

RULE 1

<u>PRESENT CHAPTER TITLE AND RULE:</u>	<u>RECOMMENDED TITLE CHAPTER AND RULE:</u>
<p data-bbox="145 395 767 468">I. SCOPE OF RULES—ONE FORM OF ACTION</p> <p data-bbox="248 509 663 540">RULE 1. SCOPE OF RULES</p> <p data-bbox="145 582 767 959">These rules govern the procedure in the district courts of the state of Montana in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81; provided, however, that the discovery procedures set forth in Rules 26 through 37, inclusive, shall be applicable to proceedings in probate. They shall be construed to secure the just, speedy, and inexpensive determination of every action.</p>	<p data-bbox="775 395 1390 468">TITLE I: SCOPE OF RULES; FORM OF ACTION</p> <p data-bbox="775 509 1206 540">RULE 1. SCOPE OF RULES</p> <p data-bbox="775 582 1390 959">These rules govern the procedure in all civil actions and proceedings in the district courts of the state of Montana, including probate proceedings, unless specifically provided to the contrary in the Uniform Probate Code; and except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.</p>

COMMITTEE NOTES

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This is not meant to be a substantive change.

The rules minimize the use of inherently ambiguous words. For example, the word "shall" is removed because it is inherently ambiguous in that it can mean "must," "may," or something else depending on the context. "Shall" is replaced with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

Language has been added to make it clear that the Civil Rules apply to probate proceedings except where the Probate Code specifies different procedures. This is consistent with § 72-1-207, MCA.

RULE 2

<u>PRESENT RULE:</u>	<u>RECOMMENDED RULE:</u>
<p style="text-align: center;">RULE 2. ONE FORM OF ACTION</p> <p>There shall be one form of action to be known as "Civil Action."</p>	<p style="text-align: center;">RULE 2. ONE FORM OF ACTION</p> <p>There is one form of action – the civil action.</p>

COMMITTEE NOTES

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.

RULE 3

<u>PRESENT CHAPTER TITLE AND RULE:</u>	<u>RECOMMENDED CHAPTER TITLE AND RULE:</u>
<p data-bbox="145 395 767 499">II. COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS</p> <p data-bbox="225 582 687 654">RULE 3. COMMENCEMENT OF ACTION</p> <p data-bbox="145 696 703 768">A civil action is commenced by filing a complaint with the court.</p>	<p data-bbox="783 395 1382 540">TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS</p> <p data-bbox="783 582 1262 654">RULE 3. COMMENCING AN ACTION</p> <p data-bbox="775 696 1294 768">A civil action is commenced by filing a complaint with the court.</p>

COMMITTEE NOTES

The language of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.

RULE 4

<u>PRESENT RULE 4A:</u>	<u>RECOMMENDED RULE 4(a):</u>
<p data-bbox="172 354 746 422">RULE 4. PERSONS SUBJECTION TO JURISDICTION- PROCESS-SERVICE</p> <p data-bbox="159 468 751 955">A. Definition of Person. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in the individual's own name or under a trade name; an individual's agent or personal representative; a corporation; a limited liability company; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.</p>	<p data-bbox="788 354 1385 457">RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE</p> <p data-bbox="788 505 1378 685">(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:</p> <ol data-bbox="842 733 1385 1638" style="list-style-type: none"><li data-bbox="842 733 1385 837">(1) an individual, whether operating in the individual's own name or under a trade name;<li data-bbox="842 884 1385 955">(2) an individual's agent or personal representative;<li data-bbox="842 1002 1385 1038">(3) a corporation;<li data-bbox="842 1085 1385 1120">(4) a limited liability company;<li data-bbox="842 1168 1385 1203">(5) a business trust;<li data-bbox="842 1251 1385 1286">(6) an estate;<li data-bbox="842 1334 1385 1369">(7) a trust;<li data-bbox="842 1417 1385 1452">(8) a partnership;<li data-bbox="842 1500 1385 1535">(9) an unincorporated association; and<li data-bbox="842 1583 1385 1638">(10) any two or more persons having a joint or common interest or any other legal or commercial entity.

RULE 4 (continued)

PRESENT RULE 4B:

B. Jurisdiction of Persons.

(1) *Subject to Jurisdiction.* All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use or possession of any property, or of any interest therein, situated within this state;
- (d) contracting to insure any person, property or risk located within this state at the time of contracting;
- (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
- (f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state.

(2) *Acquisition of Jurisdiction.* Jurisdiction may be acquired by our courts over any person through service of process as

RECOMMENDED RULE 4(b):

(b) Jurisdiction of Persons.

(1) *Subject to Jurisdiction.* All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

- (A) the transaction of any business within Montana;
- (B) the commission of any act resulting in accrual within Montana of a tort action;
- (C) the ownership, use or possession of any property, or of any interest therein, situated within Montana;
- (D) contracting to insure any person, property or risk located within Montana at the time of contracting;
- (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;
- (F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within Montana; or

RULE 4 (continued)

<u>PRESENT RULE 4B (continued):</u>	<u>RECOMMENDED RULE 4(b)</u>
<p>herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.</p>	<p><u>(continued):</u></p> <ul style="list-style-type: none"><li data-bbox="895 375 1321 482">(G) acting as personal representative of any estate within Montana. <p data-bbox="847 526 1276 561">(2) <i>Acquisition of Jurisdiction.</i></p> <p data-bbox="903 565 1326 673">Jurisdiction may be acquired by Montana courts over any person through:</p> <ul style="list-style-type: none"><li data-bbox="903 716 1326 789">(A) service of process as herein provided; or<li data-bbox="916 830 1374 1017">(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

