

Nail-and-Mail Service of Eviction Action Summons Is Used in a Majority of Cases. Given the Degradation of USPS Mail Service, the Service-of-Process Statute Should be Amended Accordingly.

INTRODUCTION

A Minnesota eviction action starts with the plaintiff (usually a landlord) filing a complaint with the court administrator, who then prepares a summons. The plaintiff's process server must then serve a copy of the summons and complaint on the defendant (usually a tenant) at least seven days before the initial hearing.

There are three ways to do this:

[1] The process server hands a copy of the summons and complaint to the defendant. Lawyers call this "personal service".

[2] The process server goes to the defendant's last usual place of abode and leaves a copy of the summons and complaint with a person of suitable age and discretion residing there. Lawyers call this "substitute service".

[3] By "posting". This involves mailing a copy of the summons and complaint to the defendant and posting the summons and complaint in a conspicuous place on the property. Lawyers often call this by the slang phrase "nail and mail".

[Minn. Stat. § 504B.331](#) governs service of process in an eviction action. When using nail and mail to serve a residential tenant, the process server must first try two times, on different days and at least once in the evening, to serve the tenant at home by either method #1 or #2 above. Only if he fails on both tries may the plaintiff use method #3. There are precise rules about associated affidavits and timing, but this essay is only about when to mail the summons and complaint. It has to be mailed at least 7 days before the initial hearing. Therefore, the deadline to put the summons and complaint in the mailbox¹

¹ The statute uses this language: "the plaintiff or the plaintiff's attorney has signed and filed with the court an affidavit stating that ... a copy of the summons has been mailed to the defendant [by the 7-day deadline] at the defendant's last known address if any is known to the plaintiff". Logically this means placing it in a mailbox with a pickup later that day or handing it to a mail carrier or USPS clerk such that it will be placed in that day's outgoing mail. I don't know of a case on point but using a mailbox that doesn't get picked up by the end of the day seems like illegal cheating. (I thought about this when I mailed a postcard to a friend from the Grand Canyon National Park using a mailbox that was labeled for pick up only one or two days per week.) I don't think many landlords or their attorneys are trying to cheat this way or even mail eviction pleadings from outside of Minnesota. However, mailing from another area (e.g.,

is 7 days before the initial hearing.

Personal service is the gold standard of service since the defendant gets the summons and complaint handed to him directly. Substituted service is the silver standard since the defendant's roommate gets the summons and complaint handed to him directly. In virtually all civil cases, one of these two methods is required. Eviction actions are the exception. The reason is that eviction actions are hurry-up cases with a very tight window of only one week or less to achieve service.²

The obvious concern with nail-and-mail service is that the tenant might not actually get timely notice of the hearing. The nailed/posted summons and complaint might literally get ripped off or blown away. Once the mailed/posted summons and complaint is put in the tenant's own mailbox or mail slot he will be able to read it but there is a natural delay from blue mailbox to home mailbox.

Minn. Stat. § 504B.331 is designed to give the tenant 7-days' notice of the initial hearing. If personal or substituted service is used, the deadline is 7 days before the hearing. The posting/nailing deadline is the same 7 days. In theory the mailing is just a backup in case the posted/nailed summons and complaint blows away. However, sometimes the backup is important. Indeed, under [Greene v. Lindsey, 456 U.S. 444 \(1982\)](#), the tenant has a constitutional right to not just posting/nailing service but also mail or similar service, at least if there is evidence of lost posted/nailed court papers in the region. When the Minnesota legislature first allowed service by posting/nailing, it simultaneously required mailing before posting [1909 Minn. Laws ch. 496, s. 1.](#)

The nail-and-mail system presumes that United States Postal Service ("USPS") First Class Mail actually functions properly. In ordinary civil cases, where pleadings after the initial summons and complaint can be mailed, the rules presume that mailpieces are delivered within three days of mailing. [Minn.R.Civ.Proc. 6.01\(e\)](#).³

rural Idaho) does suggest a loophole in the statute.

