accompanying notes 467-475 (discussing California's present practice).
24. The three-year deadline for service of summons first appears in Section 1004 of the 1895 Montana Code of Civil Procedure. Later legislative histories list the California Civil Code section 581 as the source of the change. See, e.g., MONT. REV. CODE ANN. § 9317 (Smith 1921).
added the one-year limit for the issuance of the summons and began the trend away from clarity and toward confusion of the bar by using very complicated language. The Rule then read:

No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.

Thus, the current Rule 41(e) was born. Another amendment occurred in 1993, adding even more text to the rule:

When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within three years, or upon whom summons has been issued within 1 year has been served and filed with the clerk within three years as herein required.

III. INTERIM GUIDELINES FOR COMPLYING WITH RULE 41(e)

Although the requirements of obtaining a summons within one year and serving it within three years from the date of filing the complaint do not seem unduly burdensome, Rule 41(e) has generated a disproportionately large amount of litigation. From the adoption of this rule in 1963 through December of 1998, some 35 years, the Montana Supreme Court has decided 24

26. The Commission Comment to this amendment suggests the opposite, apparently believing that the change made the situation clearer. The Comment stated:

'This clarifies and brings together the laches provisions with respect to issuance and service of summons. At present Rules 4C(1), 41(e), Section 93-3002 R.C.M. 1947, and Rule 12(b) all need to be referred to. This amendment incorporates the laches provision of Section 93-4705(7), R.C.M. 1947, which was repealed by chapter 13 of the 1961 Session Laws.

MONT. R. CIV. P. 41(e) Commission's Note to 1965 amendment.


cases in which Rule 41(e) was raised.\textsuperscript{29} Federal courts also have had to interpret and apply this rule.\textsuperscript{30} In most of these cases, lawyers simply missed one deadline or another and then thrust themselves on the mercy of the courts, with varying degrees of success.

To get a true sense of the confusion engendered by Rule 41(e) itself, its use or misuse by lawyers, and the conflicting judicial treatment of the rule by the courts, it is best to survey the cases in some detail and in chronological order. I present such a survey in the following section. As the cases illustrate, both plaintiffs and defendants can make grievous Rule 41(e) errors which may govern the outcome of their cases. First, however, because the language of the rule is so dense and its interpretation so important, I have synthesized the rule and cases into several short requirements for both plaintiffs and defendants. The source of each of the following guidelines is given in footnotes so that the reader can readily identify the particular cases dealing with the specific issue.

\section*{A. Plaintiff's Counsel}

1. Obtain a summons addressed to each defendant, including


\textsuperscript{30} See Bryan v. Fireman's Fund Ins. Cos., No. 97-35418, 162 F.3d 1167, 1998 WL 746051 (9th Cir. Oct. 20, 1998) (unpublished table decision). MONT. R. CIV. P. 41(e) is a procedural rule and so not binding on a federal court in a diversity action. However, the federal court may have to determine the consequences of a 41(e) violation if it allegedly occurred before the action was removed from state to federal court. See infra Section IV.B.
any newly discovered or identified defendants, within one year from the date the original complaint is filed.\textsuperscript{31} This should be done routinely on the date the complaint is filed.

2. Serve the summons and complaint upon each defendant within three years from the date the original complaint is filed.\textsuperscript{32} To avoid the gamble which plaintiffs lost in the \textit{Haugen} case, a prudent practitioner should calendar both issuance and location of the original summons before the end of the first year of the litigation, to allow time to have a duplicate issued before that year expires if the first summons is lost.\textsuperscript{33}

3. File the served summons within three years from the time the complaint was filed.\textsuperscript{34} A prudent practitioner should file both the served summons and the return of service.\textsuperscript{35}

4. Do not rely on Rule 41(e) as authority for timeliness in administrative,\textsuperscript{36} probate,\textsuperscript{37} or other specialized proceedings.

5. Do not rely on compliance with 41(e) as a defense to a Rule 41(b) motion to dismiss for failure to prosecute.\textsuperscript{38}

6. If plaintiff loses the original summons before service, he/she may obtain a duplicate summons, so long as that summons is virtually identical to the original issued within the first year, and the duplicate is then served within the three year period.\textsuperscript{39}


\textsuperscript{32} See MONT. R. CIV. P. 4.


\textsuperscript{34} See MONT. R. CIV. P. 4.

\textsuperscript{35} The language of the Rule was amended in 1993 to require the “summons issued within 1 year shall have been served and filed with the Clerk of Court within three years . . . .” See Montana Supreme Court Order of Mar. 26, 1993. This deletes earlier language requiring filing of the return of service, but does not meet the criticism of Livingston v. Treasure County, 239 Mont. 511, 781 P.2d 1129 (1989) (excusing late return of service made three years and three weeks after complaint filed on ground that late filing of return of service does not prejudice the defendant), infra Section IV.A.11.


\textsuperscript{37} Werning v. McFarland, 149 Mont. 137, 423 P.2d 851 (1967), infra Section IV.A.3.


7. Plaintiff may amend, with leave of court, the original summons so that it correctly reflects changed circumstances since the original summons was issued, such as dropping or adding parties or changing counsel. 40

8. Plaintiff may re-serve a timely summons within the three year period if defendant objects to the service of a late-issued summons. 41

9. If the first summons is returned unserved, it becomes functus officio. Plaintiff should request an additional summons pursuant to Mont. R. Civ. P. 4C(1). 42

B. Defense Counsel

1. Check the date of issuance of the summons and its service before making any appearance whatsoever in the case. 43

2. If the plaintiff has violated Rule 41(e), include that violation as a basis for dismissal in the first appearance, 44 moving to dismiss for both insufficiency of process and insufficiency of service of process. 45

3. If you see that the plaintiff is going to violate either the deadline for issuance of a summons or the deadline for

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as unprecedented in Montana’s rule or cases), infra Section IV.A.10.


43. See Sinclair v. Big Bud Mfg., 262 Mont. 363, 367, 865 P.2d 264, 267 (1993) (permitting prosecution of action against defendant who appeared within three years even though summons was not issued on time), infra Section IV.A.13.

44. The Rules of Civil Procedure do not themselves define “appearance.” In Montana state district court practice, the most common first document filed is a routine motion to dismiss under Rule 12(b), even if in fact this motion is groundless. The Uniform District Court Rules, which supplement the Montana Rules of Civil Procedure, specifically recognize this practice, simply stating that a motion unsupported by brief or affidavits will be denied. See MONT. UNIF. DIST. CT. R. 21(b). Furthermore, the Commission Comment to MONT. R. CIV. P. 11 exempts this “empty” Rule 12(b)(6) motion from Rule 11’s certification requirement, acknowledging and affirming its widespread use to gain more time to file a substantive response to the complaint. Nonetheless, such a motion clearly does constitute an appearance by the defendant and, without inclusion of a Rule 41(e) ground for dismissal, should waive the Rule 41(e) defenses. See Association of Unit Owners v. Big Sky of Montana, Inc., 224 Mont. 152, 729 P.2d 469 (1986), infra Section IV.A.10.

45. See infra note 53.
service of that summons, be sure to wait until after the deadline has expired to file your motion for dismissal.46

4. Be sure that any involuntary dismissal for violation of Rule 41(e) specifically states that it is with prejudice and is given res judicata effect.47

IV. JUDICIAL TREATMENT OF RULE 41(e):
GARBAGE IN, GARBAGE OUT

A. Rule 41(e) in the Montana Supreme Court

1. Whitcraft v. Semenza.48

Whitcraft was the first Montana Supreme Court case construing Rule 41(e).49 In that case, the plaintiff obtained a summons on the same day she filed her complaint, October 21, 1960.50 However, the summons was returned unserved in 1962.51 Alias summonses in the names of two defendants were issued in 1964, and both were served in that same year.52 The defendants moved to dismiss under Rule 12, alleging insufficiency of service of process and insufficiency of process.53
because of the alleged violation of the time requirements of Rule 41(e).\textsuperscript{54} The district court granted the motion to dismiss, and the Montana Supreme Court affirmed.\textsuperscript{55}

The court recognized that Rule 41(e) in Montana did not exist in the Federal Rules, after which most of the Montana rules are patterned, and spent some time explicating the origin of Rule 41(e):

Section 93-4705, R.C.M. 1947, was practically identical with Rule 41(e), the difference not being material to our discussion here, and was the law of Montana for over 65 years, until its repeal at the time of the adoption of the new Rules. It was inserted in the Rules at the next session of the Legislature in 1963.\textsuperscript{56}

The court also stated the reason for adding this subsection to Rule 41:

It must be borne in mind that the Rule is nothing more than a rule of procedure, designed to encourage promptness in the prosecution of actions . . . . [A] judgment is not res judicata unless it is on the merits, and a dismissal under the Rule is not.\textsuperscript{57}

Finally, the court expressed irritation with the plaintiffs' argument that they ought not be held to the time limits established in Rule 41(e) because the rule was not adopted until after they had begun the lawsuit:

Rule 41(e) became effective July 1, 1963, though it was passed by the Legislature and approved by the Governor on March 1, 1963. During April of 1963, twenty-six seminars were held by justices of this court in Montana to acquaint all lawyers with the changes in the Rules made by the 1963 Legislative Assembly, and mimeographed copies of all changes . . . . were distributed . . . . Special attention was paid at every seminar to the addition to Rule 41 of sub-section (e). In our view not only was a reasonable time allowed before the effective date of the change, but the information was widely distributed so that every attorney in the state would be informed.\textsuperscript{58}

Thus, \textit{Whitcraft} became the first case to dismiss an action

\textsuperscript{142, 148, 729 P.2d 469, 472 (1986) (characterizing plaintiffs' violation of Rule 41(e) as insufficient service of process rather than insufficient process).}

\textsuperscript{54.} \textit{See Whitcraft}, 145 Mont. at 95, 399 P.2d at 758.

\textsuperscript{55.} \textit{See id.} at 100, 399 P.2d at 760.

\textsuperscript{56.} \textit{Id.} at 96, 399 P.2d at 759.


\textsuperscript{58.} \textit{Whitcraft}, 145 Mont. at 99, 399 P.2d at 761.
for violation of Rule 41(e)'s deadlines.

2. State ex rel. Belwin v. Davison.\(^59\)

Belwin also involved an application of the rule shortly after its adoption. The plaintiff obtained the summons on the 364th day after the complaint was filed, in compliance with the rule.\(^60\) However, the defendant was not served with the summons until three years and one week had elapsed from the filing of the complaint.\(^61\) The trial court denied the defendant's motion to dismiss for violation of Rule 41(e), apparently on the ground that the original complaint was filed more than a month before Rule 41(e) became effective.\(^62\) The Supreme Court held that Rule 41(e) nonetheless applied to this action\(^63\) and that the district court acted outside its jurisdiction in denying the motion to dismiss.\(^64\) The Supreme Court issued a writ of prohibition directing the trial court to enter an order dismissing the action.\(^65\)

3. Werning v. McFarland.\(^66\)

Less than three months later, in Werning, the Supreme Court faced a plaintiff who had obtained a summons the same day the complaint was filed, October 22, 1965, and served that summons on the defendant less than three months later, on January 17, 1966.\(^67\) The plaintiff flourished his compliance with Rule 41(e) as a shield to the defendant's claim that the plaintiff had waited too long to prosecute his action.\(^68\) The Supreme Court agreed that the plaintiff had met the requirements of Rule 41(e) but held that Rule 41(e) did not apply to an action against an executrix based on a rejected claim against the estate:

The basic question is whether the failure of appellant to make service of the summons on the respondent before the final decree [of distribution] and discharge bars this action. We hold that it does . . . . Allowing the appellant up to three years to make service


\(^{60}\) See id. at 346, 420 P.2d at 843.

\(^{61}\) See id.

\(^{62}\) See id. at 346, 420 P.2d at 843-44.

\(^{63}\) See id. at 347-48, 420 P.2d at 844. "We deem rule 41(e) is applicable in this case. Rule 41(e) refers clearly to actions 'heretofore or hereafter commenced' . . . and therefore applies to actions filed before the effective date." Id.

\(^{64}\) See id. at 348, 420 P.2d at 844.

\(^{65}\) See id.

\(^{66}\) 149 Mont. 137, 423 P.2d 851 (1967).

\(^{67}\) See id. at 139, 423 P.2d at 852.

\(^{68}\) See id.
of summons would place an unreasonable burden on probate procedure and would ignore the purpose for which [Mont. Rev. Code Ann.] section 91-2709 [1947] was enacted. That section creates a special limitation on the type of suit before us... Nominal adherence to the requirement to "bring suit" (by filing a complaint), without service of summons, is not substantial compliance with section 91-2709.

Again, the court applied a time limitation on the service of summons on the defendant to defuse a plaintiff's claim on procedural grounds, but held here that Rule 41(e)'s limits did not apply to a probate matter and thus applied a tighter deadline.

4. State ex rel. Equity Supply Co. v. District Court.

Five years later, a violation of Rule 41(e) caused the loss of another claim. The motor vehicle collision at issue in Equity Supply occurred on January 31, 1964. The plaintiffs filed a complaint in Flathead County on January 27, 1967, within the statute of limitations period, but never had a summons issued on that complaint. The plaintiffs filed an amended complaint, seeking identical damages, on March 3, 1969 and had a summons issued the same day. That summons was served on the defendant on March 4, 1969, more than 5 years after the accident, but less than three years after the original complaint was filed.

69. This section required a claimant to "bring suit in the proper court against the executor or administrator within three (3) months after the date such rejected claim is filed." Id. at 139, 423 P.2d at 852. In Werning, the plaintiff did file the complaint within the three month period, but did not serve it on the executrix for almost three more months, until after defendant had been discharged from her duties as executrix. The claimant argued that merely filing the complaint constituted "bringing the suit." The Supreme Court stated that filing a complaint without service of summons was not substantial compliance with MONT. REV. CODE ANN. § 91-2709 (1947). See Werning, 149 Mont. at 140, 423 P.2d at 852.

70. Werning, 149 Mont. at 139-40, 420 P.2d at 852.

71. See Equity Supply, 159 Mont. at 35, 494 P.2d at 912.

72. See id. at 35, 494 P.2d at 912.

73. See id.

74. See id.

75. See id. In addition to the validity of the summons, the court also discussed the history of Rule 41(e) and its statutory precursor, MONT. REV. CODE ANN. § 93-4705(7) (1947). See Equity Supply, 159 Mont. at 36-37, 494 P.2d at 912. The court said that § 93-4705(7) "specifically provided for the dismissal of actions wherein summons had not been issued within one year" and added:

This statute was repealed in 1961, concurrently with the adoption of the Rules
The district court dismissed the action on the basis of Rule 41(e), holding that no summons was issued within one year of the filing of the original complaint, and that issuing a summons on the amended complaint more than one year after the filing of the original complaint was improper. The plaintiffs then filed a new action altogether, based on the same accident and "identical in all ways to the previously dismissed action." The defendant moved for summary judgment on its affirmative defenses of statute of limitations and res judicata. The district court denied summary judgment, citing this language from Whitcraft:

[T]he Rule is nothing more than a rule of procedure, designed to encourage promptness in the prosecution of actions. ... While an action may be dismissed the claim remains. An order of dismissal is not res judicata, it does not constitute a bar to another suit on the same claim. It is a fundamental rule that a judgment is not res judicata unless it is on the merits, and a dismissal under the Rule is not.

The district court then held that because the Rule 41(e) dismissal was not caused by neglect to prosecute the action, the plaintiffs were entitled to an extension of the statute of limitations for the filing of a new action under Mont. Rev. Code Ann. § 93-2708 (1947).

The defendant then sought a writ of supervisory control.

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of Civil Procedure. Rule 41(e), which has no counterpart in the Federal Rules, was adopted in 1963, and it provided that unless summons shall have been served and return made within three years after commencement of the action, the action should be dismissed. Rule 41(e) was again amended in 1965, but the 1963 rule came out of old Section 93-4705.

Equity Supply, 159 Mont. at 36, 494 P.2d at 912.

76. See Equity Supply, 159 Mont. at 37, 494 P.2d at 912.

77. Id. at 37, 494 P.2d at 913.

78. See id.


80. Equity Supply, 159 Mont. at 40-41, 494 P.2d at 914.

81. See id. at 37, 494 P.2d at 913. MONT. REV. CODE ANN. § 93-2708 (1947) is now MONT. CODE ANN. § 27-2-407 (1997). It provides:

If an action is commenced within the time limited therefor and a judgment therein is reversed on appeal ... or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination.

82. See Equity Supply, 159 Mont. at 35, 494 P.2d at 911.
The Montana Supreme Court issued the writ, directing the trial court to dismiss the second action. The court limited the Whitcraft language to its specific context and further stated:

As Rule 41(e) is now written, an order of dismissal is a bar to another suit on the same claim, if, as here, the statute of limitations as well as the period provided for by the rule, have run. Section 93-2708, R.C.M. 1947, as quoted previously, has been limited to that extent by the application of Rule 41. . . . [S]uch delay in prosecution should not be tolerated, and is not under our law. Rule 41(e) is explicit . . . . Any other interpretation would make Rule 41, M.R.Civ.P., and its subdivisions meaningless and they would simply become technical defects which could be endlessly corrected upon being called to the attention of the Court.

Having found that section 93-2708, R.C.M. 1947, does not operate to save a claim where the failure to have summons issued within the statutory period of limitations has occurred, it then follows that the [decision below] should be reversed . . . .