RULE 4 (continued)

<u>PRESENT RULE 4(C)(1):</u>	<u>RECOMMENDED RULE 4(c)(1):</u>
<p>C. Process.</p> <p>(1) <i>Summons-Issuance.</i> 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 and service of the summons shall be accomplished within the times prescribed by Rule 4E 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 in the manner and within the times prescribed by these rules. The party requesting issuance of the summons shall bear the burden of having it properly issued and served and filed with the clerk.</p>	<p>(c) Summons.</p> <p>(1) <i>Issuance.</i> On or after filing the complaint, the plaintiff or the plaintiff's attorney must present a summons to the clerk for issuance. The clerk must issue and deliver a properly completed summons to the plaintiff or the plaintiff's attorney, who must thereafter deliver it for service upon the defendant as prescribed by these rules. Service of the summons must be accomplished within the times prescribed by Rule 4(t). Upon request, the clerk must issue separate or additional summons against any parties designated in the original action or any additional parties who may be brought into the action. Such separate or additional summons must also be served in the manner and within the times prescribed by these rules. The party requesting issuance of the summons bears the burden of having it properly issued, served, and filed with the clerk.</p>

RULE 4 (continued)

PRESENT RULE 4C(2):

(2) *Summons-Form.* The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in . . . County, Montana, and described as follows: (Here insert descriptions of land.)" For exceptions to this form of summons see 4D(4) "Other service," set forth hereinafter.

RECOMMENDED RULE 4(c)(2):

(2) *Form.*

(A) *Contents.* A summons must:

- (i) name the court and the parties;
- (ii) be directed to the defendant;
- (iii) state the name and address of the plaintiff's attorney or – if unrepresented – of the plaintiff;
- (iv) state the time within which the defendant must appear and defend;
- (v) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;
- (vi) be signed by the clerk;
and

(vii) bear the court's seal.

(B) *Quiet Title Actions.* In an action to quiet title to real estate, the following must be added to the summons: "This action is brought to quiet title to land situated in _____ County, Montana, and described as

RULE 4 (continued)

<u>PRESENT RULE 4C(2) (continued):</u>	<u>RECOMMENDED RULE 4(c)(2) (continued):</u>
	<p>follows: (Here insert descriptions of land).”</p> <p>(C) <i>Statutory Exceptions.</i> Whenever a Montana statute, or a court order or citation issued pursuant thereto, provides for the service of a notice, order, or citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute, order, or citation. Additionally, all persons are required to comply with the provisions of the following sections, when applicable:</p> <ul style="list-style-type: none">(i) 33-1-603;(ii) 33-1-613;(iii) 33-1-614;(iv) 33-2-314;(v) 33-2-315;(vi) 70-28-207;(vii) 70-28-208;(viii) 70-28-209; and(ix) 70-28-212. <p>(D) <i>By Publication.</i> When service by publication is permitted</p>

RULE 4 (continued)

<p><u>PRESENT RULE 4C(2) (continued):</u></p>	<p><u>RECOMMENDED RULE 4(c)(2) (continued):</u></p> <p>pursuant to Rule 4(o), the published summons must also include a statement in general terms of the nature of the action. When the action is one in which the title to, or any interest in or lien upon real property is involved, affected, or brought into question, the published summons must also contain a description of the real property and a statement of the object of the action.</p>
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RULE 4 (continued)

PRESENT RULE 4D(1) (continued):

D. Service.

(1) *By Whom Served.*

(a) Service of all process shall be made in the county where the party to be served is found by a sheriff, deputy sheriff, constable, or any other person over the age of 18 not a party to the action.

(b)(i) A summons and complaint may also be served upon a defendant who is an individual other than a minor or an incompetent person or upon a domestic or foreign corporation or partnership or other unincorporated association by mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing the summons and complaint, service of such summons and complaint shall be made by one of the persons mentioned in Rule 4D(1)(a) in the manner prescribed by Rule 4D(2) and Rule 4D(3).

(ii) Unless good cause is shown for not doing so, the court shall order the payment of costs of the personal service by the person served if such person does not complete and return within 20 days after mailing, the notice

RECOMMENDED RULE 4(d)
(continued):

(d) Service.

(1) ***In General.*** The summons and complaint must be served together. The plaintiff must furnish the necessary copies to the person who makes service.

(2) ***In Person.*** Service of all process may be made in the county where the party to be served is found by a sheriff, deputy sheriff, constable, or any other person over the age of 18 not a party to the action.

(3)(A) ***By Mail.*** A summons and complaint may also be served by mailing via first class mail, postage prepaid, the following to the person to be served:

(i) a copy of the summons and complaint;

(ii) two copies of a notice and acknowledgment conforming substantially to form 18-A; and

(iii) a return envelope, postage prepaid, addressed to the sender.

