

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
AMENDMENT OF RULE 41(e) OF THE
NEVADA RULES OF CIVIL
PROCEDURE

ADKT 0560

FILED

JUN 02 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY ADUPENW
CHIEF DEPUTY CLERK

PETITION

The undersigned hereby petition the Nevada Supreme Court to amend the mandatory dismissal provisions in NRCP 41(e). The background and bases for this petition are:

1. On March 12, 2020, Governor Sisolak declared a state of emergency in Nevada due to the COVID-19 pandemic. The next day, President Trump declared a nationwide state of emergency. To implement the emergency stay-at-home directives that followed, Nevada's eleven judicial districts entered administrative orders cancelling jury trials and restricting non-essential court proceedings, including civil trials, during the period of the COVID-19 emergency. *See In the Matter of District Court Administrative Orders Related to the Coronavirus Emergency*, ADKT 555 (collecting district court COVID-19 administrative orders).

2. Rule 41(e) of the Nevada Rules of Civil Procedure governs dismissal of civil actions for lack of prosecution. NRCP 41(e) permits dismissal for lack of prosecution when an action is not brought to trial within 2 years of the filing of the complaint and mandates dismissal when an action is not brought to trial within 3 years of the filing of an appellate remittitur or a new trial order or within 5 years of the filing of the complaint.

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3. The administrative orders cancelling jury trials and suspending civil trials created potential conflicts with NRCP 41(e)'s mandatory dismissal provisions. To avoid these conflicts, each judicial district included language in its COVID-19 administrative order substantially as follows: "This order shall operate to stay trials in civil cases and toll the time for bringing a case to trial for purposes of NRCP 41(e) for the duration of the COVID-19 emergency and for a period of 30 days thereafter." *In re Coronavirus Emergency and Its Impact of the Courts*, ADKT 554 (AO-0013, Apr. 10, 2020, at Attach. A, p. 7, ¶ 13); see *Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982) ("Any period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of Rule 41(e).").

4. Recently, Governor Sisolak has eased the restrictions set forth in his earlier emergency directives. It is anticipated that in the coming weeks or months, the declared state of emergency will be lifted. When trials resume, criminal jury trials will have priority over most civil suits. As a result, even with the tolling provisions in the district court administrative orders, when the trial stays are lifted civil cases may not be able to be brought to trial in time to avoid the mandatory dismissal deadlines in NRCP 41(e), which will resume running 30 days after the declared state of emergency ends.

5. A subcommittee of the former NRCP Revision Committee, consisting of NRCP Revision Committee Co-Chairs Justices Pickering and Gibbons and attorneys Robert Eisenberg, Graham Galloway, Steve Morris, Dan Polsenberg, and Don Springmeyer, was formed to address whether and, if so, how NRCP 41(e) should be amended.

6. NRCP 41(e) currently reads as follows:

(e) Dismissal for Want of Prosecution.

(1) **Procedure.** When the time periods in this rule have expired:

(A) any party may move to dismiss an action for lack of prosecution; or

(B) the court may, on its own, issue an order to show cause why an action should not be dismissed for lack of prosecution. After briefing, the court may hold a hearing or take the matter under submission, as provided by local rules on motion practice.

(2) Dismissing an Action Before Trial.

(A) The court may dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 2 years after the action was filed.

(B) The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 5 years after the action was filed.

(3) Dismissing an Action After a New Trial is Granted. The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the entry of an order granting a new trial.

(4) Dismissing an Action After an Appeal.

(A) If a party appeals an order granting a new trial and the order is affirmed, the court must dismiss the action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court.

(B) If a party appeals a judgment and the judgment is reversed on appeal and remanded for a new trial, the court must dismiss the action

for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court.

(5) Extending Time; Computing Time.

The parties may stipulate in writing to extend the time in which to prosecute an action. If two time periods requiring mandatory dismissal apply, the longer time period controls.

(6) Dismissal With Prejudice.

A dismissal under Rule 41(e) is a bar to another action upon the same claim for relief against the same defendants unless the court provides otherwise in its order dismissing the action.