Justice Haswell issued a special concurrence, arguing that the same result should occur even if the statute of limitations had not expired. "In my view, a dismissal under Rule 41(e) operates independently of any statute of limitations, and a dismissal thereunder . . . bars a subsequent action between the same parties on the same claim." 85

5. Shields v. Pirkle Refrigerated Freightlines, Inc. 86

Justice Haswell wrote the opinion for a unanimous court in the next Rule 41(e) case. The plaintiff obtained a summons at or near the time he filed his complaint, but did not personally serve the corporate defendants. Instead, plaintiff s counsel filed an affidavit asserting that the two corporations could not be found or served in Montana, and served the summons and complaint on the Secretary of State. The affidavit deviated in several respects from the requirements of Rule 4D for substituted service. Furthermore, at the time the affidavit was filed, one

83. See id. at 41, 494 P.2d at 914-15.
84. Id.
85. Id. at 42, 494 P.2d at 915 (Haswell, J., concurring in the judgment). This dissenting opinion ascended into the majority view 23 years later, in First Call Inc. v. Capital Answering Service, Inc., 271 Mont. 425, 898 P.2d 96 (1995), infra Section IV.A.14.
87. See id. at 38, 591 P.2d at 1121.
88. See id. at 38-39, 591 P.2d at 1121.
89. See id. at 39, 591 P.2d at 1121.
of the corporations was in fact incorporated in Montana. 90 Its annual report was on record and listed the names and addresses of its officers and registered agent. 91

When the registered agent (who was also counsel for the corporation) received the summons and complaint from the Secretary of State, he advised the corporation that he thought the substituted service was defective and did not confer jurisdiction over the defendant. 92 Based on this advice, the defendant chose not to appear in the action. 93 The trial judge entered a default judgment against that defendant. 94 Exactly three years after the entry of the default judgment, the defendant moved for, and obtained, relief from that judgment. 95

Although the Supreme Court observed that "[t]here is no explanation anywhere in the record why Western Supply, Inc. waited three years before taking steps to invalidate the default judgment," 96 it is obvious that the default and the subsequent three year wait were intentional. If the defendant had moved for dismissal for lack of proper service, rather than opting for a default, the plaintiff would have learned of his own error and been able to reserve the summons within the three-year limit imposed by Rule 41(e). By waiting for three years to pass before challenging the default, the defendant made this remedy impossible.

The Supreme Court agreed with Judge Lessley that the default judgment was void for failure of service of process because of the variations from the requirements of Rule 4. 97 It also announced a new rule, that orders granting motions to vacate default judgments are generally nonappealable, but noted that there were certain exceptions to that rule:

The basis for the holdings that an order setting aside a default judgment is not appealable is that such orders are interlocutory in character, merely leaving the parties in a position to try the case. This . . . does not apply where the order sets aside the default on jurisdictional grounds that do not admit of correction. Such an order, in effect, finally concludes the case and the rights of the

90. See id.
91. See id.
92. See id. at 39, 591 P.2d at 1121-22.
93. See id. at 39, 591 P.2d at 1122.
94. See id.
95. See id.
96. Id.
97. See id. at 43, 591 P.2d at 1123-24.
parties; that is, it becomes a final judgment.\textsuperscript{98}

The court then pointed out that if service was in fact not properly made in this case, Rule 41(e) rendered that defect uncorrectable because it provided "for dismissal of an action where, as here, no service or return has been made within three years after commencement of the action."\textsuperscript{99} Because the three-year lapse made proper service impossible so that there never could be jurisdiction over the defendant, "the order of the District Court vacating the default judgment amounts to a final judgment from which an appeal can be taken."\textsuperscript{100}

Thus, although the plaintiff's attempted service met the time limits of Rule 41(e), the defendant was still able to successfully brandish the rule as a sword rather than a shield. Defense counsel's knowledge of both Rule 4 and Rule 41(e) and his exploitation of plaintiff's relatively minor errors allowed the defendant to avoid trial on the merits.

6. \textit{Rierson v. State}.\textsuperscript{101}

The Supreme Court decided three more Rule 41(e) cases in the two years after \textit{Shields}. \textit{Rierson} centered around a highway patrolman's retirement benefits. After the administrative agency denied his petition, the officer filed a petition for judicial review of the agency's determination.\textsuperscript{102} The Montana Administrative Procedure Act provides that once such a petition is filed, it must be "promptly served."\textsuperscript{103} The plaintiff obtained a summons when he filed his petition but did not serve it.\textsuperscript{104} He then returned that summons unserved, filed an amended petition and obtained an amended summons, and served the amended petition and summons more than sixteen months after filing his complaint.\textsuperscript{105}

The Board of Administration moved to dismiss the petition for insufficiency of process.\textsuperscript{106} The trial court entered an order dismissing both petitions with prejudice.\textsuperscript{107} When the plaintiff

\textsuperscript{98.} \textit{Id.} at 42, 591 P.2d at 1123.
\textsuperscript{99.} \textit{Id.}
\textsuperscript{100.} \textit{Id.} at 43, 591 P.2d at 1123.
\textsuperscript{101.} 188 Mont. 522, 614 P.2d 1020 (1980).
\textsuperscript{102.} \textit{See id.} at 525, 614 P.2d at 1022.
\textsuperscript{103.} MONT. CODE ANN. § 2-4-702(2)(a) (1997); \textit{Rierson}, 188 Mont. at 525, 614 P.2d at 1022-23.
\textsuperscript{104.} \textit{See Rierson}, 188 Mont. at 525, 614 P.2d at 1022.
\textsuperscript{105.} \textit{See id.}
\textsuperscript{106.} \textit{See id.}
\textsuperscript{107.} \textit{See id.} at 525, 614 P.2d at 1022-23.
appealed, the Supreme Court held that the "prompt service" provision of the Administrative Procedure Act applied, rather than the three-year service provision in Rule 41(e), and that a sixteen and one-half month delay between filing and service was not reasonable under the circumstances.\textsuperscript{108}

As in \textit{Werning v. McFarland},\textsuperscript{109} Rierson tried to use the liberal three-year service provision in Rule 41(e) as a defense against a claim that he had been dilatory in serving formal process on the defendant.\textsuperscript{110} As in \textit{Werning}, the Supreme Court applied the more stringent particular requirement established by statute for the specific type of action,\textsuperscript{111} and, as in all the Rule 41(e) cases to this point, the \textit{Rierson} majority had no difficulty enforcing a stated time limit on service, to the detriment of the plaintiff.

Justice Sheehy dissented in \textit{Rierson}, focusing on the substantive wrong which he perceived the Public Employees' Retirement Board had perpetrated upon the patrolman.\textsuperscript{112} He argued that the Board had attempted to exercise judicial power unconstitutionally\textsuperscript{113} and that the plaintiff would have been entitled to bring an original proceeding for a writ of certiorari rather than pursue administrative review.\textsuperscript{114} "We should therefore not kick him out of court on a procedural point relating to administrative review when the same procedure would be acceptable had his petition been confined to the judicial issues."\textsuperscript{115} Justice Sheehy also would have applied Rule 41(e) rather than the imprecise directive of the APA regarding "prompt" service.\textsuperscript{116}

Neither the majority nor the dissent in \textit{Rierson} dealt with the facts that the original summons, which was issued within

\begin{footnotes}
108. Acknowledging that appellate courts do not usually establish exact time limits where the legislature has not done so, the Montana Supreme Court stated:
However, for the sake of guidance in the future, we note that service of a petition for judicial review within thirty days, or thereabouts, from the time the petition was filed in District Court should not result in a dismissal for failure to comply with section 2-4-702(2)(a), MCA.

\textit{Rierson}, 188 Mont. at 528, 614 P.2d at 1024.
111. \textit{See id.}
112. \textit{See id.} at 529-33, 614 P.2d at 1024-27 (Sheehy, J., dissenting).
114. \textit{See id.} at 530, 614 P.2d at 1025.
115. \textit{Id.} at 531, 614 P.2d at 1025.
116. \textit{See id.} at 531, 533, 614 P.2d at 1026, 1027.
\end{footnotes}
one year of the original district court petition, was never served and that the "amended summons" which was served was not issued within one year of the filing of the original petition. It seems that because of this chronology, even if the court had applied the time constraints of Rule 41(e) to this administrative review, the plaintiff would have been in violation of the Rule. The court was squarely faced, and summarily dealt, with the inventive procedure of obtaining "amended summonses" in order to get around Rule 41(e) six years later, in *Association of Unit Owners v. Big Sky*.

7. *Brymerski v. City of Great Falls*.118

Brymerski objected to the dismissal of the action under Rule 41(b) for failure to prosecute.119 Among the five issues raised on appeal, the plaintiffs contended that the district court should have considered the time periods set out in Rule 41(e) when deciding whether plaintiffs had in fact failed to prosecute their action.120 Although the Supreme Court did not address this issue, the plaintiffs apparently were arguing that their compliance with Rule 41(e) per se meant that they had not failed to prosecute. The Supreme Court was able to resolve this case without reference to Rule 41(e), adopting the rule that "a motion to dismiss for failure to prosecute will not be granted if the plaintiff is diligently prosecuting his claim at the time the motion is filed, even if at some earlier time the plaintiff may have failed to act with due diligence."121

Interestingly, the *Brymerski* court supported its holding with the public policy in favor of trial on the merits, a public policy which it had not cited in any of the Rule 41(e) cases to date:

If a plaintiff has actively resumed the prosecution of a case, the policy favoring resolution of a case on its merits is more compelling than the policy underlying Rule 41(b) which is to prevent unreasonable delays.122

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120. See id. at 430-31, 636 P.2d at 848.
121. Id. at 432, 636 P.2d at 848-49.
122. Id. at 432, 636 P.2d at 847.
8. Larango v. Lovely.123

Like Werning v. McFarland,124 Larango involved a probate. Allegedly, the personal representative disregarded instructions that the oil, gas, and mineral rights to parcels of land in the estate had already been alienated, and thus were not to be conveyed.125 In an earlier opinion, the Montana Supreme Court held the purported conveyances by the personal representative invalid.126 While that appeal was pending, the aggrieved heirs retained an attorney to sue the personal representative for negligence.127 The original complaint, filed May 8, 1978, and a summons issued that same day128 clearly met the first deadline imposed by Rule 41(e).

Before the summons was served, however, the plaintiffs changed lawyers.129 The new attorney altered the summons in several respects, mostly to correct the names of the plaintiffs, before serving it on May 17, 1979.130 The alterations were made without leave of court.131 On the following day, the plaintiffs filed an amended complaint which contained the changes made in the amended summons as well as others: new claims for excess fees and for an accounting for the crops on one parcel of land, and a change from suing the defendant as personal representative to suing the defendant personally.132 The defendant quickly moved to quash the service of the altered summons.133 Before receiving notice that the court had granted this motion, plaintiff moved for leave to amend the summons.134 Plaintiff later filed several motions for reconsideration of the order quashing the altered summons.135 Eventually, the plaintiff simply obtained a new summons on the amended complaint, and served both the amended complaint and the summons on that complaint on defendant on June 23, 1980,

125. See Larango, 196 Mont. at 44, 637 P.2d at 517-18.
127. See Larango, 196 Mont. at 45, 637 P.2d at 518.
128. See id.
129. See id.
130. See id.
131. See id.
132. See id. at 45-46, 637 P.2d at 518-19.
133. See id. at 46, 637 P.2d at 519.
134. See id.
135. See id.
more than two years after the original complaint was filed. Predictably, the defendant moved for dismissal under Rule 41(e), citing the fact that this summons had not been issued within one year of the filing of the first complaint. The district court granted this motion and dismissed the action for violation of Rule 41(e).

For the first time, the Supreme Court expressed some frustration with the use of Rule 41(e) to defeat the goal of trial on the merits:

The Montana Rules of Civil Procedure are to be construed to secure the just, speedy and inexpensive determination of cases, Rule 1, and to facilitate the decision of cases on their merits. "[I]t is to be considered a serious matter when a party moves to have a case disposed of on grounds other than the merits." When the District Court quashed the May 8, 1978 summons on the ground that it had been altered without leave of court, failed to rule upon the motion to reconsider its quashing of the summons, and failed to rule upon the motion to allow amendment of the summons, Rule 41(e) was brought into play. The passage of time precluded the effective issuance of a new summons, and the case was dismissed. So, after four years of litigation and two reviews by this Court, the merits of this controversy are yet to be considered.

The Supreme Court held that the trial court abused its discretion in failing to allow amendment of the original summons to reflect the minor changes contained in the amended complaint. The court found that amendment of the summons would have aided in the goal of giving the defendant accurate notice of the nature of the action against him. Thus, the court remanded the action for amendment of the summons and amendment of proof of service, specifically stating:

Issuance and service of the summons shall relate back to the original dates of issuance and service, to insure that this case is not dismissed for failure to comply with the time requirements of Rule 41(e).

This case signals the first time the court stepped in to

136. See id.
137. See id.
138. See id.
139. Id. at 47, 637 P.2d at 519 (quoting Rambur v. Diehl Lumber Co., 144 Mont. 84, 394 P.2d 745 (1964)) (citations omitted).
140. See id. at 47, 637 P.2d at 519.
141. See id. at 47-48, 637 P.2d at 520.
142. Id. at 48, 637 P.2d at 520.
correct a Rule 41(e) situation because of its desire to get to the merits of the action. It is the first Rule 41(e) case in which the delay was caused by neither the plaintiff nor the plaintiff's attorney but by the trial court.

* Larango * is also the first case to directly decide whether a summons can be amended. Stating that the power to issue a summons lies exclusively with the clerk of court, the court pointed out that "the attorney in this matter was without authority to alter the summons without leave of court." Nevertheless, the Supreme Court found that once leave was requested, the district court should have allowed amendment. Rule 4D(7) specifically authorizes amendment of process or proof of service of process, and the Supreme Court found an abuse of discretion in failing to grant a motion for such amendment when the record was devoid of any indication that the defendant would be materially prejudiced.


The Rule 41(e) waters were quiet for 4 years after *Lovely*. Then, in 1985, the Supreme Court encountered a case squarely presenting a conflict between the fictitious name statute, the statute of limitations, and Rule 41(e). Sooy was the victim of a hot water heater explosion at his home. The accident occurred on June 19, 1980 and the statute of limitations expired June 19, 1983. The plaintiff filed a complaint on June 17, 1983, just within the statutory period. The complaint

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143. Extensively amended in 1997, MONT. R. CIV. P. 4C(1) now states that the “plaintiff's attorney shall present summons to the clerk for issuance. If the summons is in proper form, the clerk shall issue it and deliver it to the plaintiff or to the plaintiff's attorney who shall thereafter deliver it for service on the defendant in the manner prescribed by these rules.” See *In re Amending Rule 4C(1) of the Montana Rules of Civil Procedure*, 54 State Rptr. 71 (1997); *Supreme Court Amends Rule on Issuance of Summons*, 22 MONT. LAWYER, Feb. 1997, at 12. While the onus is on the plaintiff or her attorney to prepare the summons and have it served properly, only the clerk of court can issue the summons.

144. *Larango*, 196 Mont. at 47, 637 P.2d at 519.

145. *See id.*

146. MONT. R. CIV. P. 4D(7) gives the District Court the power "[a]t any time, in its discretion . . . [to] allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."


149. *See id.* at 419, 708 P.2d at 1015.

150. *See id.*

151. *See id.*
named two defendants, Petrolane Steel Gas, Inc., and Petrolane Steel Gas Service, alleging that these defendants had failed to add odorizers to the plaintiff’s propane, thus preventing him from knowing that he had a gas leak before he tried to light his hot water heater.\textsuperscript{152} Both defendants were properly served within a few days of filing the complaint;\textsuperscript{153} there was no Rule 41(e) problem as to them.

However, the complaint also named several fictitious “John Doe” defendants, pursuant to Montana’s fictitious name statute.\textsuperscript{154} The complaint alleged that these other defendants might also have been negligent and contributed to the plaintiff’s injury.\textsuperscript{155} After the litigation began, Sooy was able to identify additional responsible parties: Exxon, Shell Oil, Petrolane Supply and Perry Gas Products.\textsuperscript{156} These four defendants were the refiners of the propane supplied to the original two defendants, and allegedly were responsible for adding the odorant at the refinery.\textsuperscript{157}

The plaintiff had additional summonses issued on June 11, 1984, within the one-year Rule 41(e) period; these were served on the newly identified defendants on June 14, 1984.\textsuperscript{158} The date of service was also well within the three-year service limit imposed by Rule 41(e), but was almost one year after the statute of limitations had expired. The four defendants each moved to dismiss on the ground that they had not been named in the action within the statute of limitations period.\textsuperscript{159} The plaintiff then moved for leave to amend the original complaint to change the names of the John Does to the true names of the newly identified defendants and to change some of the substance of the complaint.\textsuperscript{160} The trial court denied the leave to amend and

\textsuperscript{152.} See id.
\textsuperscript{153.} See id.
\textsuperscript{154.} See id. The fictitious name statute provides:
When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleadings or proceedings may be amended accordingly.
\textsuperscript{155.} See Sooy, 218 Mont. at 419, 708 P.2d at 1015.
\textsuperscript{156.} See id.
\textsuperscript{157.} See id. at 419-20, 708 P.2d at 1015.
\textsuperscript{158.} See id. at 420, 708 P.2d at 1015.
\textsuperscript{159.} See id.
\textsuperscript{160.} See id.
dismissed the action against the four new defendants.161

On appeal, the Montana Supreme Court held that the plaintiff should have been allowed to amend against the four new defendants without leave of court, because they had not filed any responsive pleading.162 The court also held that the trial court should have allowed amendment against the two original defendants, who had filed answers, because of the language in Rule 15(a) requiring leave to be "freely given when justice so requires."163

With regard to the four newly identified defendants, the issue then became whether the amended complaint would relate back to the date of the filing of the original complaint, thus defeating the statute of limitations defense.164 In a 1979 decision, Vincent v. Edwards,165 the court had held that an amendment identifying previously fictitious defendants did not relate back.166 In Sooy, the court reversed itself and overruled Vincent:

We now hold that when a complaint sets forth a cause of action against a defendant designated by fictitious name and his true name is thereafter discovered and substituted by amendment, the fictitiously named defendant is considered a party to the action from its commencement so that the statute of limitations stops running as to the fictitious party on the date the original complaint is filed.167

The court found that its previous holding denied the status of the fictitious party as being in the action from the beginning and robbed the fictitious name statute of its efficacy,168 reasoning that the statute was meant to help plaintiffs who are unable to identify potential defendants without the aid of formal

161. See id.

162. See id. at 420, 708 P.2d at 1016. MONT. R. CIV. P. 15(a) provides that "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served."