(B) a summons and complaint may not be served by mail to the following:

(i) a minor;

(ii) an incompetent person; or

RULE 4 (continued)

<u>PRESENT RULE 4D(1) (continued):</u>	<u>RECOMMENDED RULE 4(d) continued):</u>
<p>and acknowledgment of receipt of summons.</p> <p>(iii) The notice and acknowledgment of receipt of and complaint shall be signed and dated. Service of summons and complaint will be deemed complete on the date of signature of the defendants shown on the acknowledgment.</p>	<p>(iii) a corporation, partnership, or other unincorporated association, whether domestic or foreign.</p> <p>(C) if no acknowledgment of service by mail is received by the sender within 21 days after the date of mailing, service of the summons and complaint must be made in person.</p> <p>(D) if a person served by mail does not complete and return the notice and acknowledgment within 20 days, the court must order that person to pay the costs of personal service unless good cause is shown for not doing so.</p> <p>(E) the notice and acknowledgment must be signed and dated by the defendant, and service of summons and complaint will be deemed complete on the date shown.</p>

RULE 4 (continued)

<u>PRESENT RULE 4D(2)(a):</u>	<u>RECOMMENDED RULE 4(e):</u>
<p>(2) <i>Personal service within the state.</i> The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:</p> <p>(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.</p>	<p>(e) Serving an Individual. An individual – other than a minor or an incompetent person – must be served by either:</p> <p>(1) delivering a copy of the summons and complaint to the individual personally; or</p> <p>(2) delivering a copy of the summons and complaint to an agent authorized by appointment or law to receive service of process. If the agent is one designated by statute to receive service, such further notice as the statute requires must be given.</p>

RULE 4 (continued)

PRESENT RULE 4D(2)(b) and (c):

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to the minor personally, and by leaving a copy thereof at the minor's dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to the minor's guardian, if the minor has one within the state, and if not, then to the minor's father or mother or other person or agency having the minor's care or control, or with whom the minor resides, or if service cannot be made upon any of them, then as provided by order of the court.

RECOMMENDED RULE 4(f) and (g):

(f) Serving a Minor Over the Age of 14 Years. A minor over the age of 14 years must be served by either:

- (1) delivering a copy of the summons and complaint to the minor personally and leaving a copy thereof at the minor's usual place of abode with some adult of suitable discretion also residing therein; or
- (2) delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(g) Serving a Minor Under the Age of 14 Years. A minor under the age of 14 years may be served by delivering a copy of the summons and complaint to the minor's guardian within Montana. If the minor does not have a guardian within Montana, service of process must be delivered to any of the following:

- (1) the minor's father;
- (2) the minor's mother;
- (3) another person or agency having the minor's care, control, or with whom the minor resides; or
- (4) another person or agency as provided by court order.

RULE 4 (continued)

PRESENT RULE 4D(2)(d):

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to the person's guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon that party. The court may also stay any action pending against a person on learning that such person is of unsound mind.

RECOMMENDED RULE 4(h):

(h) Serving an Incompetent Person.

- (1) an incompetent person, who has been adjudged of unsound mind by a Montana court or for whom a guardian has been appointed in Montana by reason of incompetency, may be served by delivering a copy of the summons and complaint to the person's guardian, if such guardian resides in Montana, was appointed under Montana law, and is acting under Montana law. If there be no such guardian, the court must appoint a guardian ad litem for the incompetent person.
- (2) when a party is alleged to be of unsound mind, but has not been so adjudged by a Montana court, process may be served personally upon that party.
- (3) the court may also stay any action pending against a person on learning that such person is of unsound mind.

RULE 4 (continued)

PRESENT RULE 4D(2)(e) and (f):

(e) Upon a domestic corporation, limited liability company, partnership or other unincorporated association, or upon a foreign corporation, limited liability company, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, manager, member of a member-managed limited liability company, superintendent or managing or general agent, or partner, or associate for such corporation, limited liability company, partnership, or association; or by leaving such copies at the office or place of business of the corporation, limited liability company, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation or limited liability company named on the records of the secretary of state, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, limited liability company, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be

RECOMMENDED RULE 4(i) and (j):

(i) Serving a Business or Nonprofit Entity.

- (1) for the purposes of this Rule, a business or nonprofit entity includes the following:
 - (A) a corporation;
 - (B) a limited liability company;
 - (C) a partnership;
 - (D) any other unincorporated association; and
 - (E) any business entity filed in the office of the Secretary of State.
- (2) service is available under this rule for a domestic business or nonprofit entity, as well as a foreign business or nonprofit entity that either:
 - (A) has a place of business in Montana;
 - (B) does business in Montana permanently or temporarily; or
 - (C) was doing business in Montana permanently or temporarily at the time the claim for relief accrued.
- (3) a business or nonprofit entity must be served by either:
 - (A) delivering a copy of the summons and complaint to:

RULE 4 (continued)

PRESENT RULE 4D(2)(e) and (f)
(continued):

made by leaving a copy of the summons and complaint at any office of the corporation, limited liability company, partnership or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation or limited liability company whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation or limited liability company and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation or limited liability company organized under the laws of this state, or against a corporation or limited liability company organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation or limited liability company organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation or limited liability company has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain

RECOMMENDED RULE 4(i) and (j)
(continued):

- (i) an officer;
 - (ii) a director;
 - (iii) a manager;
 - (iv) a member of a member-managed limited liability company;
 - (v) a superintendent;
 - (vi) a managing agent;
 - (vii) a general agent;
 - (viii) a partner; or
 - (ix) an associate;
- (B) leaving copies of the summons and complaint at the office or place of business within Montana with the person in charge of such office;
- (C) delivering a copy of the summons and complaint to the registered agent named on the records of the secretary of state;
- (D) delivering a copy of the summons and complaint to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the business or nonprofit entity, provided that if the agent or attorney in fact is designated by statute to receive

RULE 4 (continued)

PRESENT RULE 4D(2)(e) and (f)
(continued):

the last known address of any such person. If, after exercising reasonable diligence, the party causing summons to be issued is unsuccessful in serving said parties, an affidavit must be filed with the clerk of court in which the claim for relief is pending reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found. The sum of \$10 will be deposited with said clerk to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service; and where service is requested at more than one address, an additional \$10 shall be paid for each party to be served at each additional address. The clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in the secretary of state's absence from the secretary of state's office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The

RECOMMENDED RULE 4(i) and (j)
(continued):

service, further notice as required by the statute must also be given; or

- (E) if the suit is against a business or nonprofit entity whose charter or right to do business in Montana has expired or been forfeited, by delivering a copy of the summons and complaint to its trustees or stockholders or members.

