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November 27, 2000

Mr. Peter G. McCabe  
Secretary of The Committee on  
Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
Washington, DC 20544

00-AP-006

00-CV-H

Re: Proposed Amendments to the Federal Rules  
Of Appellate Procedure

Dear Mr. McCabe:

In accordance with the request for comments published in the November 1, 2000 advance sheet of West's Supreme Court Reporter, I am writing to comment on the proposed amendments to Rule 26 of the Federal Rules of Appellate Procedure.

I heartily concur with the notion of amending Fed. R. App. P. 26 so that it is congruent with Fed. R. Civ. P. 6. However, it is unfortunate that the Committee has not seen fit to take this opportunity to remove an ambiguity in these rules which has spawned extensive and needless litigation and which has still left the issue without a definitive resolution. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1171 at 516-21 (Supp. 2000).

The problem is this: when in the calculation process does one add the three calendar days where service has been made by mail? The answer to that question can and does impact on the ultimate calculation, as a simple example will illustrate.

Suppose an adversary serves a paper by mail, and the recipient is obligated to respond within ten days. If you add the three days for service by mail first, we are now above the 11-day threshold, which would suggest that we do not exclude intermediate Saturdays, Sundays and holidays. The final tally, then, is 13 calendar days.

Alternatively, one can first look at the original 10-day deadline, conclude that it is less than the 11-day threshold, and thereby first determine that intermediate Saturdays, Sundays and holidays do not count. This will provide a tentative time period which would typically be 10 business days or 14 calendar days. If we *now* add the three extra days for mailing, we are up to a

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total of 17 calendar days. This four-day discrepancy is significant, and can become even more so if the 17th day is a Saturday, Sunday or holiday, which could then result in a final tally of 19 calendar days or even more.

I take no position on which interpretation leads to the proper result. But I do believe that the rule should be clear so that everyone can readily calculate the correct amount of time. To that end, here are two alternative suggested rewrites of the existing first sentence of Fed. R. App. P. 26(c):

[1] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period before making of the determination set forth in Rule 26(a)(2) as to whether the period is less than 11 days, unless the paper is delivered on the date of service stated in the proof of service.

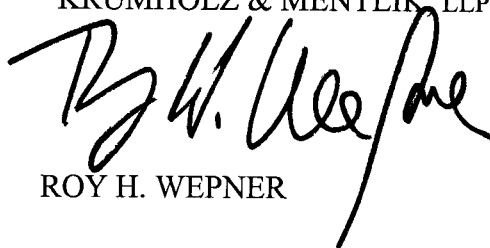
[2] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period after the deadline has been determined pursuant to Rule 26(a)(2), unless the paper is delivered on the date of service stated in the proof of service.

Should the Committee believe that one of these proposed changes to Fed. R. App. P. 26(c) is desirable, it would obviously make sense to make a similar change in Fed. R. Civ. P. 6, since failing to do so would defeat one object of the present amendment, which was to conform the two rules. If it is too late in the amendment process to make a similar change in Fed. R. Civ. P. 6, perhaps the foregoing proposal could be considered for a separate set of rule changes in the future.

The Committee's consideration of these comments is very much appreciated.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,  
KRUMHOLZ & MENTLIK, LLP



ROY H. WEPNER

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
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December 6, 2000

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Re: *Proposed Amendments to the Federal Rules of Appellate and Civil Procedure*

Dear Mr. Wepner:

Thank you for your letter of November 27, 2000, commenting on the proposed amendments to the Appellate and Civil Rules. A copy of your letter was sent to the members of the Advisory Committees on Appellate and Civil Rules for their consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe  
Secretary

cc: Honorable Anthony J. Scirica  
Advisory Committee on Appellate Rules  
Advisory Committee on Civil Rules  
Professor Daniel R. Coquillette