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

Re: Proposed Amendment to F.R.C.P. 6(e)

Dear Secretary McCabe:

I write to offer comments and suggestions about the proposed revision of Federal Rule of Civil Procedure 6(e). The proposed revision attempts to remove ambiguity from the rule, but I fear it does not quite get the job done in one respect. I suggest the addition of one word — calendar — to describe the additional three-day period granted by the rule. That simple change, already employed in the rule's F.R.A.P. counterpart, will remove all doubt on a nagging issue.

As proposed, the rule would read as follows:

“Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the period.”

The ambiguity about which I am writing stems from Rule 6(a)'s command that when a period of time prescribed by rule or order is less than 11 days, only business days are included in the computation; if the period is 11 days or more, all calendar days are counted. The intersection of Rules 6(a) and 6(e) results in three possible interpretations when the prescribed period is 10 days or less. A common situation in which the intersection is encountered is when a party must file his objections to a magistrate judge's report and recommendation within 10 days "after being served with a copy" of the recommendation. See 28 U.S.C. § 636(b)(1) and F.R.C.P. 72(b).

Some argue that when the 3-day mail rule is applicable to a 10-day period, the deadline is calculated by counting 10 business days plus 3 *business* days (because each of the two periods is less than 11 days). Others urge that three *calendar* days are added to the 10 business day period. A third (minority) view contends that a total of 13 days are now available and, because that is a period of 11 days or more, a count of 13 calendar days establishes the deadline. See 4B Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1171 (2002) and *Vaquillas Ranch Co., Ltd. v. Texaco Exploration and Production, Inc.*, 844 F.Supp. 1156 (S.D. Tex. 1994).

The text of the proposed revision squarely defeats the third argument by clarifying that the three days are added "after" the prescribed period. (The current rule says the three days are added "to" the prescribed period.) That change also appears to eliminate a related debate about whether the

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three-day period is counted before or after the prescribed period is calculated. *See Kruger v. Apfel*, 25 F.Supp.2d 937 (E.D. Wis. 1998), *vacated on other grounds*, 214 F.3d 784 (7th Cir. 2000). The revision would not, however, make clear which of the first two options is correct. Are the "3 days ... added after the period" business or calendar days?

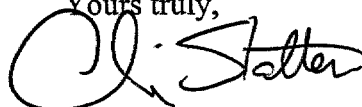
The Committee Note that follows the proposed revision provides an example that indicates the drafters intend the additional three-day period to be calendar days. In the example, a paper is mailed on Wednesday and the prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. The deadline is, therefore, the next business day, Monday. This example plainly indicates the three extra days are intended to be calendar days. I note, however, that the same Monday result would apply in the example even if the three-day period were business days. (Thursday, Friday and Monday).

Perhaps the Committee's example is sufficient to convince attorneys and judges that the rule is "10-business days plus three calendar days" when Rule 6(e) applies, but there is certainly room for doubt given Rule 6(a)'s indication that a three-day period means three business days. Given that potential for doubt, it would be preferable if the rule itself were clear on this important issue.

I suggest the Committee adopt the approach to this issue taken in F.R.A.P. 26(c). That rule specifies that when a party must act within a prescribed period following service, he gets an extra "3 calendar days". I suggest the word "calendar" also be inserted in F.R.C.P. 6(e) to avoid unnecessary ambiguity and keep the federal rules consistent in this regard. The Committee may also wish to consider proposing an amendment to Federal Rule of Criminal Procedure Article 45(e) to resolve the same ambiguity that resides in that rule.

The simple addition of the word "calendar" to describe the additional 3-day period will avoid countless hours of wasted research by attorneys, judges and law clerks, will prevent numerous telephone calls to judge's chambers to ascertain deadlines, and may even prevent claims of legal malpractice based on a lawyer's incorrect guess at the interpretation of an ambiguous rule.

Thank you for your attention to these matters. I applaud the proposed clarification of Rule 6(e) and ask that you consider making this additional point of clarity during the process.

Yours truly,  


Chris Slatten