163. Sooy, 218 Mont. at 420, 708 P.2d at 1016.

164. See id. at 421, 708 P.2d at 1016.

165. See 184 Mont. 92, 601 P.2d 1184 (1979).

166. See Sooy, 218 Mont. at 421-22, 708 P.2d at 1016.

167. Id. at 422, 708 P.2d at 1017. The court then went on to distinguish the situation where the original complaint does not designate any fictitious defendants:

But if parties are added by amended complaint as new parties and not as presently identified but formerly fictitiously named defendants, the amended complaint does not relate back to the date of the filing of the original complaint and the statute of limitations is not tolled as to such new parties.

Id.

168. See id. at 423, 708 P.2d at 1017.
prettrial discovery.\textsuperscript{169} In fact, the statute is most likely to be needed just before the statute of limitations expires, when the plaintiff is forced to conclude that he or she will be unable to identify that defendant in time to file without using a fictitious name.\textsuperscript{170}

Although the \textit{Sooy} holding does breathe life into the fictitious name statute, it obviously deprives defendants of some of the repose the statutes of limitation are supposed to provide, as well as allowing more time for evidence to be lost or destroyed and memories to fade.\textsuperscript{171} The \textit{Sooy} fictitious defendants could have argued that they began “to repose” on June 19, 1983, when they assumed the statute of limitations had expired and thus protected them forever, and that repose was unfairly snatched back when they were served almost a year later, on June 14, 1984. The court acknowledged this problem, and tried to take some of the sting out of its holding by citing Rule 41(e):

There is protection for fictitiously named defendants in the provisions of our Rule 41(e). Under that rule any defendant who has not appeared in the action or who has not been served within three years after the action has been commenced is entitled to a dismissal. Moreover, under that rule, unless summons shall have been issued within one year of the commencement of the action a defendant is entitled to dismissal.\textsuperscript{172}

That “protection” in effect extends the statute of limitations against fictitiously named defendants by at least one year. The plaintiff must identify the fictitious defendant within one year of filing the original complaint, in order to have a summons issued against that defendant within the Rule 41(e) deadline, even if the complaint is filed on the last day of the statute of limitations period. Thus, \textit{Sooy} breathed one year of post-statute life into the fictitious name statute, as the following chart shows:

\textsuperscript{169} \textit{See id.} at 422-24, 708 P.2d at 1017-18 (citing Barrington v. A.H. Robbins Co., 702 P.2d 563, 565 (Cal. 1985)).

\textsuperscript{170} \textit{See id.}

\textsuperscript{171} \textit{See Anaconda Mining Co. v. Saile, 16 Mont. 8, 12-14, 39 P. 909, 911 (1895).}

\textsuperscript{172} \textit{Sooy}, 218 Mont. at 423-24, 708 P.2d at 1018.
A fictitiously named defendant in a state cause of action must postpone his repose for one year beyond the date of repose for potential defendants whose identity the plaintiff knows. Whenever fictitiously named defendants appear in any suit on the docket, callers cannot know for sure that they will not later be identified as one of those defendants. They must suffer continuing unease for at least one more year until Rule 41(e) forecloses the plaintiff's opportunity to issue a summons against her.

In the typical case, where the defendant simply waits for the sheriff's knock on his door, the effect of Montana's Rule 41(e) is to postpone the actual day of repose by three years, the period

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173. The District Clerk of Court in Missoula has computerized the county's records from 1989 to the present. As soon as a complaint is filed, the computer record for an action begins. Thus, if a potential defendant wished to know whether she had been named as a defendant in a case, she could find this out before she is actually served. The computer record also contains the record of whether a summons had been issued for a particular defendant. All a potential defendant would have to do is call the court and give her name to find out whether she had been sued and whether there was a summons directed to her before she is actually served. Records prior to 1989 are not computerized and must be searched the old fashioned way.

174. The United States Supreme Court recently commented: "There is, no doubt, some truth to Learned Hand's comment that a lawsuit should be 'dread[ed] ... beyond almost anything else short of sickness and death.'" Clinton v. Jones, 520 U.S. 681, 706 n.40 (1997) (citation omitted).
of time the rule allows a plaintiff to wait between filing a complaint and serving a summons. Contrast this with the situation in federal court, where even if a plaintiff waits until the last day of the statute of limitations period to sue, defendant receives service within 120 days.\textsuperscript{175}

10. \textit{Association of Unit Owners v. Big Sky of Montana, Inc.}\textsuperscript{176}

\textit{Big Sky} is a civil procedure professor's dream and a litigator's nightmare. Many of the larger law firms in Montana were involved in the case, representing ten defendants including Big Sky of Montana, Boyne USA, Chrysler Realty Corp., Continental Oil, Northwest Airlines, and Burlington Northern.\textsuperscript{177}

The plaintiffs, owners of condominiums in the Deer Lodge Complex at the Big Sky Resort, sued to recover damages resulting from a fire at the condominiums.\textsuperscript{178} The original complaint was filed January 18, 1983, but no summons was issued at that time.\textsuperscript{179} On February 18, 1983, the plaintiffs filed an amended complaint and obtained a summons.\textsuperscript{180} The amended complaint identified all of the defendants, but the summons was addressed to “Big Sky of Montana, Inc. et al., Defendants.”\textsuperscript{181} The plaintiffs served four defendants with the February 1983 summons within the time limits imposed by Rule 41(e).\textsuperscript{182}

In May 1984, about fifteen months after the original summons was issued and more than a year after the complaint was filed, the plaintiffs had a number of additional summonses issued, marking them “duplicate summons.”\textsuperscript{183} Each duplicate summons was addressed to the individual defendant on whom it

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175. FED. R. CIV. P. 4(m). The federal system does not have a rule or statute which expressly permits or forbids the use of fictitiously named defendants. \textit{See} Molnar \textit{v. National Broad. Co.}, 231 F.2d 684, 687 (9th Cir. 1956). Similarly, the federal district court of Montana does not have a local rule either permitting or denying the use of fictitiously named defendants. Whether a plaintiff may proceed against a John Doe defendant lies within the discretion of the federal courts. \textit{See id.}


177. \textit{See id.} at 142, 729 P.2d at 469. The other four defendants were served in compliance with Rule 41(e) and were not involved in this appeal.

178. \textit{See id.} at 145, 729 P.2d at 470.

179. \textit{See id.} at 145, 729 P.2d at 471.

180. \textit{See id.}

181. \textit{See id.}

182. \textit{See id.}

183. \textit{See id.}
\end{flushright}
was later served. The plaintiffs evidently did not obtain leave of court for the issuance and service of any "duplicate summons," nor do the Rules of Civil Procedure provide any authority for such a procedure. It appears that the plaintiffs realized that they had violated Rule 41(e) by waiting too long to have summonses issued to the remaining defendants, and that the plaintiffs created this new device — the duplicate summons — in an effort to camouflage their error.

The Supreme Court gave short shrift to the plaintiffs' attempt to circumvent Rule 41(e) by inventing a new type of summons:

Our rules do not contain a provision for the issuance of a "duplicate" summons. We disregard that terminology in the title of the summons, and conclude that the service of such a summons fails to meet the requirements of Rule 41(e), which requires that the summons be issued within one year of the commencement of the action. We are not able to relate the actual service back to the summons properly issued on February 18, 1983, because that summons failed to name any of the six defendants in its caption or anywhere else in the summons.

The Supreme Court then affirmed the district court's dismissal of two of the six defendants who received "duplicate" summonses because the attempted service of the duplicate summonses was insufficient under Rule 41(e). The other four defendants, whose Rule 41(e) "rights" were also violated, were nonetheless stuck in the case because of their own errors in raising the Rule 41(e) defense.

Rule 12(b) requires a defendant to raise certain defenses at the outset of a case, even before the answer is filed. Rules 12(g) and 12(h) require that a defendant make only one pre-answer motion, consolidating all available Rule 12 defenses, in order to prevent seriatim motions as a delay tactic.

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184. For instance, the duplicate summons served on BN read: "Association of Unit Owners of the Deer Lodge Condominium, et al., Plaintiffs, versus Burlington Northern; et al., Defendants." See id. at 146, 729 P.2d at 471.
185. Id. at 148, 729 P.2d at 472.
186. See id.
187. See id. at 150-51, 729 P.2d at 474.
188. These defenses are: lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, failure to state a claim for which relief can be granted, and failure to join a necessary party. See MONT. R. CIV. P. 12(b).
189. See Big Sky, 224 Mont. at 149, 729 P.2d at 473 (quoting 2A MOORE'S FEDERAL PRACTICE ¶ 12.02 (1985)).
12(h)(1) specifically states that the defenses of insufficient service of process and insufficient process are waived if a Rule 12 motion is filed and they are not included in that motion.\(^{190}\)

Only two of the six defendants in *Big Sky* correctly followed the dictates of Rule 12 and capitalized on the plaintiffs' error.\(^{191}\) These two defendants each moved to dismiss the case at the outset and included the insufficiency of service of process defense in that initial motion.\(^{192}\) The other four hapless defendants — Conoco, Northwest Airlines, General Electric, and Montana Power Company — clearly did not recognize the plaintiffs' Rule 41(e) violation at first and failed to raise either insufficiency of service or process in their original responses.\(^{193}\) Only when they received copies of the responses of BN and Chrysler did they realize their omissions. Each defendant undertook various ploys to disguise its omission. However, as the plaintiffs also discovered, creativity was of no avail.

Defendant Conoco did not raise Rule 41(e) in its motion to dismiss but argued for dismissal on that ground in its subsequent brief in support of its general motion to dismiss.\(^{194}\) Noting that a brief is neither a pleading nor a motion and thus does not meet Rule 12(b)'s requirements, the Supreme Court reversed the trial court's dismissal of Conoco.\(^{195}\) Northwest
Airlines filed a motion to dismiss and a brief without raising Rule 41(e) in either.\textsuperscript{196} Northwest filed an "amended motion to dismiss" without prior court permission, including a Rule 41(e) objection, relying on Rule 15(a)'s authorization of amendment without a court's leave if the amendment is made within 20 days of the document's filing.\textsuperscript{197} However, the Supreme Court held that Rule 15(a) applies only to pleadings, that Northwest's failure to raise Rule 41(e) in its first appearance violated Rule 12(b), and that the trial court erred in dismissing Northwest.\textsuperscript{198} General Electric and Montana Power both filed motions to dismiss without mentioning Rule 41(e).\textsuperscript{199} Like Northwest, both "amended" their motions to include Rule 41(e).\textsuperscript{200} The Supreme Court also reversed the dismissals of these defendants.\textsuperscript{201}

Thus, the two defendants who correctly identified the Rule 41(e) deficiency and properly raised it as a defense in the first appearance were dismissed from the case without ever having to address the merits of the claims against them. Each of the four remaining defendants probably incurred substantial legal expenses as well as significant potential liability on the merits solely because of their lawyers' failure to recognize the plaintiffs' violation of Rule 41(e).

The lessons to be learned from \textit{Big Sky} are clear and simple:

1. Within a year of filing the complaint, the plaintiff must have a summons issued and addressed to each defendant;
2. The plaintiff cannot merely issue a "duplicate summons" after the one-year limit for issuance of summons has run;
3. The defendant must analyze the date on the summons and the date of service at the outset of the case to determine whether the plaintiff complied with Rule 41(e);
4. The defendant who wishes to have the case dismissed for violation of Rule 41(e) must either:

\textsuperscript{196.} \textit{See id.}
\textsuperscript{197.} \textit{See id.}
\textsuperscript{198.} \textit{See id.} at 150-151, 729 P.2d at 474.
\textsuperscript{199.} \textit{See id.} at 151, 729 P.2d at 474.
\textsuperscript{200.} \textit{See id.}
\textsuperscript{201.} \textit{See id.}
RULE 41(e) IN MONTANA

a. file an answer immediately, including insufficiency of service of process and insufficiency of process as affirmative defenses; or

b. file a pre-answer motion, including insufficiency of service of process and insufficiency of process, citing Rule 41(e).

11. Livingston v. Treasure County.202

Livingston obtained the summons on the date she filed the complaint and had that summons served on the last permissible day of the three-year period mandated by the rule.203 However, the plaintiff failed to file the return of service of the summons for three weeks,204 a technical violation of part of Rule 41(e) which, at that time, required dismissal of an action "unless summons issued within one year shall have been served and return made and filed with the clerk of the court within three years after the commencement of said action."205

Unlike most of the defense counsel in Big Sky, counsel for Treasure County spotted the fact that the return of service was filed too late and moved to dismiss for violation of Rule 41(e).206 The district court granted the motion and dismissed the action.207

On appeal, the Supreme Court reversed and remanded the case, holding that the failure to file the return was a mere ministerial act, and that failure to comply with the rule's deadline for filing return of service "neither hindered nor delayed prosecution of the action. Nor did it affect the validity of service."208 The court looked at other rules governing proof of service, and noted that failure to meet those time limits did not affect validity of the service of process, and could be excused upon a showing of good cause.209 The court noted that "the facts in the present case demonstrate that good cause has been shown,"210 although the opinion does not refer to any

203. See id. at 512, 781 P.2d at 1130.
204. See id.
206. See Livingston, 239 Mont. at 512, 781 P.2d at 1130.
207. See id.
208. Id. at 513, 781 P.2d at 1131.
209. See id.
210. See id.
explanation by plaintiff as to why she filed the return late.\textsuperscript{211} Instead, the court supported its holding by citing the policy of trial on the merits,\textsuperscript{212} and concluded simply that "it is appropriate here to excuse the failure to file the return."\textsuperscript{213} The court also noted the difference between the federal rule on the same subject and Montana's Rule 41(e), and referred this provision of Rule 41(e) to the Commission on Rules of Procedure for amendment.\textsuperscript{214}

Justice McDonough dissented, stating that the rule's language was quite clear and should be enforced.\textsuperscript{215} He observed that the plaintiff had not offered any excuse or reason for her delay in filing the return:

The appellant has not stated or alleged any excuse or reason... for her failure to return in the time frame required.... The defendant... was always available for over one thousand days for service of process. Our Federal Constitution was debated and approved by the Convention, and debated and ratified by the States in less time when communication and transportation was

\textsuperscript{211} The opinion states baldly:
Three years later, on November 27, 1988, plaintiff delivered the summons and complaint to the sheriff, who served defendant on that day. Plaintiff filed the summons and return with the District Court on December 20, 1988.

\textit{Id.} at 511, 781 P.2d at 1130.

\textsuperscript{212} See id. at 513, 781 P.2d at 1131.

\textsuperscript{213} Id. at 514, 781 P.2d at 1130.

\textsuperscript{214} In fact, the Supreme Court did formally amend the requirement relating to filing of the return of service in 1993. That amendment changed the rule by striking the requirement that return of service be made within the three-year period. See Montana Supreme Court Order of Mar. 26, 1993. However, the current rule reads as follows:

No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within three years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion or on the motion of any party interested therein, whether named in the complaint as a party or not, unless \textit{summons shall have been issued within 1 year}, or unless summons issued within one year \textit{shall have been served and filed with the clerk of court within three years} after the commencement of said action, or unless appearance has been made by the defendant or defendant therein within said three years. . . .

\textit{MONT. R. CIV. P. 41(e)} (emphasis added). Thus, the amendment does not appear to meet the criticism of the rule in \textit{Livingston}, and still imposes a duty on plaintiff to meet a deadline after service, and thus notice to the defendant, has been accomplished. If Rule 41(e) is retained, it should at least be amended to eliminate a deadline for filing proof of service on the returned summons. The purpose of the rule is to give notice to the defendant; filing proof of that notice is truly ministerial.

\textsuperscript{215} See \textit{Livingston}, 239 Mont. at 514, 781 P.2d at 1131 (McDonough, J., dissenting).
In Justice McDonough's view, the majority's willingness to bend the clear language of the rule fostered delay, directly contrary to the court's expressed desire to accomplish just, speedy and inexpensive determination of lawsuits.\(^ {217} \)

12. \textit{Courchane v. Kuntz}.\(^ {218} \)

Less than a year after \textit{Livingston} was decided, the plaintiffs in \textit{Courchane} invoked its reasoning to argue that their Rule 41(e) dismissal was also based on a technicality and that their case also ought to be allowed to proceed on the merits.\(^ {219} \) On October 17, 1986, the Courchanes filed a complaint against the sellers of their home, alleging fraud and negligent misrepresentation as to the condition of the sewer system.\(^ {220} \) More than three years later, the plaintiffs amended the complaint to join the realtor as a defendant.\(^ {221} \) The new defendant, Flynn Realty, moved to dismiss on the ground that it was not served with summons within three years of the commencement of the action.\(^ {222} \) The district court, finding the rule to be clear and mandatory, agreed and dismissed the action.\(^ {223} \)

Reasoning that the language of the original complaint referred to the sellers' agent, and that the plaintiffs could easily have included the realtor in the original complaint, the Supreme Court affirmed the district court's dismissal:

\begin{quote}
To allow Flynn Realty to be joined after three years had elapsed would not have been timely, and Courchanes have not stated or alleged any legal excuse or reason to invoke the equity of a court for their failure to join Flynn Realty in the time frame required.\(^ {224} \)
\end{quote}

Though the plaintiffs argued that they did not know the realtor was a potential defendant until they had undertaken

\begin{footnotes}
\item[216] \textit{Id.}
\item[217] \textit{See id.} The majority stated that the purpose of Rule 41(e) was to ensure timely prosecution of actions; the majority then found that service of the summons and complaint was indispensable but filing the return of service was not essential. \textit{See id.} at 513, 781 P.2d at 1130-31.
\item[218] \textit{246 Mont.} 216, 806 P.2d 12 (1990).
\item[219] \textit{See id.} at 217, 806 P.2d at 13.
\item[220] \textit{See id.}
\item[221] \textit{See id.}
\item[222] \textit{See id.}
\item[223] \textit{See id.}
\end{footnotes}
discovery against the sellers, the court did not address this contention. It is not clear what excuse, if any, would have been sufficient to convince the court to waive the Rule 41(e) violation in this case, but the Courchanes must have been frustrated by the result in their case, when the Livingstons offered no excuse at all for violating another portion of Rule 41(e). On the other hand, in Courchane, there was neither service nor return of service; Flynn Realty had no notice at all of the claim against it for more than three years after the lawsuit began. In the Livingston case, the defendant was served (barely) within the three years and thus had actual notice.