² Except in expedited cases, the initial hearing "shall be not less than seven nor more than 14 days from the day of issuing the summons." [Minn. Stat. § 504B.321, subd. 1\(d\)](#). This leaves no more than 7 days to accomplish service (≤ 14 days minus the 7 days in section 504B.331). Expedited cases, with a hearing held 5-7 days after the summons is issued, require service in a 24-hour period. [Minn. Stat. § 504B.321, subd. 2\(c\)](#). Only a very limited number of cases are expedited and then only when the landlord qualifies for and asks for expedited status.

³ Most service of pleadings after the summons and complaint, and all such service by one attorney to another attorney, is now done electronically. [Minn.R.Civ.Proc. 5.02\(b\)](#). However, rule 6.01(e) still applies when a party is pro se and still represents the courts' thinking about the

Unfortunately, the USPS isn't what it used to be, especially when it comes to First Class Mail. Mail to my own home, especially in winter, has been sporadic. In the last few months, my mail carrier has skipped service at least two days in a row on more than one occasion. After one such hiatus during the past holiday season, the carrier told me that his boss had told him to only deliver packages and skip service of other mail.

I'm not being singled out for bad service. I might even consider myself lucky. In some areas, mail has gone undelivered for days, even a week or more.⁴ Even the post office concedes that delivery is slower than it used to be and that in the last three months of 2022 it missed its own, lowered service standards nationwide 10.3-18.6% of the time (depending on distance). For Minnesota and North Dakota, the figures were worse, 14.3-25.3%.⁵ For the actual holiday period, service was probably even worse than over the entire three-month quarter.

If mail-and-mail service is used infrequently, the problems with mail delivery might not matter much. However, a couple of landlord-side attorneys have told me that mail-and-mail service is very common. If they are right, amending the mailing portion of Minn. Stat. § 504B.331 should be considered. Therefore, I decided to gather precise data to test these anecdotal reports.

speed of USPS mailing, or at least did so when the rule was originally promulgated on June 25, 1951.

⁴ [Angie Craig, Amy Klobuchar raise alarm over delayed mail deliveries in south metro. \(Pioneer Press, Dec. 30, 2022\); Second District constituents have reported weeks-long delays in receiving mail and spotty, inconsistent mail delivery. \(Press Release by Congresswoman Craig, Dec. 30, 2022\).](#) While Craig and Klobuchar are Democrats and Craig is from the Twin Cities, the Minnesota Republican delegation, who come from mostly rural districts, have made similar complaints. [Minnesota Republican Delegation Demands Solution to Postal Delivery Issues \(Press Release, Jan. 11, 2023\).](#) Accord, [What's behind the mail delivery delays in the Twin Cities? \(CBS, Jan. 10, 2023\).](#) The problem is nationwide. E.g. see, [USPS Is "Holding Mail Hostage," Customers Say in New Complaints \(Bestlife\); Notice a slowdown in US Postal Service delivery? Here's why. \(York Dispatch, Dec. 22, 2022\); Waiting on the Mail: Postal Service Standard Drops in Baltimore and the Surrounding Area \(Report of the U.S. House Oversight and Reform Subcommittee on Government Operations, Feb. 14, 2022\); Waiting on the Mail: Postal Service Standard Drops in Chicago and the Surrounding Area \(Report of the U.S. House Oversight and Reform Subcommittee on Government Operations, Oct. 15, 2021\)](#)

⁵ [United States Postal Service, Quarter 1 FY2023, Quarterly Performance for Single-Piece First-Class Mail](#); also see [Why your USPS mail package delivery is about to get slower \(NPR, Apr. 21, 2022\).](#)

METHODS

HOME Line has a grant to provide aid to Minnesota residential tenants sued in eviction actions. As part of this project, on a daily basis it collects the case number plus the tenant's name and address of every such case in all 87 Minnesota counties. In many of the smaller counties no case is filed on a given day, but all 87 counties are checked every day. HOME Line randomly selected 225 such cases among those filed between June 1, 2022 and December 31, 2022 and provided me with the case numbers and filing date for those 225 cases. (May 31, 2022 was the last day of the COVID-19-related eviction moratorium. [2021 Minn. Laws 1st Spec. Sess. ch. 8, art.5.](#))

I used Minnesota Court Records Online (“MCRO”)⁶ to determine how the plaintiff served process in each case. MCRO provides a copy of each pleading in every Minnesota civil case. Cases fell into four categories:

[1] For some cases, affidavits of personal service or substitute service were among the pleadings. These were both scored as “Personal Service”.