(j) Serving a Corporation or Limited Liability Company When Persons Designated Under Rule 4(i) Cannot Be Found Within Montana.

(1) this Rule applies when none of the persons designated in Rule 4(i) can be found within Montana with the exercise of due diligence, and a claim for relief is pending in any Montana court against the following:

- (A) a corporation or limited liability company that has filed a copy of its charter in the office of the Montana secretary of state and is qualified to do business in Montana;
- (B) a corporation or limited liability company which is subject to the jurisdiction of Montana courts under Rule 4(b), even though it has never qualified to do business in Montana; or

RULE 4 (continued)

PRESENT RULE 4D(2)(e) and (f)
(continued):

said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail a copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation or limited liability company was originally incorporated, if known; and the secretary of state shall make a return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation or limited liability company, and the said secretary of state, or a deputy when the secretary is absent from the secretary of state's office, is hereby appointed agent of such corporation or limited liability company for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation or limited liability company regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is

RECOMMENDED RULE 4(i) and (j)
(continued):

- (C) a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana.
- (2) the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any person designated under Rule 4(i).
- (3) if, after exercising reasonable diligence, the party causing summons to be issued is unable to accomplish service, the following must be filed with the clerk of the court in which the claim for relief is pending:
 - (A) an affidavit reciting that none of the persons designated in Rule 4(i) can be found within Montana, as well as a recitation of either:
 - (i) the last known address of any of any person designated under Rule 4(i); or
 - (ii) a statement that no address for any person designated under Rule 4(i) could be found after the exercise of reasonable diligence; and
 - (B) \$10 deposited with the clerk to be paid to the secretary of state as a fee for each defendant for whom the secretary of state is to receive service. When service is requested at more than one address,

RULE 4 (continued)

PRESENT RULE 4D(2)(e) and (f)
(continued):

hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as hereinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within 60 days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation or limited liability company, service of all other notices required by law to be served in such action may be served upon the secretary of state.

RECOMMENDED RULE 4(i) and (j)
(continued):

an additional \$10 must be paid for each party to be served at each additional address.

- (4) an affidavit filed pursuant to Rule 4(j)(3)(A) reciting that diligent inquiry was made is sufficient evidence of the diligence of inquiry. The affidavit need not detail the facts constituting such inquiry. The affidavit may also be combined in the same instrument with the affidavit required under Rules 4(o)(3)(A)(ii) and 4(p), should an affidavit under these Rules be required.
- (5) upon receiving the necessary affidavit and fees as required under Rule 4(j)(3), the clerk of court must:
 - (A) issue an order directing process to be served upon the Montana secretary of state or, in the secretary of state's absence, upon the Montana deputy secretary of state; and
 - (B) mail to the secretary of state at the office of the secretary of state:
 - (i) the original summons;
 - (ii) one copy of the summons and affidavit for the files of the secretary of state;
 - (iii) one copy of the summons attached to a copy of the

RULE 4 (continued)

<u>PRESENT RULE 4D(2)(e) and (f)</u> <u>(continued):</u>	<u>RECOMMENDED RULE 4(i) and (j)</u> <u>(continued):</u>
	<p>complaint for each of the defendants to be served by service upon the secretary of state; and</p> <p>(iv) the fee for service.</p> <p>(6)(A) upon receiving the materials required under Rule 4(j)(5)(B), the secretary of state must mail a copy of the summons and complaint by certified mail, return receipt requested, either:</p> <p>(i) to the last known address of any of the persons designated in Rule 4(i); or</p> <p>(ii) if the corporation or liability company is not organized in Montana and no address for a person designated under Rule 4(i) is known, to the secretary of state of the state in which the corporation or limited liability company was originally incorporated, if known.</p> <p>(B) the secretary of state must also make a return as provided in Rule 4(p).</p> <p>(7) service made in accordance with this Rule is deemed personal service on the corporation or limited liability company and the secretary of state, or</p>

RULE 4 (continued)

<u>PRESENT RULE 4D(2)(e) and (f)</u> <u>(continued):</u>	<u>RECOMMENDED RULE 4(i) and (i)</u> <u>(continued):</u>
	<p>a deputy in the absence of the secretary of state, is thereby appointed agent of the corporation or limited liability company for service of process.</p> <p>(8)(A) if a person designated in Rule 4(i) is located and served personally as provided by this Rule, service is deemed complete upon the corporation or limited liability company regardless of the receipt of any return receipt or advice by the postal authority of refusal of the addressee to receive the process mailed.</p> <p>(B) if a person designated in Rule 4(i) is not located or served personally as provided by this Rule, service by publication must also be made as provided in Rules 4(a)(2)(D) and 4(o)(4). Such publication must first be made within 60 days from the date the original summons is mailed to the secretary of state. If such first publication is not made, the action shall be deemed dismissed as to any corporation or limited liability company intended to be served by such publication. Service by publication in accordance with this Rule is complete upon the date of the last publication of summons.</p> <p>(9) when service of process is made in accordance with this Rule, and there is no appearance thereafter made by any attorney for such corporation or limited</p>

	liability company, service of all other notices required by law to be served in such action may be served upon the secretary of state.
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RULE 4 (continued)

PRESENT RULE 4D(2)(g) - (i) (continued):

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

RECOMMENDED RULE 4(k) - (m) (continued):

(k) Serving a Local Government Entity.