In Sinclair, a wrongful termination of employment action, the Supreme Court dismissed several defendants under Rule 41(e). The plaintiff worked at various times in various capacities for several interrelated corporations. After he was fired from his last such job, he sued that company, BBMC. The original complaint was filed on May 31, 1990. The plaintiff filed an amended complaint in January, 1992, adding as defendants several of the interrelated corporations. In February 1992, the new defendants moved to dismiss, arguing that the plaintiff had not had summonses issued to them within one year of the action's commencement. The trial court denied this motion because the new defendants had appeared in the lawsuit within three years of the commencement of the action.

The Supreme Court reversed, holding that failure to issue a summons within one year of the commencement of the action entitles a defendant to dismissal of the action. The court granted that "an action may be further prosecuted under Rule

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225. See id. at 217-18, 806 P.2d at 13-14.
228. See id. at 364, 865 P.2d at 265.
229. See id.
230. See id. at 364, 865 P.2d at 266.
231. See id.
232. See id.
233. These defendants asserted both possible defenses for this violation, insufficiency of process and insufficiency of service or process. See id. at 365-66, 865 P.2d at 266.
234. See id. at 366, 865 P.2d at 266.
235. See id. at 367, 865 P.2d at 266-67.
41(e)... if a defendant appears within three years of the commencement of the action even though summons has not been timely issued."236 Even so, the court held that the defendants' motion to dismiss based on Rule 41(e) was not an "appearance" within the meaning of the rule and did not constitute a basis for further prosecution of the action.237

*Big Sky* and *Sinclair* together teach that a defendant who believes a plaintiff violated Rule 41(e) should, if at all possible, delay filing any response at all during the three year period, in order to avoid the appearance of "appearing." This course of action, however, raises the specter of default, which could later be set aside under *Shields v. Pirkle*.238 If a defendant does file any response within the three-year period, she should confine that response to a Rule 12 motion raising only the Rule 41(e) violation and those other defenses, such as improper venue or lack of personal jurisdiction, which must be raised in a defendant's first motion to the court.239

In *Sinclair*, the plaintiff argued that he had in fact complied with Rule 41(e) when he had a summons timely issued to BBMC, because that corporation and the other defendants were in fact "one and the same."240 The Supreme Court rejected this "meritless" theory:

Rule 4C expressly requires summons [sic] to set forth the names of the parties. Thus, the summons naming only BBMC as a defendant does not provide a basis for the court to allow prosecution of the action against the non-BBMC defendants, each of which is a separate legal entity or individual.241

The court also rejected the plaintiff's excuse that he had been unable to discover his claims against the new defendants within the year after he filed his original complaint, finding that the plaintiff knew of the factual basis of those claims at the time he

236. *Id.* at 367, 865 P.2d at 267.
237. *See id.* Compare this with the situation of the four defendants in *Big Sky*, who made other types of initial motions without mentioning Rule 41(e). Under this reasoning, those defendants were not entitled to dismissal under the rule, not only because they waived their Rule 12(b) defenses of insufficiency of process and of service under Rule 12(h), but also because they appeared in the action within three years of its commencement.
239. *See MONT. R. CIV. P. 12(g), (h)(1).*
240. *Sinclair*, 262 Mont. at 368, 865 P.2d at 267.
241. *Id.*
filed the first complaint.\textsuperscript{242}

14. First Call, Inc. v. Capital Answering Service, Inc.\textsuperscript{243}

In First Call, the Supreme Court agreed with the district court that the complaint should be dismissed because the plaintiff failed to serve the summons within three years, in violation of Rule 41(e).\textsuperscript{244} However, the court reversed the district court's dismissal without prejudice, holding that such a dismissal should be made with prejudice and accorded res judicata effect.\textsuperscript{245}

The Supreme Court acknowledged that the trial judge had been correct in dismissing without prejudice because of its prior holdings in Whitcraft v. Semenza\textsuperscript{246} and State ex rel. Equity Supply v. District Court.\textsuperscript{247} In First Call, the court overruled those two cases, holding that the language of Rule 41(e) was "clear and unambiguous."\textsuperscript{248} It cited with approval Justice Haswell's concurring opinion in the Equity Supply case:

\begin{quote}
The purpose of this Rule is not only to promote diligent prosecution of claims once suit has been filed thereon, but also to bar further prosecution of laches lawsuits. The Commission Note to amended Rule 41(e) makes this clear... [T]his purpose is completely defeated by interpreting... [the rule] to permit a subsequent refiling of a laches lawsuit previously dismissed so long as the statute of limitations has not expired.\textsuperscript{249}
\end{quote}

Thus, it is now clear that dismissals under Rule 41(e) are dismissals with prejudice and have res judicata effect as though the case had been tried to conclusion and judgment rendered against the plaintiff. This means that a plaintiff's violation of Rule 41(e) in effect constitutes her one day in court — a bad way to waste that day.

15. Webb v. T.D.\textsuperscript{250}

The Supreme Court decided three separate Rule 41(e) cases in 1996. Webb, the first of these, was a medical malpractice

\begin{footnotesize}
\begin{enumerate}
\item[242.] See id. at 369, 865 P.2d at 268.
\item[244.] See id. at 427, 898 P.2d at 97.
\item[245.] See id. at 428, 898 P.2d at 98.
\item[246.] See 145 Mont. 94, 399 P.2d 757 (1965).
\item[247.] See 159 Mont. 34, 494 P.2d 911 (1972).
\item[248.] First Call, 271 Mont. at 427, 898 P.2d at 97.
\item[249.] Id. at 427-28, 898 P.2d at 97 (citing State ex rel. Equity Supply Co. v. District Court, 159 Mont. 34, 41, 494 P.2d 911, 915 (1972)).
\end{enumerate}
\end{footnotesize}
action against an orthopedist and a radiologist. The plaintiff first filed a claim with the Medical Legal Panel, within the statute of limitations period, against these two defendants.\textsuperscript{251} After the Panel’s decision, she filed a complaint in district court and obtained a summons the same day.\textsuperscript{252} However, she did not serve the summons on the defendants then.\textsuperscript{253} Later, her counsel decided that her chiropractor also should be a defendant and filed a claim against the chiropractor with the Chiropractic Legal Panel, including the orthopedist and radiologist as necessary and proper parties to the action against the chiropractor.\textsuperscript{254} The plaintiff then voluntarily dismissed the district court lawsuit against the orthopedist and the radiologist.\textsuperscript{255}

When the chiropractic panel rendered its decision, the plaintiff filed a second complaint in district court against all three defendants.\textsuperscript{256} The orthopedist and radiologist moved to dismiss this second action against them claiming that the plaintiff had violated Rule 41(e) by failing to serve the summonses in the first action on them before she dismissed that action, and that under the holding in \textit{First Call}, the plaintiff’s dismissal of the first action was actually with prejudice.\textsuperscript{257} The Supreme Court disagreed, limiting \textit{First Call} to situations where dismissals on Rule 41(e) violations are made by courts, not plaintiffs.\textsuperscript{258} The court also noted that a summons had been issued within one year of the filing of the first action, and that the second complaint and summons in fact were served within three years of the commencement of the first action.\textsuperscript{259}

The court did not comment on whether plaintiffs would have violated Rule 41(e) if they had waited more than three years from the filing of the first complaint but less than three years from the filing of the second action to serve the summons and complaint in the second action. However, it seems clear that this would not be a Rule 41(e) violation. The language of the rule speaks repeatedly of “an action,” and the dismissal of the

\textsuperscript{251} See \textit{id.} at 244, 912 P.2d at 203.
\textsuperscript{252} See \textit{id.} at 246, 912 P.2d at 203.
\textsuperscript{253} See \textit{id.} at 246, 912 P.2d at 204.
\textsuperscript{254} See \textit{id.}
\textsuperscript{255} See \textit{id.}
\textsuperscript{256} See \textit{id.}
\textsuperscript{257} See \textit{id.} at 249, 912 P.2d at 206.
\textsuperscript{258} See \textit{id.} at 249-50, 912 P.2d at 206.
\textsuperscript{259} See \textit{id.} at 250, 912 P.2d at 207.
first action should mean that the second action stands on its own, with its own separate Rule 41(e) deadlines measured from the commencement of that second action.


The next Rule 41(e) case dealt with a failure to have a summons issued within one year of the filing of the complaint. Busch's personal injury complaint was filed on January 31, 1992, just within the statute of limitations period. 261 Eight months later, in a status report to the court, plaintiff's counsel advised the court that he had not served the summons and complaint because he was in continuing negotiations with defendants' insurance company. 262

In March 1993, plaintiff discovered that no summons had ever been issued. 263 The plaintiff then attempted to have the clerk issue a summons, but the clerk refused, on the ground that the one-year Rule 41(e) period had expired. 264 The plaintiff then moved for leave of court to extend the one-year period on the basis of excusable neglect. 265 In July 1993, the district court granted leave to file an amended complaint and have a summons issued on the amended complaint, on the theory that a summons might still be issued on an amended complaint. 266 However, the plaintiff failed to file the amended complaint or have the summons issued until prodded to do so by the court in January 1995. 267 The plaintiff had the summons served and filed return of service on the day the three-year limit in Rule 41(e) was to expire. 268

The defendants moved to dismiss the action under Rule

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261. See id. at 480, 925 P.2d at 875.
262. See id.
263. See id.
264. See id. at 480-81, 925 P.2d at 875.
265. See id. at 481, 925 P.2d at 875. The proffered excuse was that plaintiff's counsel's calendaring system "was completely wiped out by a computer virus in January 1993," preventing the lawyer from discovering that no summons had been issued. Id. The attorney stated that he mistakenly believed that he had a summons issued soon after he filed the status report in September 1992. See id. Justice Gray's concurrence, joined by Justice Nelson, observed that "Plaintiff's counsel can hardly be praised for the diligent pursuit of his client's case.... If this case were to be decided purely on excusable neglect grounds and without the overlay of the issue involving Rules 4C(1) and 41(e), the result might well be different." See id. at 486, 925 P.2d at 879.
266. See Busch, 278 Mont. at 481, 925 P.2d at 875.
267. See id. at 481, 925 P.2d at 875-76.
268. See id.
The trial court granted the motion and dismissed the action because of the plaintiff's failure to issue a summons within one year of the commencement of the action. The district court also held that the one-year time period ran from the date the original action was filed, even though the plaintiff was permitted to file an amended complaint.

On appeal, the Supreme Court noted its earlier rulings that:

Rule 41(e) requires dismissal of an action where summons is not issued within one year of the commencement of the action, unless an appearance is made by the defendant within three years of the commencement of the action.

The court did not rule on plaintiff's arguments that a trial court has authority to extend the time for issuance of the summons for good cause or excusable neglect. Instead, it decided the case on the issue of who has the burden of issuing the summons in a timely manner: the plaintiff's attorney or the clerk of court.

The Supreme Court acknowledged that Montana practice had been for the attorney to prepare the summons and then direct the clerk of court to issue that summons at a specified time, but then found that this prevailing practice was "actually at odds with what the Rules clearly and unambiguously require." The court held that Rule 4C(1) requires the clerk of court to "forthwith issue a summons, and . . . deliver the summons either to the sheriff . . . or to the person who is to serve it." Under this reading of the rule, the Supreme Court found that the plaintiff's attorney is able only to request delivery of the summons and then take responsibility for its service and return, but the attorney has no power or duty to issue the summons.

That being so, the court reversed the dismissal of plaintiff's action caused by the late issuance of the summons:

Since Rule 4C(1) clearly places the initial burden and mandatory duty of issuing and delivering a summons on the clerk of court.

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269. They filed a combined Rule 12(b) motion, alleging both insufficiency of process and insufficiency of service of process under Rule 41(e). See id. at 479, 481, 925 P.2d at 875, 876.
270. See id. at 479, 925 P.2d at 875.
271. See id. at 482, 925 P.2d at 876.
272. Id. (citations omitted).
273. See id. at 483, 925 P.2d at 877.
274. See id.
275. See id.
276. See id. at 484, 925 P.2d at 877.
upon the filing of the complaint, we are unwilling to affirm the trial court sanctioning the Plaintiff with dismissal under Rule 41(e) and with the irrevocable deprivation of her day in court, where that sanction results clearly from the failure of the clerk — an officer of the court — to perform this duty, which is clearly required under the Rules and is solely within that official's responsibility.\textsuperscript{277}

A unanimous court remanded the case to allow plaintiff's action to proceed.\textsuperscript{278} It then signalled its intention to amend Rule 4C(1) to place the burden of insuring issuance of summons on the plaintiff, rather than on the clerk, thus revising the language of the rule to reflect the prevailing practice.\textsuperscript{279} This amendment occurred in 1997.\textsuperscript{280} It is now clear that it is the responsibility of the plaintiff's lawyer to insure that the summons is actually issued within the one year period, as well as to have it served and the return of service filed in conformity with Rule 41(e).\textsuperscript{281}

17. \textit{Haugen v. Blaine Bank}.\textsuperscript{282}

On the same day that it decided \textit{Busch}, the Supreme Court issued another much more controversial Rule 41(e) opinion, this time affirming a dismissal under that rule. Unlike the \textit{Busch} decision, \textit{Haugen} polarized the court and provides some juicy legal reading.

The plaintiffs sued a bank and some individual defendants on August 28, 1992, seeking damages for an alleged unlawful

\begin{footnotes}
\item[277.] See id. at 484, 925 P.2d at 878.
\item[278.] See id. at 486, 925 P.2d at 878.
\item[279.] See id. at 485, 925 P.2d at 878.
\item[281.] The amended MONT. R. CIV. P. 4C(1) now reads:

Upon or after filing the complaint the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall present a summons to the clerk for issuance. If the summons is in proper form, the clerk shall issue it and deliver it to the plaintiff or to the plaintiff's attorney who shall thereafter deliver it for service upon the defendant in the manner prescribed by these rules. Issuance, service and filing of the served summons with the clerk shall be accomplished within the times prescribed by Rule 41(e) of these rules. Upon request, the clerk shall issue separate or additional summons against any parties designated in the original action, or against any additional parties who may be brought into the action, which separate or additional summons shall also be served and filed in the manner and within the time prescribed by these rules. The party requesting issuance of the summons shall bear the burden of having it properly and timely served and filed with the clerk.

\item[282.] 279 Mont. 1, 926 P.2d 1364 (1996).
\end{footnotes}
sale of personal property at a sheriff's sale. The clerk of court issued a summons for each defendant on July 23, 1993, within the Rule 41(e) limit, but the summonses were never served. As the end of the three-year service period neared, two defendants prepared a motion to dismiss for failure to comply with Rule 41(e). Unfortunately for them, they apparently mistakenly filed the motion on August 24, 1995, a few days before the three-year period actually expired, thus sounding an alarm for the plaintiffs.

The plaintiffs responded by making their own mistake. They obtained amended summonses and had them served on two defendants on August 25, 1995 and on a third defendant on August 29, 1995. Pursuant to the instruction of plaintiffs' counsel, the sheriff returned the summonses and proof of service to the lawyer, rather than directly to the clerk of court, and did not do that until August 31, 1995. The attorney mailed the returned summonses to the clerk of court on September 2, 1995. The clerk received and filed them on September 5, 1995.

As in Livingston v. Treasure County seven years earlier, the plaintiffs here accomplished service on at least two defendants just barely within the three-year period mandated by Rule 41(e). However, the return of service for all these defendants was filed after that period expired. Relying on Livingston, the plaintiffs argued that the filing of the proofs of service was simply ministerial and not essential to the goal of Rule 41(e). The plaintiffs in Haugen were undoubtedly shocked to learn that the pendulum had swung to the opposite extreme in the seven short years since Livingston:

Having carefully considered Livingston and other more recent decisions involving Rule 41(e) . . . we now conclude that our
interpretation of this Rule in Livingston was incorrect.294

Writing for the majority, Justice Nelson quoted Justice McDonough’s dissent in the Livingston case,295 as well as from the majority’s language in First Call,296 and reiterated the court’s obligation simply to apply plainly stated rules:

The language of Rule 41(e) . . . is clear and unambiguous; all actions shall be dismissed unless summons issued within one year “shall have been served and filed with the clerk of court within three years after the commencement of said action.” We therefore hold that filing proof of service with the clerk of court is not “simply a ministerial act” as we stated in Livingston and we overrule Livingston on that basis.297

The Haugen majority expressed concern with the rights of defendants, whereas the Livingston court based its decision on the harshness of the dismissal to the plaintiff and the goal of trial on the merits:

Furthermore, we reasoned in Livingston that dismissing an action because the plaintiff failed to file proof of service . . . was too harsh a result and prejudicial to the plaintiff. On the contrary, permitting a plaintiff to disregard the mandates of Rule 41(e) is prejudicial to the defendant and defeats the purpose of the Rule which is to promote diligent prosecution of claims once suit is filed.298

The court found that plaintiffs were “less than diligent” in proceeding with their claim, and failed to take advantage of several different options which would have guaranteed compliance with Rule 41(e): having the sheriff file the proofs of service directly with the clerk of court; directing the sheriff to serve and provide plaintiffs’ counsel with the returns by a specific date; picking up the proofs of service rather than having the sheriff mail them; and finally, simply having the service occur earlier to allow time to meet Rule 41(e).299

The majority considered and rejected a plea that its reversal of Livingston and its new insistence on having the return of

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294. Id.
295. See Livingston, 239 Mont. at 514, 781 P.2d at 1131 (McDonough, J., dissenting), supra Section IV.A.11.
297. Haugen, 279 Mont. at 6, 926 P.2d at 1367.
298. Id.
299. See id. at 7, 926 P.2d at 1367.

https://scholarship.law.umt.edu/mlr/vol60/iss2/2
service filed within three years of the date of the filing of the complaint should be applied prospectively and not to the Haugen parties. Thus, it affirmed the trial court's dismissal of the action against all three defendants, including the two who clearly were served within the three year period.