7. Nevada has had a mandatory 5-year dismissal rule since 1943. *See Astorga v. Ishimatsu*, 77 Nev. 30, 32, 359 P.2d 83, 84 (1961) (tracing history and statutory origins of NRCP 41(e)). The rule has two principal exceptions: (1) where the parties stipulate to waive the rule, *see Carstarphen v. Milsner*, 128 Nev. 55, 58, 270 P.3d 1251, 1253 (2012); and (2) where trial is stayed, for the period of time the stay order prevented trial, *see Boren*, 98 Nev. at 6, 638 P.2d at 405. Otherwise, “where a case has not been brought to trial after five years, dismissal is mandatory, affording the district court no discretion.” *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 131 Nev. 865, 872, 358 P.3d 925, 929 (2015). This suggests that, once jury trials resume, if the district courts have to delay civil trials to give priority to criminal jury trials, civil actions will be subject to NRCP 41(e)’s mandatory dismissal provisions unless the rule is amended.¹

¹Convening a trial, calling the first witness, then continuing the trial has also been used to avoid mandatory dismissal under NRCP 41(e). *See Smith v. Timm*, 96 Nev. 197, 200, 606 P.2d 530, 531 (1980). This device does not solve the COVID-19 dilemma because of the burdens it would impose on the district courts, prospective jurors, witnesses, and parties inconsistent with COVID-19 public health protocols.

8. In evaluating possible amendments to NRCP 41(e), the committee considered other jurisdictions' rules regarding dismissal for want of prosecution. See Fifty-State Survey, attached as Exhibit A. FRCP 41(b) provides for dismissal "[i]f the plaintiff fails to prosecute," but does not mandate a specific timeframe for bringing a case to trial. With the advent of modern case management rules, almost all states have adopted discretionary non-prosecution dismissal rules modeled on FRCP 41(b). These rules allow for discretionary dismissal under the fluid "[i]f the plaintiff fails to prosecute" standard, and do not mandate dismissal if a case is not brought to trial within a particular time period. States that once had bright-line rules requiring cases to be tried within certain time periods have almost without exception abandoned their mandatory dismissal provisions, leaving Nevada one of just a few states to retain any such provision.

9. California most resembles Nevada in that it retains statutes mandating dismissal for failure to bring a case to trial within 5 years. See Cal. Code Civ. Pro. §§ 583.310 & 583.360. But, unlike Nevada, California law incorporates express exceptions to its mandatory dismissal rules, in addition to stipulations and stays. Compare Cal. Code Civ. Pro. § 583.340(c) ("In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which . . . [b]ringing the action to trial . . . was impossible, impracticable, or futile."), with *Thran v. First Judicial Dist. Court*, 79 Nev. 176, 180, 380 P.2d 297, 300 (1963) (declining to adopt California exclusion for times during which bringing a case to trial was impossible, impracticable, or futile because such was not provided for in the text of

NRCP 41(e) or its predecessor statute); *see* Cal. Civ. Proc. Code § 583.350 (“If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension.”).

10. In view of the foregoing, the committee recommends amending NRCP 41(e) to alleviate potential harm resulting from delays created by the prioritization of criminal cases over civil cases due to the COVID-19 pandemic. Specifically, the committee recommends removing the mandatory dismissal provision of NRCP 41(e) and retaining its provision providing for discretionary dismissal after 2 years. This amendment would bring Nevada into line with the majority of jurisdictions, which recognize that modern case management practices have greatly reduced the need for mandatory dismissal rules, and also decrease the contentious motion practice that NRCP 41(e) has occasionally generated. The committee’s proposed amendment of NRCP 41 is set forth in Exhibit B.

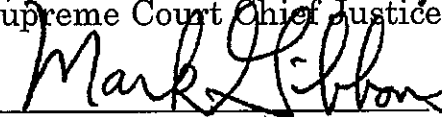
11. As an alternative, NRCP 41(e) could be amended to adopt exceptions modeled on California Code of Civil Procedure sections 583.340(c) and 583.350. Such amendments would likely resolve the COVID-19 related issues with NRCP 41(e), although section 583.350’s grace period might be unrealistically short.