- (1) for purposes of this Rule, a local government entity includes the following:
 - (A) a city;
 - (B) a village;
 - (C) a town;
 - (D) a school district;
 - (E) a county; or
 - (F) a public agency or board of any such entity.

- (2) a local government entity must be served by delivering a copy of the summons and complaint to any of the following:
 - (A) a commissioner;
 - (B) a trustee;
 - (C) a board member;
 - (D) a mayor; or
 - (E) a head of the legislative department thereof. Whenever an officer or employee of the local government entity is sued in an individual capacity for an act or omission occurring in connection with duties

	<p>performed on the local government entity's behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the local government entity and also serve the officer or employee under Rule (e), (f), (g), (h) or (n).</p>
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RULE 4 (continued)

<u>PRESENT RULE 4D(2)(g) - (i) (continued):</u>	<u>RECOMMENDED RULE 4(k) - (m) (continued):</u>
<p>(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the attorney general and to any other party which may be prescribed by statute.</p>	<p>(l) Serving the State. The state, as well as any state board or agency, must be served by delivering a copy of the summons and complaint to the attorney general and any other party prescribed by statute. Whenever an officer or employee of the state is sued in an individual capacity for an act or omission occurring in connection with duties performed on the state's behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the state and also serve the officer or employee under Rule (e), (f), (g), (h) or (n).</p>
<p>(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.</p>	<p>(m) Serving an Estate or Trust.</p> <p>(1) an estate must be served by delivering a copy of the summons and complaint to the personal representative.</p> <p>(2) a trust must be served by delivering a copy of the summons and complaint to any of the trustees.</p>

RULE 4 (continued)

<u>PRESENT RULE 4D(3):</u>	<u>RECOMMENDED RULE 4(n):</u>
<p>(3) <i>Personal Service Outside the State.</i> Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.</p>	<p>(n) Personal Service Outside Montana.</p> <p>(1) when a person cannot, with due diligence, be served personally within Montana, service may be made outside Montana in the manner provided for service within Montana. Such service has the same force and effect as though it had been made within Montana.</p> <p>(2) where service by publication is permitted, personal service of the summons and complaint upon the defendant outside Montana is equivalent to and dispenses with the procedures, publication, and mailing provided for in Rules 4(o)(3), 4(o)(4), and 4(o)(5).</p>

RULE 4 (continued)

<u>PRESENT RULE 4D(4):</u>	<u>RECOMMENDED RULE:</u>
<p>(4) <i>Other Service.</i> All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of 33-1-603, 33-1-613, 33-1-614, 33-2-314, 33-2-315, 70-28-207, 70-28-208, 70-28-209, and 70-28-212, Montana Code Annotated, when the action pertains to the provisions of such sections.</p>	

RULE 4 (continued)

PRESENT RULE 4D(5):

(5) Service by Publication -- When Permitted -- Effect -- Manner -- Proof.

(a) When Permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for dissolution or for a declaration of invalidity of a marriage of a resident of this state or for modification of a decree of dissolution granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

RECOMMENDED RULE 4(o):

(o) Service by Publication.

(1) ***When Permitted.*** A defendant who has not been served under the foregoing sections of Rule 4 can only be served by publication in the following situations:

(A) when the subject of the action is real or personal property in Montana in which the defendant has or claims an actual or contingent lien or interest, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein;

(B) when the action is to foreclose, redeem from, or satisfy a mortgage, claim, or lien upon real or personal property within Montana.

(C) when the action is for dissolution or a declaration of invalidity of a marriage of a Montana resident, or for modification of a decree of dissolution granted by a Montana court; or

(D) when the defendant has property within Montana which has been attached or has a debtor within Montana who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under Rules 4(o)(1)(A), 4(o)(1)(B), or 4(o)(1)(C).

RULE 4 (continued)

PRESENT RULE 4D(5) (continued):

(b) **Effect of Service by Publication.** When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) **Filing of Pleading and Affidavit for Service by Publication; and Order for Publication.** Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals defendant's person to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that the affiant has made diligent search and

RECOMMENDED RULE 4(o) (continued):

(2) ***Effect of Service by Publication.*** When a defendant has been served by publication as provided in this Rule, any Montana court having jurisdiction may render a decree adjudicating any interest of such defendant in the status, property, or thing acted upon. Such a decree does not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(3) ***Filing of Pleading and Affidavit for Service by Publication; Order for Publication.***

(A) before service of the summons by publication is authorized, the following must be filed with the clerk of the district court of the county in which the action is commenced:

(i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in Rule 4(o)(1); and

(ii)(a) in situations defined in Rules 4(o)(1)(A), 4(o)(1)(B), and 4(o)(1)(C), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that either:

RULE 4 (continued)