Justice Nelson also filed a special concurrence, joined by Justice Gray. In that opinion, he put the blame for the loss of the plaintiffs' cause of action squarely on their own shoulders:

The rules are there for both parties to read and to follow. If lawyers choose to conduct their practices in the eleventh hour, neither they nor their clients should be particularly surprised when, whether through dalliance, neglect or lack of attention to the time limits clearly set forth in the rules, time eventually runs out.

Finally, contrary to the dissent, it is not the majority opinion that has denied these litigants their day in court but, rather, it is the litigants' own failure to pursue their lawsuit with diligence and within the time limits unambiguously set forth in Rule 41(e). If those time limits or the requirements of the rule serve as nothing more than to impose meaningless barriers to litigation, as the dissent seems to believe, then the rule should be changed. Unless and until it is, however ... [defendants] have as much right to rely on this rule in their effort to avoid the expense and time of defending ... as ... [plaintiffs] had in bringing suit and prosecuting this cause of action in the first place.

Justices Leaphart, Trieweiler, and Hunt each filed dissenting opinions. Justice Leaphart believed both that Livingston should not be overruled and that if it was, the new rule should not apply to the Haugens. He observed that the defendants had in fact been served and had formal notice of the claim against them within the three year period, and that filing the return of service had nothing to do with the subsequent procedural steps available to the defendants. That being so, Justice Leaphart could find no prejudice to defendants from the several days' delay in filing the return of service, especially when weighed against plaintiffs' prejudice in losing their right to trial on the merits.

Both Justices Leaphart and Trieweiler stressed the
importance of fairness to the litigants. They were primarily concerned with the plaintiffs, who had relied on the court's earlier and opposite interpretation of Rule 41(e) in the Livingston case. Justice Trieweiler reasoned that the bar had every bit as much right to rely on the Supreme Court's decision in Livingston as it did to rely on the language of the rule, and that now penalizing plaintiffs for that reliance was simply unfair:

No amount of pontification by the majority about the retroactive application of judicial decisions can disguise its callous disregard for the rights of the litigants in this case. Cutting through the legal mumbo-jumbo in the majority opinion, the practical effect of its decision is simply indefensible based on any notions of fairness, common sense, or respect for the legal profession.\(^{306}\)

Justice Leaphart maintained that the plaintiffs' lawyer had done exactly what the Livingston court had told him he could do: serve within the three year limit but wait a short time before filing proof of that service.\(^{307}\) Furthermore, Justice Trieweiler reasoned that the filing, or not filing, of the proof of service did absolutely nothing to further the lawsuit: "In fact, if the affidavit is never filed it would make absolutely no difference to anyone."\(^{308}\)

Justice Hunt echoed this sentiment, stating that "the error complained of here is a mere technicality if ever there was one"\(^{309}\) and that the court's often-stated policy in favor of trial on the merits should override this technical error in order to achieve the goal of substantial justice for all litigants.\(^{310}\) He also observed that the plaintiffs had in fact met all other deadlines in this case, even if some of those actions were done later rather

\(^{306}\). *Id.* at 16, 926 P.2d at 1373 (Trieweiler, J., dissenting). Justice Nelson characterized Justice Trieweiler's prose as:

[S]ound-bite legal writing . . . guaranteed to provide easy copy for the press, editorial writers and talk-show hosts — especially those who could care less about reading, much less fairly and intelligently reporting, the opinion when there is a dissent full of one-liners to quote. However, it is precisely this sort of rule-from-the-gut and shoot-from-the-hip approach that produces result-oriented decisions like *Livingston*.

See *id.* at 12, 926 P.2d at 1370.

\(^{307}\). See *id.* at 16, 926 P.2d at 1373.

\(^{308}\). *Id.* at 17, 926 P.2d at 1373. This is true in all circumstances except one: the return of service must be filed before a court will enter a default judgment.

\(^{309}\). *Id.* at 19, 926 P.2d at 1374.

\(^{310}\). See *id.* at 18, 926 P.2d at 1374.
than earlier in the allowable periods. 311

Despite these passionate dissents, four members of the court voted to, and did, dismiss the plaintiffs' action for failure to file the proof of service within the three years required by Rule 41(e), even though the plaintiffs had gotten the summonses issued and served on time. Once again, the plaintiffs' violation of Rule 41(e) resulted in a total loss of their cause of action.

18. Yarborough v. Glacier County. 312

The next Rule 41(e) case provided an opportunity for the court to reunite in a unanimous opinion written by Justice Trieweiler. The case involved an employment contract dispute. 313 The Rule 41(e) question arose but was not discussed in Haugen: what is the effect of obtaining a summons within the first year, but later serving an identical duplicate summons which was issued after the first year? 314

Yarborough filed her complaint and had a summons issued the same day, July 8, 1993. 315 In February of 1994, plaintiff's counsel sent the complaint and summonses to the Glacier County Attorney and asked him to acknowledge service. 316 He refused to do so, requiring personal service on the county. 317 At some point after February 15, 1994, but before it could be served, the original summons was lost. 318 In June of 1995, almost two years after the action was commenced, plaintiff's counsel asked the clerk of court to reissue a photocopy of the original summons. 319 The only change from the original summons was in its title: "Duplicate Summons." 320 This duplicate summons was served with the complaint on October 3, 1995, well within the three-year limit imposed by Rule 41(e). 321 The defendant moved to dismiss under Rule 41(e), arguing that the summons with which it was served had not in fact been issued within one year of the filing of the complaint. 322 The district court originally denied the
motion to dismiss. 323

Later, after the Supreme Court's decisions in Busch and Haugen, the defendant moved for reconsideration on the ground that these new decisions indicated that Rule 41(e) was to be applied literally. 324 Glacier County also argued that the Rules of Civil Procedure do not provide for a "duplicate summons" in any event, as the Supreme Court had observed in Big Sky. 325 The district court reversed itself and dismissed the plaintiff's action. 326

On appeal, the Supreme Court concluded that plaintiff had complied with Rule 41(e) despite the duplicate summons, and reversed and remanded the case to the trial court:

In substance, the summons served on Glacier County was identical to the original summons which had originally been issued. Glacier County received exactly the same notice in exactly the same form it would have received had the original summons not been lost... [N]o prejudice can be demonstrated by Glacier County from the mere fact that it received a copy of the original summons, rather than the original. 327

The court distinguished this case from Big Sky, in which duplicate summonses were also obtained by the plaintiffs after the one year period, on the basis that the Big Sky duplicate summonses were in fact quite different from the original summonses. 328 In Big Sky, the court stated:

We are not able to relate the actual service back to the summons properly issued on February 18, 1983, because that summons failed to name any of the six defendants in its caption or anywhere else in the summons. As a result, that summons would have been inadequate to give notice to these six defendants because of the absence of the defendants' names in the summons. 329

In Yarborough, the two summonses were identical, and the defendant received exactly the same notice from the duplicate as it would have received from the original. 330 Justice Trieweiler

323. See id.
324. See id.
326. See Yarborough, 285 Mont. at 496, 948 P.2d at 1182.
327. Id. at 499, 948 P.2d at 1183.
328. See id. at 497-98, 948 P.2d at 1183.
329. Big Sky, 224 Mont. at 148, 729 P.2d at 472.
330. See Yarborough, 285 Mont. at 499, 948 P.2d at 1183-84.

https://scholarship.law.umt.edu/mlr/vol60/iss2/2
also distinguished this case from Haugen, finding that this plaintiff had been diligent whereas the court had found the Haugen plaintiffs to lack diligence. 331

Therefore, Yarborough stands for the proposition that a plaintiff may successfully serve within three years a summons which was not itself issued within one year from the filing of the complaint, so long as that summons is identical to a summons issued within the one year period but later lost. 332 However, like Livingston v. Treasure County, this case is simply a judicial interpretation of fairly clear language in the rule, and like Livingston, is subject to retroactive overruling by a later court. To avoid the gamble which plaintiffs lost in the Haugen case, a prudent practitioner should calendar both issuance and location of the original summons before the end of the first year of the litigation, to allow time to have a duplicate issued before that year expires if the first summons has been lost.

19. Rocky Mountain Enterprises, Inc. v. Pierce Flooring. 333

In Rocky Mountain, the plaintiffs filed their original complaint on October 21, 1988, and obtained a summons naming Pierce Flooring as a defendant on that same day. 334 A subsequent summons was issued more than a year later but was never served. 335 A third summons was issued on February 28, 1990, and served on Pierce sometime in March 1990. 336 This third summons was served within the three-year limit for service, but had not been issued within the one-year limit for issuance. 337 Pierce moved to dismiss the action against it based on Rule 41(e), contending that they were served with a summons which had not been issued on time. 338 After the defense filed this motion, the plaintiffs attempted to cure the alleged deficiency by re-serving Pierce with the summons which had been issued on October 21, 1988. 339 That re-service occurred April 16, 1990, less than three years after the commencement of...

331. See id. at 498, 948 P.2d at 1183.
332. This is apparently what the plaintiffs did in Haugen. See Haugen v. Blaine Bank, 279 Mont. 1, 4, 926 P.2d 1364, 1365 (1996), supra Section IV.A.17. However, the defendants in Haugen did not raise failure to issue the summons as a defense.
334. See id. at 304, 951 P.2d at 1340.
335. See id.
336. See id.
337. See id.
338. See id.
339. See id. at 305, 951 P.2d at 1340.
the action. The district court held that the plaintiffs had in fact cured the earlier Rule 41(e) problem.

The Montana Supreme Court affirmed, finding that the original summons was issued within the one year and served within the three-year period specified in the rule. Recognizing that *First Call* held that failure to serve within the three-year limit required dismissal with prejudice and that *Soo"y* required the same result where the summons was not issued within the one-year period, the court stated: "We determine that the issuing of subsequent summonses did not serve to nullify the original summons."

The court noted again that "[t]he purpose of Rule 41(e) . . . is to ensure that actions are timely prosecuted." Although it did not discuss the rationale behind its conclusion that the issuance and service scenario in *Rocky Mountain* met Rule 41(e)'s requirements, it appears that the court found that the invalid first service did not interfere with the timely prosecution of the case, because the plaintiffs did in fact ultimately accomplish service of a timely issued summons and thus did not delay the case beyond the limits set by Rule 41(e).


Like *Livingston*, *Eddleman* involved a failure to file the return of service within the three-year period. The summons was issued and served on time. The defendant moved to dismiss for the Rule 41(e) violation, and the district court denied the motion, based on the *Livingston* case. After *Haugen* reversed *Livingston*, Aetna moved for reconsideration of its Rule 41(e) motion. The court did reconsider and granted the Rule

340. See id.

341. See id.

342. See id. at 305, 951 P.2d at 1341.


346. Id. at 304, 951 P.2d at 1340.


349. See *Eddleman*, 1998 MT 52 at ¶ 2-3, 955 P.2d at 646.

350. See id. at ¶ 2.

351. See id. at ¶ 4, 955 P.2d at 647.

352. See id.
41(e) motion, dismissing the plaintiff's case with prejudice. The Supreme Court affirmed the dismissal, finding that Haugen controlled. The court rejected the plaintiff's arguments on appeal that the dismissal constituted a due process violation and that Haugen should be applied prospectively only, finding that neither argument had been raised at the trial court level. Thus, another plaintiff lost another chance for trial on the merits solely because of a procedural error in the relatively simple process of filing the return of service of process.

21. Hadford v. Credit Bureau of Havre, Inc. Hadford revisited the issue of naming fictitious defendants raised by the Sooy case. Hadford won a default judgment against her employer, Big Sky Billing Service, in a wrongful discharge suit. Because Big Sky Billing had no assets, Hadford attempted to collect the judgment by filing a complaint in 1995 against the Credit Bureau of Havre, owned by the same shareholders as Big Sky Billing Service, and against John Does I-IV. Stating that the John Does were the actual participants, she alleged that Big Sky had been dissolved to avoid paying her claim and that Big Sky was the alter ego of the Credit Bureau. A summons was issued and served on the Credit Bureau but not on the John Does.

The Credit Bureau moved for summary judgment, claiming that it had insufficient notice of the wrongful discharge action to be held personally liable and that it was not the alter ego of Big Sky. At the same time, more than a year after filing the complaint, plaintiff moved to further amend her complaint and substitute the president of Big Sky, Teddy Reber, as John Doe I. The court denied leave to amend and granted summary

353. See Eddleman, 1998 MT 52 at ¶ 4, 6, 955 P.2d at 647.
355. See id. at ¶¶ 11-12, 955 P.2d at 647.
358. See Hadford, 1998 MT 179 at ¶ 6, 962 P.2d at 1200.
359. See id.
360. See id.
361. See id.
362. See id. at ¶ 10, 962 P.2d at 1200.
363. See id.
On appeal, the Supreme Court affirmed, finding that plaintiff's failure to obtain a summons for the John Doe defendants within one year of filing the complaint violated Rule 41(e), requiring dismissal of those defendants with prejudice and rendering amendment useless. The court also rejected Hadford's argument that the Rule 41(e) argument was improper because it was raised by the Credit Bureau, rather than by the directly affected John Doe defendant:

Rule 41(e), M.R.Civ.P., specifically authorizes any interested party to move for dismissal and it is clear that the Credit Bureau had a legitimate interest in opposing the motion in order to bring the litigation to an end.

22. MacPheat v. Schauf

Just within the past nine months, the Montana Supreme Court has decided three more Rule 41(e) cases. In MacPheat, a pro se plaintiff filed a complaint alleging slander. The complaint was filed April 8, 1996, and the summons was issued that same month. When the sheriff returned the summons unserved, the plaintiff obtained a second summons which the sheriff was also unable to serve. The plaintiff then tried to serve by publication, but the court quashed that service on the defendant's motion. The court went on to dismiss the entire case, concluding that the plaintiff had not been able and never would be able to comply with Rule 41(e) because the summons issued was not served within one year of the filing of the complaint.

The Supreme Court reversed, holding that:

[W]hen a party has caused a summons to issue within one year of the commencement of an action, he has complied with Rule 41(e). The fact that he or she is not successful in serving the summons within one year of the commencement of the action is of no consequence. A party may cause additional summons to issue

364. See id. at ¶ 11, 962 P.2d at 1200.
365. See id. at ¶ 38, 962 P.2d at 1204.
366. Id. at ¶ 41, 962 P.2d at 1205.
368. See id. at ¶ 7, 969 P.2d at 266.
369. See id.
370. See id.
371. See id.
372. See id.
pursuant to Rule 4C(1), M.R.Civ.P., and have three years from the commencement of the action to obtain service.\textsuperscript{373}

The court found that at the time of dismissal, the plaintiff had complied with Rule 41(e) by obtaining not one but two summonses from the clerk of court,\textsuperscript{374} and that because the three-year period had not yet expired, the plaintiff could not have violated the remaining provisions of Rule 41(e).\textsuperscript{375} Relying on Schmitz v. Vasquez,\textsuperscript{376} the court noted that the two summonses which were returned unserved had become \textit{functus officio} not with regard to issuance but with regard to further service.\textsuperscript{377} The court held that the trial court was correct in refusing to allow the plaintiff to amend these two summonses, but that MacPheat should "have requested an additional summons pursuant to Rule 4C(1)."\textsuperscript{378} Without expressly commenting, the court apparently believed that MacPheat could still comply with Rule 41(e), and reversed the trial court's dismissal of the action.

23. \textit{Schmitz v. Vasquez}.\textsuperscript{379}

Decided December 23, 1998, \textit{Schmitz} involved another form of substituted summonses. There, the pro se plaintiff sued Dr. Vasquez and Dr. Sanz for medical malpractice.\textsuperscript{380} The plaintiff had made a claim against Vasquez before the Medical Legal Panel but had not done so with regard to Sanz.\textsuperscript{381} In the district court, plaintiff obtained a summons for each defendant on the day she filed her complaint, April 5, 1994.\textsuperscript{382} She apparently did not serve either defendant then. When she later obtained counsel, the plaintiff filed an amended complaint on April 1, 1997, dropping the allegations against Sanz and leaving those against Vasquez intact.\textsuperscript{383} On the same day, plaintiff returned

\textsuperscript{373} \textit{Id.} at \S 19, 969 P.2d at 268.
\textsuperscript{374} \textit{See id.} at \S 17, 969 P.2d at 268.
\textsuperscript{375} \textit{See id.}
\textsuperscript{376} 1998 MT 314, 970 P.2d 1039 (1998); \textit{see also infra} Section IV.A.23. \textit{MacPheat} was originally decided on October 20, 1998, and amended on denial of rehearing on December 30, 1998; hence its reference to the following case.
\textsuperscript{377} \textit{See MacPheat}, 1998 MT 250 at \S 17, 969 P.2d at 268. \textit{Functus officio} means "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority." \textit{BLACK'S LAW DICTIONARY} 673 (6th ed. 1990).
\textsuperscript{378} \textit{MacPheat}, 1998 MT 250 at \S 18, 968 P.2d at 268.
\textsuperscript{380} \textit{See id.} at \S 4, 970 P.2d at 1040.
\textsuperscript{381} \textit{See id.} at \S 6, 970 P.2d at 1040.
\textsuperscript{382} \textit{See id.} at \S 5, 970 P.2d at 1040.
\textsuperscript{383} \textit{See id.} at \S 7, 970 P.2d at 1040.
the original summons to the court and obtained an “amended summons” for service on Vasquez. This amended summons was identical to the first summons except that Sanz’ name was removed and the summons bore the title “Amended Summons.” The amended summons was served on Vasquez on April 1, 1997, and proof of service was filed April 2, 1997, both just within the three-year period set by Rule 41(e).

Vasquez properly objected to the service on him, claiming that plaintiff violated Rule 41(e) because, although service was within three years, the summons which was served had not been issued within one year. He also objected to the fact that the plaintiff had not sought or obtained leave of court to amend the summons under Rule 4D(7). The trial court dismissed the plaintiff’s complaint.