[2] For some cases, affidavits of mailing and of posting were among the pleadings. These were scored as “nail-and-mail service”. In a very small minority of these cases only one of these types of affidavits were filed but the court held the hearing anyhow, so these were also scored as “Nail and Mail Service”.

[3] For some cases, the plaintiff filed a pleading dismissing the case before service of process, often stating a reason such as “the tenant paid all the rent and costs owed” or “tenant has moved out”. These were scored as “Dismissed Before Service”.

[4] For some cases, MCRO reported “No cases match your search. The case you are searching for may be unavailable in MCRO, or may not exist.”. This strongly indicated that the case had been expunged⁷ after filing but before I received the case number. These were scored as “Expunged”.

The raw data is displayed in [Table RD](#).

⁶ Available at <https://www.mncourts.gov/Access-Case-Records/MCRO.aspx>

⁷Expungement involves sealing the file and removing traces of it from the public record, based on either [Minn. Stat. § 484.014](#) or *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981). See [At Home Apartments v. DB, File No. No. A18-0512 \(Minn. Ct. App. Jan. 14, 2019\)](#).

RESULTS

Service of Process

The top part of Table 1 shows the number of each kind of case for all 225 cases. It also shows the percentage that number represents among the 225 statewide cases. The lower part of Table 1 shows similar results but broken down by geographic area – the 83 cases in Hennepin County, the 44 cases in Ramsey County, the 40 cases in Anoka + Carver + Dakota + Washington Counties combined (“Other 4 Suburbs”), and the 58 cases in the remaining 81 counties (“Greater Minnesota”).

TABLE 1
Method of Service by Area

| Counties | Personal Service | Nail and Mail Service | Dismissed Before Service | Expunged | Total |
|--|---------------------|-----------------------------|--------------------------------|----------|-------|
| =====. | | | | | |
| All 87 Counties | | | | | |
| Raw Number | 65 | 84 | 27 | 49 | 225 |
| Percent | 29% | 37% | 12% | 22% | 100% |
| ~~~~~. | | | | | |
| Hennepin | | | | | |
| Raw Number | 10 | 32 | 10 | 31 | 83 |
| Percent | 12% | 39% | 12% | 37% | 100% |
| Ramsey | | | | | |
| Raw Number | 13 | 19 | 6 | 6 | 44 |
| Percent | 30% | 43% | 14% | 14% | 100% |
| Anoka, Carver, Dakota & Washington (Other 4 Suburbs) | | | | | |
| Raw Number | 12 | 15 | 7 | 6 | 40 |
| Percent | 30% | 38% | 18% | 15% | 100% |
| Other 81 Counties ("Greater Minnesota") | | | | | |
| Raw Number | 30 | 18 | 4 | 6 | 58 |
| Percent | 52% | 31% | 7% | 10% | 100% |

As shown in Table 2 (which is based on the data in Table 1), far from being a rare occurrence, nail-and-mail service was more frequent than personal service in all areas except Greater Minnesota. In Hennepin County the effect was especially pronounced, where nail-and-mail service was used in more than 3/4 of the reported cases. Even in the 81 Greater-Minnesota counties nail-and-mail service was used in 3/8 of the reported cases.

TABLE 2
Ratio of Nail-and-Mail Service over Personal Service

| <u>Area</u> | Number Cases with Personal Service | Number Cases with Nail & Mail Service | Ratio Nail & Mail over Personal |
|-------------------|---|--|--|
| | [1] | [2] | [2] ÷ [1] |
| All Counties | 65 | 84 | 1.29 |
| Hennepin | 10 | 32 | 3.20 |
| Ramsey | 13 | 19 | 1.46 |
| Other 4 Suburbs | 12 | 15 | 1.25 |
| Greater Minnesota | 30 | 18 | 0.60 |

Expungement

In Hennepin County, more than one third of cases (37%) were expunged. In the other areas the expungement rate was 10-15%.