<u>PRESENT RULE 4D(5) (continued):</u>	<u>RECOMMENDED RULE 4(o) (continued):</u>
<p>inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of the court.</p>	<ol style="list-style-type: none">(1) such defendant resides out of Montana;(2) such defendant has departed from Montana;(3) such defendant cannot, after due diligence, be found within Montana;(4) such defendant conceals the defendant's person to avoid the service of summons;(5) the defendant is a business or nonprofit entity as defined in Rule 4(i)(1) of which none of the persons in Rule 4(i) can, after due diligence, be found within Montana; or(6) the defendant is an unknown claimant and the affiant has made diligent search and inquiry for all persons

(d) Number of Publications. Service of the summons by publication may be made by publishing the same three times, once each week for 3 successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such

RULE 4 (continued)

<u>PRESENT RULE 4D(5) (continued):</u>	<u>RECOMMENDED RULE 4(o) (continued):</u>
<p>county then in a newspaper published in an adjoining county and having a general circulation therein.</p>	<p>who claim or might claim any present or contingent right, title, estate, interest in, lien, or encumbrance upon such property or any part thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, including any right of inchoate or accrued dower, and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained.</p>
<p>(e) Mailing Summons and Complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at defendant's place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.</p>	<p>(b) such affidavit is sufficient evidence of the diligence of any inquiry made by the affiant if it recites the fact that diligent inquiry was made. The facts constituting such inquiry need not be detailed.</p>
<p>(f) Time When First Publication or Service Outside State must Be Made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.</p>	<p>(c) such affidavit may be with the affidavit required</p>
<p>(g) When Service by Publication or Outside State Complete. Service by publication is complete on the date of the</p>	

RULE 4 (continued)

<u>PRESENT RULE 4D(5) (continued):</u>	<u>RECOMMENDED RULE 4(o) (continued):</u>
<p>last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.</p>	<p>under Rules 4(j)(3)(A) and 4(p), should an affidavit under these Rules be required.</p>
<p>(h) Additional Information to Be Published. In addition to the form of summons prescribed above in "C. Process, (2) Summons--form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.</p>	<p>(iii) in the situation defined in Rule 4(o)(1)(D), proof that a valid attachment or garnishment has been effected must first be presented to the court.</p>
	<p>(B) upon complying herewith, the plaintiff must obtain an order, issued either by the judge or clerk of court, for the service of summons to be made upon the defendants by publication.</p>
	<p>(4) <i>Number of Publications.</i> Service by publication must be made by publishing the summons once a week for three successive weeks in a newspaper published in the county in which the action is pending or, if no newspaper is published in such county, then in a newspaper published in an adjoining county that has a general circulation therein.</p>
	<p>(5) <i>Mailing Summons and Complaint.</i> A copy of the summons and complaint, at any time after the filing of the affidavit for publication but not later than ten days after the first publication of the summons, must be mailed, postage prepaid, to the defendant at defendant's place of residence, unless the affidavit for</p>

RULE 4 (continued)

PRESENT RULE 4D(5) (continued):

RECOMMENDED RULE 4(o) (continued):

publication states that the residence of the defendant is unknown. If the defendant is a business or nonprofit entity as defined in Rule 4(i)(1), and personal service cannot with due diligence be effected within Montana on any of the persons designated in Rule 4(i), then the secretary of state must be served pursuant to Rule 4(j).

(6) *Time When First Publication or Service Outside Montana Must Be Made.* The first publication of summons or personal service of the summons and complaint upon the defendant out of Montana must be made within 60 days after the filing of the affidavit for publication. If not, the action must be dismissed as to any party intended to be served by such publication.

(7) *When Service by Publication or Outside Montana Complete.* Service by publication is complete on the date of the last publication of the summons or, in case of personal service of the summons and complaint upon the defendant out of Montana, on the date of such service.

RULE 4 (continued)

PRESENT RULE 4D(6):

(6)(a) Service on secretary of state. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or the party's attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served. Such affidavit shall be filed with the clerk of court in which the claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state. The sum of \$10 will be deposited with said clerk to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; and where service is requested at more than one address an additional \$10 shall be paid for each party to be served at each additional address. The clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

RECOMMENDED RULE 4(p):

(p) Serving the Secretary of State.

- (1) whenever service is to be made as provided in Rules 4(i) and 4(o)(5), the requirements of Rule 4(i) must be complied with.
- (2) in all other cases, unless otherwise provided by statute, whenever the Montana Secretary of State has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party or the party's attorney must file with the clerk of court in which the claim for relief is pending the following:
 - (A) an affidavit stating the facts showing that the secretary of state is such agent, as well as the residence and last known address of the person to be served;
 - (B) sufficient copies of the affidavit, summons, and complaint for service upon the secretary of state; and
 - (C) \$10 to be paid to the secretary of state as a fee for each of the defendants for whom the secretary of state is to receive service. Where service is requested at more than one

RULE 4 (continued)

PRESENT RULE 4(D)(6) (continued):

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or a deputy to the party to be served at that party's last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or a deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

RECOMMENDED RULE 4(p) (continued):

address, an additional \$10 must be paid for each party to be served at each additional address.