The Supreme Court reversed and reinstated the complaint, even though it found a technical violation of Rule 4D(7) in the failure to obtain leave to amend the summons. It held that the original and “amended” summonses were substantively identical, and that Vasquez received as much notice from the amended summons as he would have from the original:

Rather than being prejudiced by the amended summons, the amendment actually assisted Vasquez in ascertaining the true nature of the action against him. Schmitz could not proceed against Sanz because she did not make a claim against him before the Medical Legal Panel and, therefore, the District Court had no jurisdiction over him. The amended summons more accurately reflected this fact. In Larango, we concluded that where the amendment would have aided a party, it was an abuse of discretion for the district court not to allow the amendment.

The court distinguished the facts in Schmitz from those in Big Sky on the basis that the Schmitz summonses both gave adequate notice to the defendants, whereas the timely issued “duplicate” summonses in Big Sky were substantially changed and did not give adequate notice. Justice Trieweiler, writing

384. See id. at ¶ 8, 970 P.2d at 1040.
385. See id.
386. See id. at ¶ 9, 970 P.2d at 1040.
387. See id. at ¶¶ 10, 15, 970 P.2d at 1040, 1041.
388. See id. at ¶ 15, 970 P.2d at 1041.
389. See id. at ¶ 10, 970 P.2d at 1040.
390. See id. at ¶ 19, 970 P.2d at 1041.
391. Id. at ¶ 21, 970 P.2d at 1041-42.
392. See id. at ¶ 25, 970 P.2d at 1042.
for the five-justice majority, stressed the policy of trial on the merits and said, "[a]s in Yarborough, we decline to elevate form over substance." 393

Justice Nelson wrote a dissent in which Justice Gray concurred. He believed that Haugen controlled, and that the plain language of Rule 41(e) required that the summons which was served be the one issued within one year. 394 He observed that the plaintiff could easily have served the original summons on Vasquez 395 and further that the "one free amendment" provision of Rule 15 did not apply because a summons is not a pleading. 396 Justice Nelson also termed the majority's view — that the defendant had not been prejudiced by the technical violation of Rule 41(e) — "flat wrong": 397

Dr. Vasquez will now be forced to defend the merits of a medical malpractice suit from which, under the law, he is entitled to be dismissed. His rights to rely on the courts to evenhandedly apply the rules of civil procedure have been completely trashed. I am hard-pressed to come up with a more clear example of prejudice or result-oriented "justice." 398

Lastly, Justice Nelson uttered the same plea that I made in a draft of this article last fall, a plea I reiterate here. No matter which side of the "rule vs. merits" divide a lawyer or judge might favor, the history of Montana cases involving Rule 41(e) supports this plea:

Finally, it is worth noting that, for a procedural rule, Rule 41(e) generates what, in my view, is an inordinate amount of litigation, appeals and, sometimes, bitterly divided decisions from this Court. I, for one, believe that it is an appropriate time for this Court's Advisory Commission on the Montana Rules of Civil Procedure to take a critical look at this rule and to make appropriate recommendations to this Court. I strongly urge it to do so at the earliest opportunity. 399

24. Quamme v. Jodsaas. 400

The most recent Rule 41(e) case was decided only a week

393. Id. at ¶ 27, 970 P.2d at 1042.
394. See id. at ¶ 28, 970 P.2d at 1042-43.
395. See id. at ¶ 30, 970 P.2d at 1043.
396. See id. at ¶ 29, 970 P.2d at 1043.
397. Id. at ¶ 32, 970 P.2d at 1043.
398. Id.
399. Id. at ¶ 33, 970 P.2d at 1043-44.
after Schmitz and, interestingly, involved the same set of lawyers who litigated a Rule 41(e) issue in a different case to the Ninth Circuit Court of Appeals earlier in the same year.\(^\text{401}\) The plaintiff in Quamme filed her personal injury complaint on January 8, 1996, and obtained a summons that same day.\(^\text{402}\) However, that summons was never served.\(^\text{403}\) On July 10, 1997, Quamme hired a new attorney, who, on July 15, returned the original summons to the clerk and obtained a second summons.\(^\text{404}\) This second summons was identical to the first except that it showed the change of counsel.\(^\text{405}\) On July 22, 1997, well within the three-year service period, the plaintiff's counsel mailed the second summons to the defendant and asked her to acknowledge service of process.\(^\text{406}\)

On defendant's motion, the trial judge dismissed the complaint for violation of Rule 41(e), relying on Haugen v. Blaine Bank of Montana.\(^\text{407}\) Eight days later, the Supreme Court decided Yarborough.\(^\text{408}\) The plaintiff moved for reconsideration, but the trial court did not grant the motion.\(^\text{409}\) On appeal, the Supreme Court, in the person of Justice Hunt, agreed that Yarborough and Schmitz warranted reversal of the plaintiff's dismissal.\(^\text{410}\) The court found that the two summonses were "substantively identical"\(^\text{411}\) and that the sole change, the name of the attorney to whom the answer should be sent, provided more and better information to the defendant than would service of the original summons.\(^\text{412}\) Again, the majority stressed the need to elevate substance over form:

> Barring Quamme from the courthouse solely because she failed to serve the original summons, which identified an attorney who no longer represents her, does nothing to advance the goals and

\(^{401}\) See Bryan v. Fireman's Fund Ins. Cos., No. 97-35418, 162 F.3d 1167, 1998 WL 746051 (9th Cir. Oct. 20, 1998) (unpublished table decision); see also infra Section IV.B.

\(^{402}\) See Quamme, 1998 MT 341 at ¶ 5, 970 P.2d at 1050.

\(^{403}\) See id.

\(^{404}\) See id. at ¶ 6, 970 P.2d at 1050.

\(^{405}\) See id.

\(^{406}\) See id.

\(^{407}\) See id. at ¶ 7, 970 P.2d at 1050. See also Haugen v. Blaine Bank, 279 Mont. 1, 926 P.2d 1364 (1996), supra Section IV.A.17.

\(^{408}\) See Quamme, 1998 MT 341 at ¶ 7, 970 P.2d at 1050. See also Yarborough v. Glacier County, 285 Mont. 494, 948 P.2d 1181 (1997), supra Section IV.A.18.

\(^{409}\) See Quamme, 1998 MT 341 at ¶ 7, 970 P.2d at 1050.

\(^{410}\) See id. at ¶ 16, 970 P.2d at 1051.

\(^{411}\) Id. at ¶ 17, 970 P.2d at 1052.

\(^{412}\) See id. at ¶ 20, 970 P.2d at 1052.
policies of the Rules of Civil Procedure, when common sense dictated that she simply serve another substantively identical summons that correctly informed Jodsas of her current attorney as required by Rule 4C(2), M.R.Civ.P. Jodsas is unable to show any prejudice, because the second summons adequately notified her that she was a defendant in a civil action and that she had twenty days in which to make an appearance.\footnote{Id. at \S 28, 970 P.2d at 1053.}

Again, Justice Nelson registered a separate opinion, although this time in the form of a special concurrence. He agreed with the result, finding that the facts in this case were similar to those in \textit{Yarborough}, but reiterated his disagreement with the result in \textit{Schmitz}.\footnote{See id. at \S 31, 970 P.2d at 1054 (Nelson, J., specially concurring).} He also reiterated his plea for a reconsideration of the rule in question:

\begin{quote}
As I did in \textit{Schmitz}, once again I strongly urge this Court's Advisory Commission on the Montana Rules of Civil Procedure to take a critical look at Rule 41(e), M.R.Civ.P. and to make appropriate recommendations to this Court. This procedural Rule is implicated in far too many appeals. It is obvious that the practicing bar and trial courts have difficulty following and applying this Rule. Worse, our decisions are rapidly becoming simply a compilation of exceptions demonstrating that the rule is, alternately, a trap for the unwary or a haven for the incompetent. Either way, Rule 41(e) needs to be changed.\footnote{Id. at \S 32, 970 P.2d at 1054 (citations omitted).}
\end{quote}

For over three years, the Montana bench and bar have struggled with the application and interpretation of a single rule of civil procedure, resulting in 24 separate opinions, many of which are contradictory and all of which involved time, expense, and attention that would be better devoted to the merits of each case. Justice Nelson's summary and conclusion are correct: Rule 41(e) has proven to be a trap and should be changed.

\textbf{B. The Ninth Circuit Considers Mont. R. Civ. P. 41(e)}

The federal courts, in the exercise of diversity of citizenship jurisdiction, also have had to deal with Montana's Rule 41(e) even though no federal corollary exists. \textit{Bryan v. Fireman's Fund} began as a state court action stemming from a fire loss on December 27, 1983.\footnote{See Bryan v. Fireman's Fund Ins. Cos., No. 72074 (4th Dist. Ct. Mont. filed Dec. 27, 1989).} The plaintiffs filed the complaint on
December 27, 1989, and had a summons issued the same day.\textsuperscript{417} That summons was never served.\textsuperscript{418} A substitute summons was issued on December 22, 1992, and served on December 23, 1992, within the three-year period, but the return of service was not filed until December 29, 1992.\textsuperscript{419}

The defendants removed the case to federal court on January 21, 1993,\textsuperscript{420} and then asked the federal court to dismiss the claim because of the plaintiffs' violation of Montana Rule 41(e).\textsuperscript{421} The district court denied this motion, concluding that state law governed the sufficiency of service when service is made prior to removal to federal court, but finding that under \textit{Livingston}, the failure to timely file the return of service did not warrant dismissal.\textsuperscript{422} The court's order was dated March 14, 1994.\textsuperscript{423} When the Montana Supreme Court overruled \textit{Livingston} in \textit{Haugen}, on October 24, 1996, the defendants moved for reconsideration of the motion to dismiss by the federal court.\textsuperscript{424} Judge Lovell concluded that \textit{Haugen} overrode his earlier decision, and dismissed the Bryans' action.\textsuperscript{425}

The Bryans appealed to the Ninth Circuit. They argued that, because defendants removed to federal court, neither Montana Rule 41(e) nor \textit{Haugen} applied; that federal procedure controlled; and that the Federal Rules of Civil Procedure had no counterpart to Rule 41(e).\textsuperscript{426} Ironically, if defendants had foreseen \textit{Haugen}, they could have stayed in state court, bided their time, and clearly would have won dismissal after \textit{Haugen},


\textsuperscript{418} See id.

\textsuperscript{419} See id. This presents, of course, the same problem as \textit{Livingston} v. Treasure County, 239 Mont. 511, 781 P.2d 1129 (1989), supra Section IV.A.11, and \textit{Haugen} v. Blaine Bank, 279 Mont. 1, 926 P.2d 1364 (1996), supra Section IV.A.17.


\textsuperscript{421} The defendants raised the defenses of insufficiency of process and insufficiency of service. See id.

\textsuperscript{422} See Bryan, No. CV-93-12-CCL (D. Mont. Mar. 14, 1994) (order denying defendants' motion to dismiss).

\textsuperscript{423} See id. at 8.

\textsuperscript{424} This is the same route successfully followed by the defense in the state court case of Eddleman v. Aetna Life Ins. Co., 1998 MT 52, 955 P.2d 646 (1998), supra Section IV.A.20.


\textsuperscript{426} See Brief for Defendants, Bryan v. Fireman's Fund Ins. Cos. (9th Cir. 1998) (No. 97-35418).
like the defendant in *Eddleman*. Thus, the defendants, of course, not being omniscient and having fled the state system, were now stuck arguing that the state procedural rules should apply despite their removal to the federal system.

Thus, the murkiness of Montana’s Rule 41(e) and its inconsistent interpretation by the Montana Supreme Court merged with the *Erie* doctrine, itself the result of an aboutface in the United States Supreme Court’s treatment of the Rules of Decision Act. The Ninth Circuit heard oral argument on this case in early September 1998 in Billings and subsequently ruled in favor of the plaintiffs, holding that they were entitled to proceed in federal court in spite of their failure to comply with Montana Rule 41(e) while their case was in state court:

Once a case has been removed to federal court, federal rather than state procedural law governs future proceedings. “The federal court takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court.” Accordingly, Mont. R. Civ. P. 41(e) does not apply to this action, and the district court erred in relying upon it in dismissing the case.

**C. Lessons from the Case Law**

There are two different conclusions to draw from Rule 41(e) and the cases which interpret and apply it. Earlier, I

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430. *Erie* overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which for many years had interpreted the Rules of Decision Act to mean that federal courts should apply federal common law in diversity cases where a state had only case law on the issue, though state statutory law would pre-empt federal case law. *Erie* held, for the first time, that state substantive law controls in diversity actions, whether that state law is found in statutory or common law. This apparently clear doctrine has given rise to a body of federal diversity cases struggling to delineate substantive, state law issues from procedural, federal issues. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (statutes of limitation are substantive and state law controls); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (burden of proof is substantive and state law controls); *Hanna v. Plumer*, 380 U.S. 460 (1965) (method of service of process is procedural and FED. R. CIV. P. 4D(1) controls).


synthesized the Rule and the cases into a set of clear guidelines for the practitioner to follow as long as Rule 41(e) persists.\(^{433}\) Secondly, and more importantly, Rule 41(e) case law demonstrates that the rule, in its current form, is unmanageable and must be either substantially simplified or eliminated altogether.

Attorneys seem to have inordinate trouble complying with the current Rule 41(e). The sheer number of cases arising from Rule 41(e) indicates that this rule represents a significant challenge to the Montana bar, and thus, to the Montana Supreme Court. Issuance and service of process should be a relatively insignificant aspect of pretrial procedure, not a deadly trap waiting to snare the unwary. The goal of the Rules of Civil Procedure, overall, is to facilitate trial on the merits. Rule 41(e), as currently written and applied, is a threat to that goal.

In all of the cases where Rule 41(e) has been invoked successfully to dismiss cases without providing trial on the merits to the plaintiffs,\(^ {434}\) it appears that plaintiffs were represented by counsel who, for one reason or another, did not comply with the rule. The Montana Supreme Court has only sporadically shown sympathy for the clients whose cases were lost through their lawyers’ inability to correctly apply Rule 41(e).

For instance, in *Rierson v. State*,\(^ {435}\) the court echoed its language from *Equity Supply*,\(^ {436}\) another Rule 41(e) case where the plaintiff’s claim was dismissed:

> An attorney’s mistake is unfortunate, particularly here where Rierson’s claim was dismissed with prejudice. However, there are two sides to all litigation, and the State and the Board of

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433. *See supra* Part III.

434. *Whitcraft, Belwin, Equity Supply, Shields, Larango, Livingston, Courchane, First Call, Haugen, Eddleman, and Hadford.* Some but not all defendants were dismissed in two cases, *Sinclair* and *Big Sky*. In *Sinclair*, the plaintiff’s case was dismissed with regard to those defendants whose summonses had not been issued within one year. Similarly, in *Big Sky*, the plaintiff lost with respect to those defendants who were improperly served under rule 41(e) and who raised this defense in a timely manner. Plaintiff was permitted to proceed against the rest of the defendants, who failed to raise the defense of insufficiency of service of process, thus waiving it, or who amended their motion to dismiss to include that defense without permission of the court. In *Shields*, plaintiff’s default judgment was rendered void on Rule 41(e) grounds. Each of these cases is discussed *supra* Part IV.A.

435. 188 Mont. 522, 614 P.2d 1020 (1980).

436. *See State ex rel. Equity Supply Co. v. District Court, 159 Mont. 34, 494 P.2d 911 (1972).*
Justice Sheehy's dissent cogently presents the other view: "We should therefore not kick him out of court on a procedural point." The Supreme Court as a whole signed on to this more merciful view in *Larango*, issuing a clear directive to the trial court to allow amendment of the summons and to relate that amendment back to the date of the original complaint "to insure that this case is not dismissed for failure to comply with the time requirements of Rule 41(e) . . ." In *Larango*, however, the foot-dragging was on the part of the trial judge, who had failed to rule on several motions to amend the summons and to reconsider its earlier ruling quashing a summons which counsel had altered himself.

While the sporadic treatment of Rule 41(e) by the Montana Supreme Court makes any prediction tenuous, it does appear that the court as a whole may have lost its taste for rigid enforcement of the clear language of the rule. The last three cases, late in 1998, all reversed trial court rulings dismissing the plaintiffs' claims for Rule 41(e) violations, allowing plaintiffs far more latitude in obtaining and serving summonses than previous cases had indicated. However, mercy is a recent development. Counsel should not depend on it.

Rules must be enforced as written in order to promote a systematic and just pretrial process, but the rules should not be impossible or even difficult to follow. It seems especially harsh to penalize clients for a violation of a rule which is so hard to find and, judging from the number of cases it has engendered, so hard to understand. One way to ameliorate this situation is to make the rule easier to find and easier to understand once found, resulting in much less attorney expense, court time, danger to clients, and malpractice claims. Below, I compare Montana's rule with the federal corollary and those in other states and several tribes, and suggest a revision of Montana's

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438. *Id.* at 531, 614 P.2d at 1025.
440. *See Larango*, 196 Mont. at 46, 637 P.2d at 519.
rule.

V. ALTERNATIVES TO RULE 41(e)

A. Sources

1. The Federal Model

Montana's Rules of Civil Procedure, by and large, mirror the Federal Rules of Civil Procedure. Similarity between the two procedural systems is an avowed goal of the Montana rulemakers. However, the two systems are very different with regard to time limits for issuance and service of the summons. The federal rule is lovely in its simplicity when compared to Montana's syntactical nightmare.

First, the federal time limit for issuing and serving the summons is appropriately located in Rule 4, with the rest of the provisions on how to obtain and serve process. Second, Fed. R. Civ. P. 4(m) has a clear and accurate title: “Time Limit for Service.” Third, the language of the rule is easy to understand and follow. It provides:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

This clear and simple provision was added to Federal Rule 4 in 1983. The time line is unambiguous, as is the consequence

442. "The intent and purpose of this act is to make possible the adoption of the Federal Rules of Civil Procedure so far as seems presently practicable to the existing Montana Code to the end of uniformity, but not at the expense of existing procedural statutory rules that may be better for Montana state practice." See Spaberg v. Johnson, 143 Mont. 500, 502, 392 P.2d 78, 79-80 (1964). This was the language used by the Montana Civil Rules Commission in 1959 when it compiled and promulgated the proposed Montana Rules of Civil Procedure. See Act of Mar. 13, 1959, 1959 Mont. Laws 606.