12. Given the urgent need for prompt action due to the COVID-19 pandemic, we request this Court to place this matter on its administrative docket, solicit public comment, and consider the committee's proposed rule amendment as expeditiously as possible.

Respectfully submitted,



Kristina Pickering
Supreme Court Chief Justice



Mark Gibbons
Supreme Court Associate Chief Justice

EXHIBIT A
FIFTY-STATE SURVEY

States **Rules Regarding Want of Prosecution**

Alabama Alabama provides for dismissal “[f]or failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within any particular time period. *See* Ala. R. Civ. P. 41(b).

Alaska Alaska provides for dismissal if “the case has been pending for more than one year without any proceedings having been taken” or if “the case has been pending for more than one year, and no trial or mandatory pretrial scheduling conference has been scheduled or held,” but does not require a case to be brought to trial within any particular time period. *See* Alaska R. Civ. P. 41(e). Pending cases are reviewed twice per year and the parties of any cases falling within this rule must demonstrate good cause not to dismiss. *See* Alaska R. Civ. P. 41(e)(2).

Arizona Although Arizona previously provided for dismissal of actions that remained on the “inactive calendar” for approximately one year, *see Gorman v. City of Phoenix*, 731 P.2d 74 (Ariz. 1987), it now provides for dismissal “[i]f the plaintiff fails to prosecute,” and does not require a case to be brought to trial within any particular time period. *See* Ariz. R. Civ. P. 41(b).

Arkansas Arkansas provides for dismissal of actions “in which there has been no action shown on the record for the past 12 months,” but does not require a case to be brought to trial within a particular time period. *See* Ark. R. Civ. P. 41(b).

California California provides that “[a]n action shall be brought to trial within five years after the action is commenced against the defendant.” *See* Code Civ. Pro. 583.310. Further, actions in which a new trial is granted must be brought to trial within three years. *See* Code Civ. Pro. 583.320. In computing the time within which an action must be brought to trial, the time during which any of the following existed must be excluded: (a) The jurisdiction of the court to try the action was suspended; (b) Prosecution or trial of the action was stayed or enjoined; or (c) Bringing the action to trial, for any

other reason, was impossible, impracticable, or futile. See Code Civ. Pro. 583.340.

Colorado

Colorado provides for dismissal “[f]or failure of a plaintiff to prosecute,” and for “[a]ctions not prosecuted or brought to trial with due diligence,” see Colo. R. Civ. P. 41(b)(1)-(2), elaborating that “[i]f the case has not been set for trial, no activity of record in excess of 12 continuous months shall be deemed prima facie failure to prosecute,” see Colo. R. Civ. P. 121, Section 1-10(3), but does not require a case to be brought to trial within a particular time period.

Connecticut

Connecticut provides for dismissal “[i]f a party shall fail to prosecute an action with reasonable diligence,” but does not require a case to be brought to trial within any particular time period. See Conn. Practice Book Sec. 14-3(a).

Delaware

Delaware provides for dismissal “[f]or failure of the plaintiff to prosecute” and elaborates that dismissal is appropriate if “no action has been taken for a period of 1 year” absent “good reason for the inaction,” but does not require a case to be brought to trial within a particular time period. See Del. Ch. Ct. R. 41.

Florida

Florida provides for dismissal of “all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court,” if, after notice of the foregoing, “no record activity occurs within the 60 days immediately following the service of such notice,” but does not require a case to be brought to trial within a particular time period. See Fla. R. Civ. P. 1.420(e).

Georgia

In Georgia, “[a]ny action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff.” See Ga. Code Ann. § 9-2-60. This statute requires “only the most minimal of activity to avoid dismissal,” see *Brown v. Kroger Co.*, 597 S.E.2d 382, 384 (Ga. 2004), and does not require a case to be brought to trial within a particular time period.