- (3) upon receipt of the materials specified in Rule 4(p)(2), the clerk must forward to the secretary of state the following:
 - (A) the original summons;
 - (B) a copy of both the summons and the affidavit for the files of the secretary of state;
 - (C) a copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state; and
 - (D) the fee.
- (4) such service on the secretary of state is sufficient personal service upon the person to be served provided that either:
 - (A) notice of such service, a copy of the summons, and a copy of the complaint are sent from the secretary of state or a deputy to the party to be served at the party's last known address by registered or certified mail, marked "Deliver to Addressee Only" and "Return Receipt Requested." Either such return receipt purportedly signed by the

RULE 4 (continued)

PRESENT RULE 4(D)(6) (continued):

The secretary of state, or a deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon the secretary of state by the clerk of court, including the day, and hour of such service; (2) the fact of mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where the secretary of state is relieved from doing so under the provisions of D(2)(f) in which cases the affidavit shall so recite; and (3) the fact of receipt of a return from the postal department including the date, and hour thereof, and attaching to the affidavit a copy of such return. The secretary of state, or a deputy, shall then transmit the original summons, and original affidavit along with copy of the notice to the defendant where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice is required. The secretary of state shall keep on file in the secretary of state's office a copy of the summons, a copy of the affidavit served on the secretary of state by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

RECOMMENDED RULE 4(p) (continued):

addressee must be received by the secretary of state, or the postal authority must advise the secretary of state that delivery of the registered or certified mail was refused by the addressee, except in those cases where compliance is excused under the provisions of Rule 4(i). The date upon which the secretary of state receives either the return receipt or the advice of the postal authority is deemed the date of service; or

- (B) the secretary of state, or a deputy, may cause a copy of the summons and complaint to be served by any qualified law enforcement officer in accordance with the applicable procedure from Rules 4(e)-(n).
- (5) the secretary of state or a deputy must make an original and two copies of an affidavit reciting the following:
 - (A) the fact of service upon the secretary of state by the clerk of court, including the day and hour of such service;
 - (B) the fact of mailing a copy of the summons, complaint, and notice to the defendant, including the day and hour thereof, except in those cases where such mailing is excused under Rule 4(i), in

RULE 4 (continued)

PRESENT RULE 4D(6) (continued):

(b) Continuance to Allow Defense. In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

RECOMMENDED RULE 4(p) (continued):

which cases the affidavit must so recite; and

- (C) the fact of receipt of a return from the postal department, including the date and hour thereof. A copy of such return must be attached to the affidavit.
- (6) the secretary of state, or a deputy, must then transmit to the clerk of court the following, which the clerk must file in the claim for relief:
 - (A) the original summons;
 - (B) the original affidavit; and
 - (C) a copy of the notice to the defendant, when such notice was required.
- (7) the secretary of state or a deputy must also transmit to the plaintiff's attorney a copy of the secretary of state's or deputy's affidavit, along with a copy of the notice to the defendant where such notice was required.
- (8) the secretary of state must keep on file in the secretary of state's office copies of the following:
 - (A) the summons;
 - (B) the affidavit served on the secretary of state by the clerk of court; and

RULE 4 (continued)

<u>PRESENT RULE 4D(6) (continued):</u>	<u>RECOMMENDED RULE 4(p) (continued):</u>
	<p>(C) a copy of the affidavit executed and issued by the secretary of state or a deputy.</p> <p>(9) <i>Continuance to Allow Defense.</i> In any of the cases provided for in either this Rule or Rule 4(i), the court in which the claim for relief is pending may order any continuance necessary to afford a reasonable opportunity to defend the action.</p>

RULE 4 (continued)

<p><u>PRESENT RULE 4D(7):</u></p> <p><i>(7) Amendment.</i> At any time, in its discretion, and upon such notice and terms as it deems just, the court may 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.</p>	<p><u>RECOMMENDED RULE 4(q):</u></p> <p>(q) Amendment. Upon such notice and terms as it deems just, the court in its discretion may allow any process or proof of service thereof to be amended at any time, unless it appears that material prejudice would result to the substantial rights of the party against whom the process issued.</p>
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RULE 4 (continued)

<u>PRESENT RULE 4D (8) and (9):</u>	<u>RECOMMENDED RULE 4(r):</u>
<p>(8) <i>Proof of Service.</i> Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:</p>	<p>(r) Proof of Service.</p>
<p>(a) If served by the sheriff or other officer, the sheriff's or other officer's certificate thereof;</p>	<p>(1) proving service of the summons and the complaint or notice accompanying the same, if any, must be accomplished as follows:</p>
<p>(b) If by any other person, that person's affidavit thereof;</p>	<p>(A) if by the sheriff or other officer, the sheriff's or other officer's certificate including the time, date, and place of service;</p>
<p>(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or</p>	<p>(B) if by any other person, that person's affidavit;</p>
<p>(d) The written admission of the defendant showing the date and place of service.</p>	<p>(C) if by publication, an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if deposited; or</p>
<p>(e) If service is made under Rule 4D(1)(b) above, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.</p>	<p>(D) the written admission of the defendant showing the date and place of service.</p>
<p>The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.</p>	<p>(2) if service is made under Rule 4(d)(3), the sender must file with the court the acknowledgment received.</p>
	<p>(3) failure to make proof of service does not affect the validity of service.</p>
	<p>(4) the required affidavit of service must state the time, date, place, and manner of service. When service is by a person other than the sheriff or person designated by law, the affidavit must also state that the person serving is of</p>

RULE 4 (continued)

<p><u>PRESENT RULE 4D (8) and (9)</u> <u>(continued):</u></p> <p>(9) <i>Contents of Affidavit of Service.</i> Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.</p>	<p><u>RECOMMENDED RULE 4(r):</u></p> <p>legal age and knew the person served to be the person named in the papers served and the person intended to be served.</p>
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RULE 4 (continued)

PRESENT RULE 4D(10):

(10) *Procedure Where Only Part of Defendants Are Served.* If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause that defendant to appear in said court to show cause why that defendant should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

RECOMMENDED RULE 4(s):

(s) Procedure Where Not All Defendants Served.