444. "Congress enacted sweeping amendments to the procedures for service of process in 1983." 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137, at 383 (2d ed. 1987). "The 120-day limit on service endorsed both by Congress and the Supreme Court reflects the modern trend of encouraging more efficient litigation by reducing the time between the institution of an action and service of process." Id. at 385. For these reasons, "Rule 4(j) attempts to harmonize the open-
for failing to observe it: dismissal without prejudice as to that defendant, thus allowing the plaintiff another chance to pursue trial on the merits in another action against that defendant so long as the statute of limitations has not expired.

The most litigated aspect of Fed. R. Civ. P. 4(m) is the determination of what constitutes "good cause" for an extension of the time for service. However, despite the potential problems with defining "good cause" or the interplay of the time limit with the statutes of limitations, this federal rule has not caused any significant problem for lawyers who practice in federal courts.

2. Other States

Of the 50 states in the union, 32, including Montana, have rules of civil procedure based largely on the federal model. Of these 32 states, 8 have deadlines for the issuance and service of process identical to Fed. R. Civ. P. 4(m): the summons must be issued and served within 120 days of filing the complaint. Of these states, the number of cases heard regarding the time limit for service seems considerably lower than the number heard in Montana regarding Rule 41(e).

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door policy of the federal court system and the mandate in Rule 1 for the 'just, speedy and inexpensive determination of every action.'

445. See id. at 391-95 & nn. 24-28; see also id. at 96-98 (Supp. 1999).

446. A Westlaw search for federal cases since 1983, revealed 706 cases heard around the nation, an average of 46 cases per year throughout the entire country.

447. "[M]any states have adopted a similar procedure in whole or in part." WRIGHT & MILLER, supra note 444, § 1008, at 48. My research shows that the current list of such states includes Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.


449. A search on Westlaw turned up only 12 cases on Delaware's Rule 4(j); 11 cases heard in Utah on Rule 4(b); 6 on Arizona's Rule 4(i); 5 on Nevada's Rule 4(i); 4 on West Virginia's Rule 4(k); and zero on Alaska's Rule 4(j). West Virginia recently changed its time limit for service from 180 days to 120. See Annotations, W. Va. R. Civ. P. 4(k). The rest of the West Virginia rule mirrors Federal Rule 4(m) and is written in the same clear, concise style.

Westlaw turned up 44 published cases on Florida's Rule 1.070(j). Why so many? Very likely it is because of the sheer volume of Florida's court system. Florida has "the fourth largest state court system in the United States. Dockets are becoming more crowded and cases are becoming more complex." Bill Ruffy, Justice Addresses State Legislature, THE LEDGER (Lakeland, Fla.), Mar. 24, 1995, at 3B.
Three states which are not "Federal Rules model states" per se have also adopted rules imposing the same 120-day time limit for service as the Federal Rule.\textsuperscript{450} Other states have rules which are similar to the Federal rule in clarity but allow plaintiffs different amounts of time for service.\textsuperscript{451} The Appendix shows the time limit for service in each state. One state, Georgia, requires service within 5 days of filing the complaint. South Carolina allows only 10 days. Although the states' deadlines vary, none is as syntactically byzantine as Montana's.

At least two states, Illinois and Texas, do not have set time limits for service. For instance, in Texas, "[t]he mere filing of a petition will not toll the running of a statute of limitation; to interrupt the statute, the plaintiff must exercise due diligence in procuring the issuance and service of citation upon the defendant."\textsuperscript{452} In \textit{Perry v. Kroger Stores}, nine months elapsed between the time Perry filed her suit and the time she actually served Kroger Stores.\textsuperscript{453} Kroger Stores moved for summary judgment arguing that the plaintiff had not exercised due diligence in serving it.\textsuperscript{454} The court found that "the lapse of time and Perry's actions conclusively negate diligence,"\textsuperscript{455} and further noted that six and a half months can establish a lack of due diligence.\textsuperscript{456} In one case, a complaint was dismissed because the plaintiff had not served the defendant within 100 days of filing.\textsuperscript{457}

\textsuperscript{450.} See ARK. R. CIV. P. 4(i); MISS. R. CIV. P. 4(h); N.Y. C.P.L.R. § 306-b (McKinney 1998). A search on Westlaw turned up 25 published cases on Arkansas Rule 4(i) and 7 cases on Mississippi's Rule 4(h). As for New York, 151 cases turned up in a Westlaw search for Rule 306-b. Like Florida's (see supra, note 449), the New York courts are among "the largest and busiest in the world, with case loads that are all too familiar to the legal community and demands on judges that are legendary." Jonathan Lippman, \textit{Serving Justice: Needs of Public Must Be Met}, N.Y. L.J., Jan. 24, 1996, at S1.

\textsuperscript{451.} See, e.g, D.C. R. CIV. P. 4(m) (60 days); MASS. R. CIV P. 4(j) (90 days); MICH. R. CIV. P. 2.102(e) (91 days); IDAHO R. CIV. P. 4(a)(2) (6 months); OHIO R. CIV. P. 4(e) (6 months); OKLA. STAT. ANN. tit. 12 § 2004(i) (West 1993) (180 days);


\textsuperscript{453.} \textit{See id.}

\textsuperscript{454.} \textit{See id.} Perry filed suit on October 11, 1984. Her petition had an incorrect address for service of process for the defendant, Kroger Stores. A citation directed to the wrong address was issued on October 11, 1984 and was returned, unserved. Perry did nothing to effect service on the defendant until June 17, 1985. On June 17, 1985 she requested that a new citation be issued. The citation was issued on June 19, 1985 and Kroger was served on July 10, 1985. The court granted summary judgement to Kroger based upon plaintiffs failure to effect timely service, holding that in order to toll the statute of limitations, one must file and serve the summons.

\textsuperscript{455.} \textit{Id. at 535.}

\textsuperscript{456.} \textit{See id.} (citing Hamilton v. Goodson, 578 S.W.2d 448 (Tex. Civ. App. 1979)).

\textsuperscript{457.} In \textit{Neese v. Wray}, 893 S.W.2d 169 (Tex. App. 1995), a district court judge signed
Illinois also lacks a hard and fast rule governing the time limit for a summons. Instead, the Illinois rule states that "if the plaintiff fails to exercise reasonable diligence to obtain service on a defendant, the action as to that defendant may be dismissed without prejudice, with the right to refile if the statute of limitation has not run. The dismissal may be made on the application of any defendant or on the court's own motion." Thus the court must determine whether the plaintiff was reasonably diligent in getting the summons served. "[A] trial court is given wide discretion to dismiss a suit under 103(b) where plaintiff fails to exercise reasonable diligence in obtaining service." The Illinois courts use seven factors when deciding whether to dismiss an action for delay in serving the summons. These factors are: 1) amount of time in obtaining service; 2) plaintiff's activities; 3) plaintiff's knowledge of defendant's whereabouts; 4) ease in ascertaining defendant's location; 5) defendant's actual knowledge of the pendency of the suit resulting from ineffective service; 6) special circumstances affecting plaintiff's efforts; 7) actual service effected on defendant. In applying these factors, the court reminded Illinois judges and practitioners that "the rules of our supreme court are not aspirational," and that this rule was adopted "to protect against unreasonable delay in the service of process and to prevent plaintiffs' circumventing the statute of limitations."

In one case, the Appellate Court of Illinois found that a lapse of thirteen months and six days between filing a lawsuit and effecting service of process constituted lack of due diligence. Keeping an eye on the statute of limitations, Illinois has dismissed cases where the delay between filing and serving was as short as ten weeks and has accepted delays up to

a dismissal order about 100 days after the suit was filed because the plaintiff had not served the defendant. The appellate court did not express any concern about the lower court's dismissal.

458. ILL. S. CT. RULE 103(b) (1998).
460. Marks, 636 N.E.2d at 829.
461. See Billerbeck, 685 N.E.2d at 1020.
462. See id.
463. Id. at 1020, 1022.
464. See id. at 1022-23.
Despite the differences in their rules governing the time limit for service of a summons, each state seems to use these rules for a similar purpose: to move litigation along and to provide the defendant with timely notice, thus preventing stale claims and lost evidence. Courts have been reluctant to allow plaintiffs to abuse these rules as a way to "ice the statute of limitations" and deny the defendant the repose it confers.

Only one state, California, has a time limit for service as long as Montana's; this should be no surprise because Montana's statute first establishing the current system came to us from California. California's rule states:

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant.

There is no separate deadline for the issuance of the summons in California. Cal. Civ. Proc. § 582.250 sets forth the consequences for violation of the three-year rule:

(a) If service is not made in an action within the time prescribed in this article:

1. The action shall not be further prosecuted and no further proceedings shall be held in the action.

2. The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory and are not

465. In Illinois Farmer's Ins. Co. v. Makovsky, 689 N.E.2d 618, 623 (Ill. App. Ct. 1997) the court said that "a dismissal with prejudice can only be entered when the failure to use diligence in obtaining service occurred after the expiration of the applicable statute of limitations." In this case, where the minor's statute of limitation had not run, the court allowed a delay of six years. In another case, the Appellate Court of Illinois upheld the dismissal of a case because of a ten-week delay between the expiration of the statute of limitations and actual service. See Federal Signal Corp. v. Thorn Automated Sys., 693 N.E.2d 418 (Ill. App. Ct. 1998).

466. Alvarez v. Meadow Lane Mall Ltd., 560 N.W. 2d 588, 591 (Iowa 1997).

467. See CAL. CIV. PROC. § 583.210 (West Supp. 1999). The three-year deadline for service of summons first appears in MONT. CODE CIV. P. § 1004 (1895). Later legislative histories list the California Civil Code as the source of the statute. See, e.g., MONT. REV. CODE ANN. § 9317 (Smith 1921).

subject to extension, excuse, or exception except as expressly provided by statute.\textsuperscript{469}

Thus, if the plaintiff fails to serve the summons within three years, the plaintiff's case will be dismissed, no ifs, ands, or buts.\textsuperscript{470} The only reason which would persuade the California court to allow an extension of the time for service would be if the defendant were "not amenable to the process of the court,"\textsuperscript{471} meaning subject to service rather than convenient to serve.\textsuperscript{472}

California apparently believes that its deadline for service helps prevent stale claims and lost evidence, similar to the purpose of the statutes of limitation:

[T]he nature and purpose of the three-year service of process statute and the statute of limitations are virtually identical. A statute of limitations serves to promote the public policy of furthering justice by precluding the assertion of stale claims.\textsuperscript{473}

Section 583.210 requires that the summons and complaint be served on a defendant within three years of the commencement of the action against that defendant. The policy of the dismissal statutes is to promote trial of cases before evidence is lost and memories dim and to protect defendants from being subjected to the annoyance of unmeritorious actions that remain undecided for indefinite periods of time. The specific purpose behind section 583.210 is to assure that defendants receive prompt notice of the action.\textsuperscript{474}

Even California's similar rule has not produced the apparent confusion and litigation engendered by Mont. R. Civ. P. 41(e),\textsuperscript{475} perhaps because it is more clearly written, perhaps

\textsuperscript{469} Id. § 583.250. The California courts construe this rule strictly because subsection (b) curtails the courts' ability to excuse noncompliance with the rule.

\textsuperscript{470} In one instance, an attorney lied to her plaintiff-client, telling him that the defendant had been served within the three-year limit. \textit{See} Shipley v. Sugita, 57 Cal. Rptr. 2d 750, 751 (1996). In actuality, the defendant had not been served and the plaintiff's case was dismissed. On appeal, the court found that the attorney's misconduct did not qualify as an acceptable excuse which would give rise to an extension. \textit{See id.} "If the Legislature wishes to extend the circumstances under which mandatory dismissal may be avoided, it may do so. To date, it has not." \textit{Id.}

\textsuperscript{471} Watts v. Crawford, 896 P.2d 807, 812 (Cal. 1995) (en banc).

\textsuperscript{472} The court decided that not being amenable to process meant "the determination whether he or she is subject to being served, rather than to the reasonable availability of that defendant for service of process." \textit{Watts}, 896 P.2d at 815. Thus, a defendant could conceivably hide himself away and still be considered amenable to service.


\textsuperscript{475} CAL. CIV. PROC. § 583.210 corresponds to Montana's Rule 41(e). A Westlaw
because there is no separate provision for issuing summonses, or perhaps because the rule itself forecloses any mercy.

3. The Tribal Courts

While it is very difficult to research the deadlines for issuance and service of process in civil cases in all the tribal courts in the United States, I did compare civil procedure provisions in all seven tribal court systems in Montana as well as the rules adopted by the Navajo and Cherokee Nations. The seven tribal courts in Montana have extensive rules concerning proper service of process. However, none of them have a time limit for service.

Of the nine tribal court systems I investigated, only the Cherokee Nation established a specific time limit for service of process, and that by adoption of the Federal Rules of Civil Procedure. In Title 12, ch. 1, the Cherokee Nation Code states that “the Federal Rules of Civil Procedure shall be used in the Cherokee Nation Courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of civil procedure.” Rule 4(m) of the Federal Rules has not been superseded by a rule of civil procedure enacted in the Cherokee Nation Code. Thus, in the courts of the Navajo Nation, as in courts of the United States, the plaintiff must serve the defendant within 120 days or risk dismissal without prejudice.

B. Suggested Revisions

Montana’s Rule 41(e) has proven difficult for the bench and bar. It is out of line with the rules used in the federal system

search using “583.210” as the search term turned up 76 cases, only 50 of which dealt with the rule in any meaningful way. In view of the volume of cases in the California court system, this is obviously a far smaller issue in California than in Montana.

476. A current estimate is that there are 217 tribal court systems located within the United States. See Gloria Valencia Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225, 233 n.23 (1994).


479. Id.
and most other states. It is also out of line with its own purpose — that of encouraging diligence in the prosecution of a civil lawsuit. It is time to erase this troubled tablet and start over again with a rule about issuance and service of summons which makes sense, which attorneys can understand and follow, and which will help, not hinder, the trial process. To accomplish this, Rule 41(e) should be replaced by a rule which is located in a logical place, which is more clearly written, and which imposes much shorter time limits.

1. Minimal Requirements

New Location

The Rule establishing time limits for the issuance and service of the summons should be relocated to make it easier to find. The most logical location for this requirement is as a subpart to Rule 4, because this rule governs all other aspects of the issuance and service of the summons. This relocation also would realign the Montana rules with the federal rules and those in many other states. At this time, Rule 4 has subsections A through D; this new provision should become Mont. R. Civ. P. 4E. Subpart (e) of Mont. R. Civ. P. 41 should be deleted simultaneously.

New Title

The new subpart should be given a title indicating that it imposes time limits for particular events connected with the issuance and service of the summons. This conforms with the goal of Article V, Section 11 of the Montana Constitution, which requires statutes to have titles which clearly express their purposes. The subtitle would also help practitioners find the relocated rule. The clearest subtitle would be: “Time Limit for Service of Summons and Complaint.”

New Text

Montana’s deadlines for the issuance and service of process should be greatly simplified. There are two alternatives here.

480. See Mont. Const. art. V, § 11: “[E]ach bill, except general appropriation bills and bills for the general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.”
First, Montana could elect to keep the same time frames and simply rewrite the rule to clarify the deadlines and the consequences for missing deadlines. Second, Montana could, and in my view should, change the deadlines themselves to dramatically shorten the time between filing the complaint and serving the summons, thus providing the repose to the defendant and prevention of lost evidence which is the purpose of the statutes of limitation. This alternative has the added advantage of spurring plaintiffs' counsel to action, to save themselves from forgetting or at least procrastinating service.

2. Four Suggestions

Option 1: Simple Rewrite, No Substantive Change

Rule 4E. Time Limits for Issuance, Service, and Filing of Return of Service of Summons and Complaint.

(1) The plaintiff is responsible for preparing the summons or summonses, and then for having the clerk issue the summons or summonses by signing and stamping the summons. The plaintiff shall have a summons issued and shall direct it to each defendant. The plaintiff must accomplish issuance of the summons no later than one year from the date the complaint is filed. If the plaintiff fails to meet this deadline with regard to any defendant, and that defendant moves to dismiss for insufficiency of process under M.R. Civ. P. Rule 12(b)(4), the plaintiff's complaint against that defendant shall be dismissed with prejudice.

(2)(a) If, during the one-year period following the filing of the complaint, the plaintiff amends the complaint to add new defendants or identify defendants formerly named fictitiously, the plaintiff must obtain a summons for each new or newly identified defendant, also within the one-year period from the time the complaint was filed and subject to the same consequences for missing this deadline set forth in subsection (1).

(b) If the plaintiff does obtain a summons within the one year period established above, but the summons is misplaced or destroyed any time during the three-year period before it must be served, the clerk may issue a duplicate of that summons.

481. The requirement that the affected defendant move for dismissal to obtain the protection of this rule is a change from the current version, which gives standing to "any party interested therein, whether named in the complaint as a party or not." Excepting the most recent case, Hadford v. Credit Bureau of Havre, 1998 MT 179, 962 P.2d 1198 (1998), supra Section IV.A.21, in all the cases decided by the Montana Supreme Court, the affected defendant raised the Rule 41(e) violation. There is no good reason to allow other parties, much less non-parties, to enforce the rule.
The duplicate summons will have the effect of complying with subsection (1) so long as it is identical to the summons which was issued within the one-year period.

(3) In addition, the plaintiff is responsible for having the summons and complaint served, for obtaining proof that such service has occurred, and for filing that proof of service with the clerk of court. The plaintiff must accomplish all three of these steps no later than three years from the date the complaint is filed. If the plaintiff fails to accomplish any of these steps within the deadline as to any defendant, the plaintiff's complaint against that defendant shall be dismissed with prejudice.

