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04-CV-A

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January 2, 2004

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Professor Edward H. Cooper  
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**Re: Proposed Amendment to Federal Rules of Civil Procedure**

Dear Professor Cooper:

I write to you in your role as reporter for the Advisory Committee on Civil Rules to suggest an amendment to Federal Rules of Civil Procedure 5 and 6.

As you know, in 2001, Rule 5(b)(2)(D) was amended. That rule now provides that service of documents other than original process may be by electronic means as well as by other means to which the parties have consented (presumably including mechanisms such as commercial overnight couriers). Rule 6(e) was amended at the same time to include among the types of service that engender an additional three days for responsive actions those types of service described in Rule 5(b)(2)(D).

In reviewing the committee's records, I see that there was considerable debate about that amendment to Rule 6(e). I believe that, in practice, that amendment has created a somewhat illogical result.

As I understand it, among the committee's considerations were providing added incentives to lawyers to consent to electronic service and recognizing the potential for transmission problems with electronic service.

Many courts that have implemented ECF, including the district court before which I most often practice (the Middle District of Pennsylvania), include in their local rules a provision that registration as an ECF user is deemed to be consent to electronic service. The result is that every document filed electronically triggers Rule 6(e), even though the court's ECF system effects service within just a few minutes of filing. Many courts, like the Middle District of Pennsylvania, already or shortly will require ECF filing in almost all cases. Thus, there is no need to provide an incentive to lawyers to consent because they have no choice.

The ECF systems now in place are very reliable and, in any event, they immediately provide notice to all involved that service has been provided. Moreover, the sorts of transmission problems the committee considered with respect to other forms of electronic service (including electronic mail and facsimile) do not seem to be a problem in practice.

Professor Edward H. Cooper  
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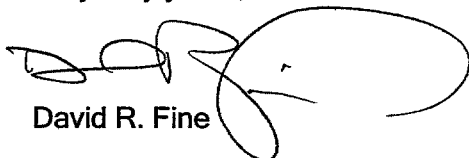
Since electronic service through ECF, electronic mail or facsimile is substantially instantaneous, it should be treated for purposes of Rule 6(e) the same way hand delivery is treated. It makes little sense that a method of service that is in most circumstances even faster than hand delivery should provide the recipient with an additional three days to respond. Indeed, it is arguable that this anomaly makes some lawyers reluctant to consent to electronic service because they do not wish to allow their opponents additional time to work on briefs and other documents.

I believe there is a simple means to address this issue. I would propose the following:

<p><i>Current Rule 5(b)(2)</i></p> <p>(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.</p> <p><i>Current Rule 6(e)</i></p> <p>(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.</p>	<p><i>Proposed Rule 5(b)(2)</i></p> <p>(D) Delivering a copy by electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities</p> <p>(E) Delivering a copy by any other means, consented to in writing by the person served. Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery.</p> <p><i>Proposed Rule 6(e)</i></p> <p>(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (E). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party under Rule 5(b)(2)(B), (C), or (E), 3 days shall be added to the prescribed period.</p>
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I would be most grateful if you would share my suggestion with the committee.

Very truly yours,

  
David R. Fine

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7 January 2004

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Re: Civil Rules 5(b)(2), 6(e)

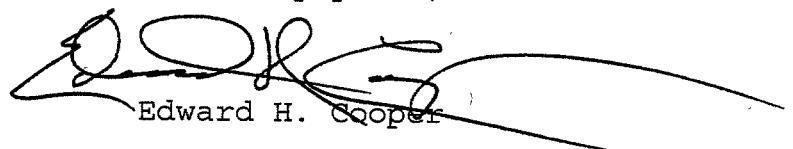
Dear Mr. Fine:

Thank you for your 2 January letter suggesting reconsideration of the Rule 6(e) provision that allows extra time to respond after service by electronic means. The thought that some attorneys may resist electronic service because they believe it more important to limit their adversaries' response time than to extend their own is a new one to me. It surely is worthy of consideration along with the basic observation that electronic service now works as reliably as in-hand service.

My immediate role as Advisory Committee Reporter is simple. I use this letter to forward your suggestion to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, at the Administrative Office of the United States Courts. Mr. McCabe will place the topic on the Advisory Committee agenda. The "due course" of agenda consideration varies with the press of work. The Advisory Committee is now in the middle of the project to restyle all of the Civil Rules, and is advancing ever further into the questions that arise from discovery of computer-based information. Some of its other projects also seem to require prompt attention. It may be a while before this agenda item comes on for consideration in the ordinary course of business. But it will not be lost from sight.

Again, thank you for your interest and help in the Civil Rules. Active engagement by members of the bar is one of the most important sources of information and help. Please do not be discouraged if your proposal waits in the wings for a while.

Sincerely yours,



Edward H. Cooper

EHC/lm  
c: Peter G. McCabe, encl.