DISCUSSION

Service Time

Given the prevalence of service by nail and mail, especially in the Twin Cities counties, where about 74% of the eviction cases are filed (167 out of 225 in our sample), the degradation of USPS First Class Mail service is troubling. It makes sense to amend Minn. Stat. § 504B.331 so that tenants actually get close to 7-day notice by mail when they have to defend an eviction action. Several possibilities come to mind.

[1] Amend the statute to allow all tenants to require that any mailed nail-and-mail notice be sent by both USPS mail and email to an email address of the tenant's choosing.

The tenant could be allowed to change his email address upon relatively short notice (say a week) to allow for troubles with email service. Except for a very few mom-and-pop landlords with no email service, this would be a small burden on landlords. Even those few probably can get email service via a local public library. Given that younger generations are increasingly avoiding “snail mail” and using digital correspondence instead, this might just be simple modernism.⁸

[2] Amend the statute to require the mailing to occur at least 10 days prior to the initial hearing if the plaintiff wants to use nail and mail. For those tenants suffering from really terrible service, like those constituents of Rep. Craig who went without mail for a week, this would not help. However, with most mail service being merely slow as opposed to terribly slow, this would likely help significantly.

Requiring the mailing to occur from the same area (e.g., within 50 miles or within the same three-digit zip code⁹) as the residence could be added to the rule. Or, using a more liberal -- and simpler -- rule, require mailing from within Minnesota.

Obviously, a 10-day rule would eliminate nail-and-mail service in the few cases set for hearing less than ten days from issuance of the summons. This is a relatively small number of cases. Also, anecdotally, some landlord-side attorneys are now routinely mailing a copy of the summons and complaint the same day they receive it just in case personal service doesn't work since photocopying and postage costs are pretty low.

[3] Require the mailing to be done by Priority Mail. So far, this USPS service has not degraded much, if at all. Seemingly, the USPS has been concentrating its resources on services, including Priority Mail, where it has competition. It has a legal monopoly on First Class Mail and apparently gives it lower priority (pun intended). This would insure ≥ 5 -day notice in most cases.

⁸ While some tenants might prefer texting might to email, email is more universal, allows sending from a public library without a cell phone, and should make it easier to send a document like a summons and complaint in easy-to-read form. Presumably even a texting-preferred tenant can get email.

⁹ Here is a map showing the Minnesota 3-digit-zip-code areas: <https://www.mapofzipcodes.com/zip-code-map-downloads/mn-minnesota-zip-code-map.pdf> . Since the plaintiff or his attorney might live or work near the tenant but in an adjacent 3-digit area (e.g., the plaintiff is in 554 [Minneapolis] and the tenant in 551 [St. Paul]), giving the plaintiff a choice of either 50 miles or same 3-digit zip code would be fairer than requiring just the same 3-digit code.

A Priority-Mail requirement would be an extra burden on landlords. For a mom-and-pop landlord with no access to a mailing service like pirateship.com, it might require a trip to the post office plus postage of \$9.75 per tenant for a Flat Rate Priority Mail envelope instead of First Class Mail postage of 63¢ for a one-ounce letter (about 5 sheets of paper).¹⁰ With a free service like pirateship.com the Flat Rate Priority Mail Envelope postage is \$8.05 and the label & postage can be printed on a computer's printer.¹¹ Compared to the court filing fee of about \$300 this is a relatively small amount of money but not zero.

Some advocates have suggested increasing the amount of time from filing the eviction action to the initial hearing. Depending on the details, such a change could indirectly ameliorate the problem with First Class Mail service. However, the purpose of this essay is to discuss the more limited question of how bad USPS mail service is depriving some tenants of good notice under the current statutory timelines.

Expungement

This study was not designed to examine expungement issues and I don't intend to do that here. However, I was surprised by the number of cases being expunged, especially in Hennepin County. Of the cases heard in Hennepin (cases that were not dismissed prior to service), more than 2/5 were expunged (31 out of 73 cases). Either a large number of cases have no merit from the start, or the process is leading to many expungements for some other reason.

¹⁰ Current postage prices are available at <https://pe.usps.com/text/dmm300/notice123.htm>

¹¹ There are fancier, fee-based mailing services like stamps.com and PitneyBowes which can print Priority Mail postage as well as other items, but I'm a fan of PirtateShip because it is free and can do much of what the fee-based services do.