(4) If the plaintiff violates the time limits set forth in this rule, but the affected defendant fails to raise the violation as a defense as set forth above, the defendant has waived that defense and the action shall proceed as if this rule had been complied with.

Option 2: Simple Rewrite, Omitting Deadline for Filing Proof of Service

The issuance and service of the summons are designed to provide actual notice to a defendant. It makes sense to require that these acts occur within stated time limits, to move the lawsuit along. On the other hand, filing proof that the service actually occurred rarely matters. (The only exception is when the defendant has not responded and plaintiff wishes to take a default. In this circumstance, the plaintiff must file the return of service to prove to the court that the defendant was served). Neither the federal rule nor the rules in other states require the filing of the proof of service to meet any deadline. Indeed, the Livingston court characterized this act as "ministerial," and Haugen did not change this characterization. Haugen simply held that the requirement was clear in the rule and should be enforced until the rule was changed.

To avoid the trap identified in Livingston and Haugen, even if Montana retains the one-year issuance, three-year service rules, it should delete any deadline for the filing of return of service. If this were done to the proposed amendment above, subsection (3) of the rule would read:

Rule 4E. Time Limits for Issuance, Service, and Filing of Return of Service of Summons and Complaint.

(3) In addition, the plaintiff is responsible for having the summons and complaint served no later than three years from
the date the complaint is filed. If the plaintiff fails to accomplish service within the three year time period as to any defendant, the plaintiff's complaint against that defendant shall be dismissed with prejudice.

**Option 3: Major Simplification, Following Federal Model**

The best option is to both simplify the wording of the rule and dramatically shorten the time limits in the current version of Rule 41(e). As the survey of rules in other jurisdictions indicates, only Montana and California allow a plaintiff to file a lawsuit and then linger for years before actually serving the defendant and proceeding to trial on the merits. In the federal system, many states, and the Cherokee Nation, a plaintiff must obtain and serve the summons within 120 days or less.

This change would realign Montana with the federal rule, in accordance with the general policy behind Montana's Rules of Civil Procedure. Further, this change would better accomplish a stated goal of Rule 41(e)'s time limits: to encourage promptness in the prosecution of actions. Three years is certainly not prompt, especially when added to the statute of limitations period which may be up to as much as ten years. As the defendant in *Sooy v. Petrolane Steel Gas* complained, the effect of permitting a plaintiff to postpone giving actual notice to the defendant she has sued may be to lull the defendant into repose too early, resulting in destruction by the defendant of relevant evidence while the plaintiff, knowing of the existence of the lawsuit, continues to hoard and increase her evidence. The additional time is inconsistent with the purposes of the statutes of limitation: to allow repose to defendants, and to prevent stale evidence.

No Montana case has ever analyzed the reason for the large amount of time granted to the plaintiff after the filing of the lawsuit to achieve service. Indeed, when the Supreme Court

482. See infra Appendix.


484. See, e.g., MONT. CODE ANN. § 27-2-206 (1997) (setting shorter limits on actions where injury can reasonably be known immediately and providing that "in no case may the action [for legal malpractice] be commenced after 10 years from the date of the act, error, or omission."); § 27-2-208 (setting ten-year limit on actions for damages arising out of work on improvements to real property); § 27-2-214 (1997) (setting the statute of limitations for actions for mesne profits of real property at ten years).

RULE 41(e) IN MONTANA

refused to allow the Rule 41(e) time limits to apply to probate proceedings, it specifically stated that three years to make service "would place an unreasonable burden"\(^{486}\) on the defendant. It is difficult to see any legitimate reason for what turns out to be, from the defendant's standpoint, a three-year extension on the statute of limitations. It is also hard to see what detriment a plaintiff would incur from a shorter time period. The plaintiff already is forced to gather facts and prepare and file a complaint within the statute of limitations period; adding the preparation and issuance of the summons at the same time, and requiring service of the summons soon thereafter does not significantly add to this burden.

Of course, there are circumstances when a plaintiff, despite her best efforts, simply cannot identify a potential defendant within the statute of limitations period and is forced to file against a fictitious defendant in order to gain the discovery advantages of formal litigation, the situation presented in *Sooy*.\(^{487}\) At the present time, the limits imposed by Rule 41(e) curb the abuse of this statutory process by requiring the plaintiff to identify the fictitious defendants in time to get the summons issued within the first year after the complaint is filed.\(^{488}\) If Rule 41(e) is changed to greatly decrease the time allowed for the issuance and service of the summons, this amendment could gut the fictitious name statute.\(^{489}\) This problem has a legislative solution: rather than keeping an indefensible Rule 41(e), the legislature should amend the fictitious name statute or the statutes of limitation to provide for a stated extension of the ordinary statutes of limitation, or of the ordinary time limit for serving process, in fictitious name circumstances. Alternatively, this provision could be inserted into the new Rule 4E.

The only really important event in service is the actual service of process itself. Service on the defendant, not issuance of the summons, gives notice to the defendant that he has been sued and must respond within the stated period of time. It does not matter whether the plaintiff obtains the summons on the day she files her complaint or on the day she serves it, so long as she gets the summons issued before it is served. Given the large number of Montana's Rule 41(e) cases involving variations in


\[^{488}\] See *id.* at 423, 708 P.2d at 1018.

the issuance process – lost, amended, duplicate, or substitute summons issues – it makes sense simply to eliminate a separate time limit for issuing the summons and concentrate instead on a single limit for serving the summons.

Similarly, filing the return or proof of service is indeed "ministerial" and does not further the lawsuit in any way. In fact, the return is important only if the defendant does not respond to the summons and the plaintiff seeks a default judgment. The current requirement that the returned summons be filed within a specific time frame has caused several of the recent Rule 41(e) problems, without any countervailing advantage. Therefore, this separate time limit should also be eliminated in favor of a single deadline for serving the summons.

A rule written with these concerns and objectives in mind would read:

Rule 4E. Time Limit for Service of Summons and Complaint.

(1) The plaintiff is responsible for preparing the summons or summonses, and then for having the clerk issue the summons or summonses by signing and stamping each summons. The plaintiff shall have a summons issued directed to each defendant. The plaintiff is also responsible for having the summons and complaint served upon the defendant.

(2) If service of the summons and complaint is not made upon a defendant within 120 days after filing the complaint, the court, upon motion of such defendant or on its own initiative after giving plaintiff notice and an opportunity to be heard, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for any failure, the court shall extend the time for service for an appropriate period.

(3) A plaintiff who names a fictitious defendant in the complaint, pursuant to M.C.A. § 25-5-103, may amend the complaint to substitute a real defendant for the fictitious defendant within one year of filing the original complaint in the action. The 120-day time period and other provisions set forth in subsection (2) of this rule will begin to run, as to the newly


491. This subsection does not appear in the federal rule but clearly allocates the responsibility for obtaining and serving the defendant, in accordance with the Montana cases. The wording repeats MONT. R. CIV. P. 4C(1) to some extent; I believe this repetition is helpful. The Civil Rules Commission's proposal eliminates this subsection. See infra Section V.B.2, Option 4.
identified defendant, from the date of the filing of the amended complaint in which that defendant was first identified.

(4) The time limit imposed by subsection (2) shall apply to all lawsuits in which the original complaints were filed on or after __________ (the effective date of this subdivision E). The provisions of M.R.Civ.P. 41(e), replaced by this subdivision E, shall apply to all lawsuits in which the original complaint was filed before __________ (the effective date of this subdivision E).

Although this suggested provision drastically reduces the time available to a plaintiff to accomplish service, there are several mitigating features. First, the dismissal for failure to serve the defendant within the allotted time is without prejudice, as opposed to Montana's draconian dismissal with prejudice for violation of the current 41(e). This, alone, helps move the lawsuit along without risking the policy of trial on the merits. Second, a plaintiff who can show the court that he is making reasonable efforts to serve the defendant, to no avail, may obtain an extension of the presumptive time period. Thus, this provision, while shorter than the current Montana rule, is more flexible. Third, as with the second option set forth above, this rule focuses on the important aspect of service, actual notice to the defendant, and omits any deadline for issuance of the summons or for filing the return of service. Last, but not least, having the Montana rule the same as the federal counterpart removes one temptation for parties to choose a court system solely because of perceived procedural advantages.

Option 4: Civil Rules Commission Proposal

The Civil Rules Commission has recommended that the Montana Supreme Court eliminate the current Rule 41(e) and substitute a Rule 4E identical to Option 3 but without the first subsection. The rationale is that the responsibility for obtaining the summons and serving the defendant is already covered by Rule 4C. The Commission agreed that the subsection specifically dealing with fictitious defendants was more appropriately placed in the Rules rather than in the fictitious-defendant statute. Thus, the Commission's proposal reads:

Rule 4E. Time Limit for Service of Summons and Complaint.

(1) If service of the summons and complaint is not made upon a defendant within 120 days after filing the complaint, the court, upon motion of such defendant or on its own initiative after giving plaintiff notice and an opportunity to be heard, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for any failure, the court shall extend the time for service for an appropriate period.

(2) A plaintiff who names a fictitious defendant in the complaint, pursuant to M.C.A. § 25-5-103, may amend the complaint to substitute a real defendant for the fictitious defendant within one year of filing the original complaint in the action. The 120-day time period and other provisions set forth in subsection (1) of this rule will begin to run, as to the newly identified defendant, from the date of the filing of the amended complaint in which that defendant was first identified.

(3) The time limit imposed by subsection (1) shall apply to all lawsuits in which the original complaints were filed on or after _________ (the effective date of this subdivision E). The provisions of M.R.Civ.P. 41(e), replaced by this subdivision E, shall apply to all lawsuits in which the original complaint was filed before _________ (the effective date of this subdivision E).

Comments on the proposed revision should be directed to the Montana Supreme Court.

VI. CONCLUSION

Montana’s Rule 41(e) is unmanageable in its current form. It constantly threatens to deprive plaintiffs of their day in court and defendants of their statutory right to repose. Rule 41(e) must be replaced by a new rule setting out clear and short deadlines for the initial steps of a lawsuit. Plaintiffs should be able to consult a single rule, Rule 4, to determine how to obtain a summons, get it served, and file the return of service. The deadline for having the summons issued and served should be reduced to 120 days from the filing of the complaint, thus achieving conformity with Fed. R. Civ. P. 4(m) and the practice prevailing in other states, as well as the Montana policy in favor of repose for defendants after the statute of limitations period has expired.
APPENDIX:

Time Limit in Each State for Service of Summons

Unless otherwise noted, the action in each state is commenced and the statute of limitations is tolled when the complaint is filed.

<table>
<thead>
<tr>
<th>STATE</th>
<th>TIME LIMIT FOR SERVICE OF SUMMONS</th>
<th>RULE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>30 days</td>
<td>ALA. R. CIV. P. 4.1(a)(4)</td>
</tr>
<tr>
<td>Alaska</td>
<td>120 days</td>
<td>ALASKA R. CIV. P. 4(j)</td>
</tr>
<tr>
<td>Arizona</td>
<td>120 days</td>
<td>ARIZ. R. CIV. P. 4(i)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>120 days</td>
<td>ARK. CODE ANN. § 16-58-134 (Michie 1987)</td>
</tr>
<tr>
<td>California</td>
<td>3 years</td>
<td>CAL. CODE CIV. PROC. § 583.210 (West Supp. 1999)</td>
</tr>
<tr>
<td>Colorado</td>
<td>summons must be served within 10 days of filing complaint</td>
<td>COLO. R. CIV. P. 3(a)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>12 days in superior court, 30 days in circuit court</td>
<td>CONN. GEN. STAT. ANN. § 52-46 (West 1991)</td>
</tr>
<tr>
<td>Delaware</td>
<td>120 days</td>
<td>DEL. SUPER. CT. R. CIV. P. 4(j)</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>60 days</td>
<td>D.C. R. CIV. P. 4(m)</td>
</tr>
<tr>
<td>Florida</td>
<td>120 days</td>
<td>FLA. R. CIV. P. 1.070</td>
</tr>
<tr>
<td>State</td>
<td>Time Limit</td>
<td>Relevant Statute/Rule</td>
</tr>
<tr>
<td>----------------</td>
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<tr>
<td>Georgia</td>
<td>5 days</td>
<td>GA. CODE ANN. § 9-11-4(c) (1993)</td>
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<tr>
<td>Idaho</td>
<td>6 months</td>
<td>IDAHO R. CIV. P. 4(a)(1)</td>
</tr>
<tr>
<td>Illinois</td>
<td>6 months</td>
<td>ILL. S. CT. RULE 103(b)</td>
</tr>
<tr>
<td>Indiana</td>
<td>6 months</td>
<td>IND. TRIAL PROCEDURE RULE 41(E)</td>
</tr>
<tr>
<td>Iowa</td>
<td>90 days</td>
<td>IOWA R. CIV. P. 49(f)</td>
</tr>
<tr>
<td>Kansas</td>
<td>90 days</td>
<td>KAN. STAT. ANN. § 60-203 (1994)</td>
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<tr>
<td>Kentucky</td>
<td>90 days</td>
<td>KY. R. CIV. P. 3.01</td>
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<tr>
<td>Louisiana</td>
<td>90 days</td>
<td>L.A. CODE CIV. PROC ANN. art. 1201(C); L.A. REV. STAT. ANN. § 13:3471 (West 1991)</td>
</tr>
<tr>
<td>Maine</td>
<td>20 or 90 days</td>
<td>ME. R. CIV. P. 3</td>
</tr>
<tr>
<td>Maryland</td>
<td>60 days</td>
<td>MD. R. CIV. P. CIR. CT. 2-113</td>
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<tr>
<td>Massachusetts</td>
<td>90 days</td>
<td>MASS. ST. R. CIV. P. 4(j)</td>
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<tr>
<td>State</td>
<td>Time Limit</td>
<td>Code or Rule</td>
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<tr>
<td>Michigan</td>
<td>91 days</td>
<td>MICH. CT. R. 2.102</td>
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<tr>
<td>Minnesota</td>
<td>60 days</td>
<td>MINN. R. CIV. P. 3.01(c)</td>
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<tr>
<td>Mississippi</td>
<td>120 days</td>
<td>MISS. R. CIV. P. 4(h)</td>
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<tr>
<td>Missouri</td>
<td>30 days, can be extended up to 90 days</td>
<td>MO. SP. CT. RULE 54.21</td>
</tr>
<tr>
<td>Montana</td>
<td>1 year to issue summons, 3 years to serve summons</td>
<td>MONT. R. CIV. P. 41(e)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>20 days</td>
<td>NEB. REV. STAT. § 25-507.01(1) (1995)</td>
</tr>
<tr>
<td>Nevada</td>
<td>120 days</td>
<td>NEV. R. CIV. P. 4(i)</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>suit commences when writ is completed with good faith intent to serve; writ must also be served and returned by return date</td>
<td>Desaulnier v. Manchester Sch. Dist., 667 A.2d 1380 (N.H. 1995)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>60 days</td>
<td>N.J. GEN. APP. R. 1:13-7(b)</td>
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<tr>
<td>New Mexico</td>
<td>dismissal for failure to take &quot;significant action&quot; within 2 years</td>
<td>N.M. DIST. CT. R. CIV. P. 1-041(E)</td>
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<tr>
<td>New York</td>
<td>120 days</td>
<td>N.Y. C.P.L.R. § 306-b (McKinney 1998)</td>
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<tr>
<td>North Carolina</td>
<td>30 days</td>
<td>N.C. R. CIV. P. 4(c)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>action commenced with filing of complaint and service of summons; statute of limitations controls time limit for service, + 60 days</td>
<td>N.D. CENT. CODE § 28-01-38 (1991)</td>
</tr>
<tr>
<td>State</td>
<td>Time Limit</td>
<td>Legal Reference</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td>Ohio</td>
<td>6 months</td>
<td>OHIO R. CIV. P. 4(E)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>180 days</td>
<td>OKLA. STAT. ANN. tit. 12, § 2004(I) (1993)</td>
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<tr>
<td>Oregon</td>
<td>180 days</td>
<td>OR. REV. STAT. § 12.020(1), (2) (1998)</td>
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<tr>
<td>Oregon</td>
<td>action commenced with filing of complaint and service of summons; statute of limitations controls time limit for service, + 60 days</td>
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<tr>
<td>Pennsylvania</td>
<td>30 days</td>
<td>PA. R. CIV. P. 401(a)</td>
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<tr>
<td>Rhode Island</td>
<td>120 days</td>
<td>R.I. SUPER. CT. R. CIV. P. 4(I)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>10 days</td>
<td>S.C. R. CIV P. 5(d)</td>
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<tr>
<td>South Dakota</td>
<td>60 days</td>
<td>1997 S.D. Laws § 15-2-31</td>
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<tr>
<td>Tennessee</td>
<td>30 days</td>
<td>TENN. R. CIV. P. 3</td>
</tr>
<tr>
<td>Texas</td>
<td>dismissal for failure to prosecute case</td>
<td>TEX. R. CIV. P. 165a(1)</td>
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<tr>
<td>Utah</td>
<td>120 days</td>
<td>UTAH R. CIV. P. 4(b)</td>
</tr>
<tr>
<td>Vermont</td>
<td>60 days</td>
<td>VT. R. CIV. P. 3</td>
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<tr>
<td>Virginia</td>
<td>after 12 months, the due diligence standard applies</td>
<td>VA. CODE ANN. § 8.01-275.1 (Michie Cum. Supp. 1998)</td>
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<td>Washington</td>
<td>90 days</td>
<td>WASH. REV. CODE ANN. § 4.16.170 (West 1998)</td>
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<tr>
<td>West Virginia</td>
<td>120 days</td>
<td>W.VA. R. CIV. P. 4(I)</td>
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<td>State</td>
<td>Time</td>
<td>Law</td>
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<td>Wisconsin</td>
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<td>WIS. STAT. ANN. § 801.02(1) (Supp. 1998)</td>
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<tr>
<td>Wyoming</td>
<td>60 days</td>
<td>WYO. R. CIV. P. 3(b)</td>
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