- (1) if the summons is served on one or more, but not all, defendants, plaintiff may proceed to trial and judgment against the served defendant(s).
- (2) at any time thereafter, plaintiff may serve summons to cause the unserved defendant(s) to appear to show cause why the unserved defendant(s) should not be made a party to such judgment. The court must then hear and determine the matter in the same manner as if the unserved defendant(s) had been originally brought into court. The unserved defendant(s) must also be allowed the benefit of any payment or satisfaction made on the recovered judgment.

RULE 4 (continued)

PRESENT RULE 4E:

E. Time limit for issuance and service of process.

(1) A plaintiff shall have 3 years after filing a complaint to have a summons issued and accomplish service. Unless appearance has been made by the defendant(s), the court, upon motion or on its own initiative, shall dismiss an action without prejudice if a plaintiff fails to either have the summons issued or fails to accomplish service within 3 years from the date of the filing of a complaint. The plaintiff shall file the summons with the clerk of the court within 30 days after service, however, failure to do so shall not affect the validity of service or serve as a basis for dismissal of said action.

(2) A plaintiff who names a fictitious defendant in the complaint, pursuant to 25-5-103, MCA, may amend the complaint to substitute a real defendant for the fictitious defendant within 3 years of filing the original complaint in the action. The 3 year time period set forth in subparagraph (1) of this rule for issuance and service begins to run, as to the newly identified defendant, from the date of the filing of the original complaint.

(3) The time limit imposed by subparagraphs (1) and (2) above shall apply to all lawsuits in which the original complaints were filed on or after January 1, 2000. The provisions of Rule 41(e), M.R.Civ.P., replaced by this rule, shall apply to all lawsuits in which the original complaint was filed before January 1, 2000.

RECOMMENDED RULE 4(t):

(t) Time Limit for Issuance and Service of Process.

(1) a plaintiff must accomplish service within two years after filing a complaint. Absent an appearance by defendant(s), the court, upon motion or on its own initiative, must dismiss an action without prejudice if the plaintiff fails to do so.

(2) a plaintiff who names a fictitious defendant in the complaint pursuant to 25-5-103, MCA, may, within two years of filing the original complaint, amend the complaint to substitute a real defendant for the fictitious defendant. The two year time period set forth in Rule 4(t)(1) begins to run as to the newly identified defendant from the date of the filing of the original complaint.

(3) The time limit imposed by subparagraphs (1) and (2) above shall apply to all lawsuits in which the original complaints were filed on or after, _____ **(fill in)**.

COMMITTEE NOTES

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.

Rules 4(c)(2)(C) and 4(c)(2)(D) contain language from previous Rules 4D(4) and 4D(5)(h) for the purpose of including all rules regarding the form of a summons in the same rule.

The first two sentences of previous Rule 4D(2) have been moved to Rule 4(d)(1) to make the rule more easily understood and to conform to the Federal Rule.

Rules 4(i) and 4(j) remove the language in previous Rule 4D(2)(e)(iii), because this language in pertinent part simply repeats the language in Rule 4(i)(3)(B). The language regarding the sheriff in previous Rule 4D(2)(e)(iii) is superfluous.

The rule removes the language “organized under the laws of the state, or against a corporation or limited liability company organized under the laws of any other state or country” at the beginning of previous Rule 4D(2)(f), because such language includes all corporations and limited liability companies.

The rule adds “any business entity filed in the office of the Secretary of State” in the list of entities which constitute business of nonprofit entities for purpose of this rule.

Previous Rule 4D(4) has been moved to Rule 4(c)(2)(C) for the purpose of including all the rules regarding the form of a summons in the same rule.

Rule 4(d)(3)(C) (acknowledgment of summons) has been changed from 20 to 21 days for the reasons stated in Committee Notes to Rules 6.

Rule 4(o) removes the language “whether known or unknown” from previous Rules 4D(5)(a), 4D(5)(a)(i), and 4D(5)(b), because such language includes all defendants.

Rule 4(o) moves previous Rule 4D(5)(h) to Rule 4(c)(2)(D) for the purpose of including all rules regarding the form of a summons in the same rule.

Rule 4(q) removes the adjective “clearly” to avoid potential ambiguity.

Rule 4(r)(3) incorporates the last sentence of previous Rule 4D(8)(e). This change is meant to apply the principle that “failure to make proof of service does not affect the validity of service” to all situations, thereby putting Rule 4(r) in agreement with the Federal Rule. Rule 4(r)(4) incorporates previous Rule 4D(9) to avoid duplication and foster clarity.

Rule 4(t) changes the three year time limit for service of process in the previous rules to two years. This continues to be different from Federal Rule 4(m) which provides that a complaint will be dismissed if not served within 120 days. As explained in Ford, *Does It Have to Be This Hard? Rule 41(e) in Montana*, 60 Mont. L. Rev. 285 (1999), the shorter time limit also brings Montana closer to conformity with the majority of other states.

Rule 4(t) removes reference to issuance of summons in favor of a single deadline regarding service of process for simplicity. For process to be served in one year, summons must also have been issued within one year.

Rule 4(t) removes the deadline for the plaintiff to file the summons with the clerk of the court, because the failure to meet this deadline in the rule has no practical effect.

The three year time limit for amending a complaint to substitute a real defendant for a fictitious defendant in the previous rule is changed to two years in Rule 4(t) to reflect the change to the time limit for service of process and to avoid the unnecessary extension of the statute of limitations brought about by the three year time limit.