Hawaii

Although Hawaii previously provided for dismissal of any action “remaining untried for a period of six years after it

has been placed on calendar,” *see Kudlich v. Ciciarelli*, 401 P.2d 449 (Haw. 1965), it now provides for dismissal “for failure of the plaintiff to prosecute” and does not require a case to be brought to trial within a particular time period. *See* Haw. R. Civ. P. 41(b).

- Idaho provides for dismissal “[i]f the plaintiff fails to prosecute,” and elaborates that most actions “in which no action has been taken for a period of 90 days may be dismissed” absent “a showing of good cause for retention,” but does not require a case to be brought to trial within a particular time period. *See* Idaho R. Civ. P. 41.
- Illinois provides for dismissal “for want of prosecution by reason that the plaintiff neglects to prosecute the same,” but does not require a case to be brought to trial within a particular time period. *See* 735 ILCS 5/5-116.
- Indiana provides for dismissal “when no action has been taken in a civil case for a period of sixty [60] days” without “sufficient cause,” but does not require a case to be brought to trial within a particular time period. *See* Ind. R. Trial P. 41(E).
- Iowa provides that “except under unusual circumstances,” most civil actions “shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.” *See* Iowa R. Civ. P. 1.944(1). Cases that do not comply with this deadline are subject to dismissal without prejudice, “unless satisfactory reasons for want of prosecution or grounds for continuance” are shown. *See* Iowa R. Civ. P. 1.944(2).
- Kansas provides for dismissal “[i]f the plaintiff fails to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Kan. Stat. Ann. § 60-241(b).
- Kentucky provides for dismissal “[f]or failure to prosecute,” *see* Ky. R. Civ. P. 41.02(1), and for cases “in which no pretrial step has been taken within the last year,” Ky. R. Civ. P. 77.02(2), but does not require a case to be brought to trial within a particular time period.

- Louisiana Louisiana provides for dismissal of most civil actions for “abandonment” when “the parties fail to take any step in its prosecution or defense in the trial court for a period of three years,” but does not require a case to be brought to trial within a particular time period. *See* La. Code Civ. Proc. Ann. art. 561.
- Maine Maine provides for dismissal “for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance,” but does not require a case to be brought to trial within a particular time period. *See* Me. R. Civ. P. 41.
- Maryland Maryland provides for dismissal “for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance,” but does not require a case to be brought to trial within a particular time period. *See* Md. Rules 2-507(c).
- Massachusetts Massachusetts provides for dismissal, upon one year’s notice, “for lack of prosecution any action which has remained upon the docket for three years preceding said notice without activity shown other than placing upon the trial list, marking for trial, being set down for trial, the filing or withdrawal of an appearance, or the filing of any paper pertaining to discovery,” but does not require a case to be brought to trial within a particular time period. *See* Mass. R. Civ. P. 41(b)(1).
- Michigan Michigan provides for dismissal for “lack of progress” in “an action in which no steps or proceedings appear to have been taken within 91 days,” but does not require a case to be brought to trial within a particular time period. *See* Mich. Ct. R. 2.502.
- Minnesota Minnesota provides for dismissal “for failure to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Minn. R. Civ. P. 41.02(a).
- Mississippi Mississippi provides for dismissal “[f]or failure of the plaintiff to prosecute,” *see* Miss. R. Civ. P. 41(b), and for “actions wherein there has been no action of record during the preceding twelve months,” *see* Miss. R. Civ. P. 41(d), but

does not require a case to be brought to trial within a particular time period.

- Missouri Missouri provides for dismissal “for failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Mo. Sup. Ct. R. 67.03.
- Montana Montana provides for dismissal “[i]f the plaintiff fails to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Mont. R. Civ. P. 41.
- Nebraska Nebraska provides for dismissal “for want of prosecution,” but does not require a case to be brought to trial within a particular time period. *See* Neb. Rev. Stat. Ann. § 25-1149.
- Nevada Nevada mandates the dismissal of civil actions “if a plaintiff fails to bring the action to trial” within certain timeframes. *See* NRCP 41(e)(2)-(4) The only exception set forth in the rule is for a written stipulation between the parties extending the time in which to prosecute the action. *See* NRCP 41(e)(5).
- New Hampshire Although New Hampshire lacks a formal rule on the subject, the New Hampshire Supreme Court has stated that courts have inherent authority to dismiss actions for lack of prosecution. *See Garabedian v. Donald William, Inc.*, 207 A.2d 425 (N.H. 1965). It does not, however, require a case to be brought to trial within a particular time period.
- New Jersey New Jersey provides for dismissal of most civil cases for want of prosecution after four months of inactivity, but does not require a case to be brought to trial within a particular time period. *See* N.J. Misc. R. P. 1:13-7(a).
- New Mexico Although New Mexico once had a rule requiring civil actions to be brought to trial within two years of filing, *see Martin v. Leonard Motor-El Paso*, 402 P.2d 954 (N.M. 1965), its rule now provides for dismissal “[f]or failure of the plaintiff to prosecute,” and does not require a case to be brought to trial within a particular time period. *See* N.M. Dist. Ct. R. Civ. P. 1-041(B).
- New York New York provides for dismissal “[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof,” but does not

require a case to be brought to trial within a particular time period. *See* N.Y. C.P.L.R. 3216.

- North Carolina North Carolina provides for dismissal “[f]or failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* N.C. Gen. Stat. Ann. 1A-1, 41(b).
- North Dakota North Dakota provides for dismissal “[i]f the plaintiff fails to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* N.D. R. Civ. P. 41(b).
- Ohio Ohio provides for dismissal “[w]here the plaintiff fails to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Ohio R. Civ. P. 41(b)(1).
- Oklahoma Oklahoma provides for dismissal of “[a]ny action in which no pleading has been filed or other action taken for a year and in which no motion or demurrer has been pending during any part of said year,” but does not require a case to be brought to trial within a particular time period. *See* Okla. Stat. Ann. title 12, § 1083.
- Oregon Oregon provides for dismissal “[f]or failure of the plaintiff to prosecute” and for cases “in which no action has been taken for one year,” but does not require a case to be brought to trial within a particular time period. *See* Or. R. Civ. P. 54.
- Pennsylvania Pennsylvania provides for “termination” “[w]here a matter has been inactive for an unreasonable period of time,” but does not require a case to be brought to trial within a particular time period. *See* Pa. R. Jud. Admin. 1901(a)
- Rhode Island Although Rhode Island provides for dismissal “for lack of prosecution where the action has been pending for more than five (5) years,” or where the plaintiff fails “to proceed when the action is reached for trial,” such dismissal is discretionary, not mandatory, *see* R.I. Super. R. Civ. P. 41, and must be supported by more than “mere delay.” *See Cotter v. Dias*, 130 A.3d 164, 169 (R.I. 2016).
- South Carolina South Carolina provides for dismissal “[f]or failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* S.C. R. Civ. P 41(b).

South Dakota South Dakota provides for dismissal of “any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary,” but does not require a case to be brought to trial within a particular time period. *See* S.D. Codified Laws § 15-11-11.

Tennessee Tennessee provides for dismissal “[f]or failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Tenn. R. Civ. P. 41.02(1).

Texas Texas provides for dismissal “for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice,” or when a case is “not disposed of within the time standards promulgated by the [Texas] Supreme Court under its Administrative Rules” *See* Tex. R. Civ. P 165(a)(1)-(2). Texas’s Administrative Rules, in turn, provide that civil jury cases “should, so far as reasonably possible” be “brought to trial or final disposition” within 18 months from the appearance date, but this rule is aspirational/discretionary, not mandatory. *See* Tex. R. Jud. Admin 6.1.

Utah Utah provides for dismissal “[i]f the plaintiff fails to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Utah R. Civ. P. 41(b).

Vermont Vermont provides for dismissal “[f]or failure of the plaintiff to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Vt. R. Civ. P. 41(b)(2).

Virginia Virginia provides for the “discontinuation” of actions that have been inactive for over two years, *see* Va. Code Ann. § 8.01-335(A), or that are not served within one year of commencement, *see* Va. Code Ann. § 8.01-335(D), but does not require a case to be brought to trial within a particular time period.

Washington Washington provides that “[a]ny civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been

joined,”¹ but does not require a case to be brought to trial within a particular time period. *See* Wash. Super. Ct. Civ. R. 41(b)(1).

- West Virginia West Virginia provides for dismissal of actions “[f]or failure of the plaintiff to prosecute,” and actions “wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs,” but does not require a case to be brought to trial within a particular time period. *See* W. Va. R. Civ. P. 41(b).
- Wisconsin Wisconsin provides for dismissal (among other actions) “[f]or failure of any claimant to prosecute,” but does not require a case to be brought to trial within a particular time period. *See* Wis. Stat. Ann. § 805.03.
- Wyoming Wyoming provides for dismissal of “any action not prosecuted or brought to trial with due diligence,” but the rule is discretionary and does not require a case to be brought to trial within a particular time period. *See* Wy. R. Civ. P 41(b)(2).

¹Under Washington caselaw, the term “note the action for trial,” means “giving to the opposing party the statutory notice provided for by RCW 4.44.020.” *Friese v. Adams*, 267 P.2d 107, 108 (Wash. 1954). That rule, in turn, sets forth notice and filing procedures for setting a case for trial and identifying the issues to be tried, among other things. *See* Wash. Rev. Code Ann. § 4.44.020.

EXHIBIT B

AMENDMENT OF NEVADA RULE OF CIVIL PROCEDURE 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By the Plaintiff.

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

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

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

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

(C) Filing Fees. Unless otherwise stipulated, the plaintiff must repay the defendant's filing fees.

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

(b) Involuntary Dismissal: Effect. If the plaintiff fails to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against the defendant. Unless the dismissal order or an applicable statute provides otherwise, a dismissal under Rule 41(b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

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

(1) before a responsive pleading is served; or

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

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

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

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

(e) Dismissal for Want of Prosecution.

(1) **Procedure.** When the applicable time [~~periods~~] period in subsection 2 of this rule [~~have~~] has expired:

(A) any party may move to dismiss an action for lack of prosecution; or

(B) the court may, on its own, issue an order to show cause why an action should not be dismissed for lack of prosecution. After briefing,

the court may hold a hearing or take the matter under submission, as provided by local rules on motion practice.

(2) Dismissing an Action ~~[Before Trial.]~~ for Want of Prosecution.

~~[—————(A)]~~ The court may dismiss an action for want of prosecution if a plaintiff ~~[fails]~~ has failed to bring the action to trial within 2 years after (a) the action was [filed.] filed; (b) the entry of an order in the district court granting a new trial; or (c) an order for a new trial has been filed in an appellate court and the appellate court's remittitur has been filed in the district court.

~~[(B) The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 5 years after the action was filed.]~~

~~(3) Dismissing an Action After a New Trial is Granted. The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the entry of an order granting a new trial.~~

~~(4) Dismissing an Action After an Appeal.~~

~~(A) If a party appeals an order granting a new trial and the order is affirmed, the court must dismiss the action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court.~~

~~(B) If a party appeals a judgment and the judgment is reversed on appeal and remanded for a new trial, the court must dismiss the action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court.~~

~~(5)~~ (3) **Extending Time; Computing Time.** The parties may stipulate in writing to extend the time in which to prosecute an action. ~~[If two time periods requiring mandatory dismissal apply, the longer time period controls.]~~

~~(6)~~ (4) **Dismissal [With] Without Prejudice.** A dismissal under Rule 41(e) is not a bar to another action upon the same claim for relief against the same ~~[defendants]~~ defendant(s) unless the court ~~[provides]~~ states otherwise in its order dismissing the action.