COMMENTS OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ON THE PROPOSED TIME-COMPUTATION AMENDMENTS

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York respectfully submits the following comments on the proposed time-computation amendments which were circulated for public comment in August 2007 by the Standing Committee on Rules of Practice and Procedure.

1. The Proposed Time-Computation Amendments Would Cause Serious Practical Disruptions That Would Outweigh Their Theoretical Benefits

By changing the current rule under which intermediate Saturdays, Sundays, and holidays are not counted in computing time period of ten days or less, the proposed time-computation amendments would cause serious practical problems. Judicial officers, court personnel, and practitioners have become familiar with the existing time-computation rule over the course of many years. They have learned to rely upon it as a default rule which will apply unless other specific dates are set by the court. Statutes, local rules, standard-form orders, and practitioners' forms have all evolved against the backdrop of the current rule. Any change in the current time-computation rule would lead to significant disruptions while the new rule is promulgated, disseminated, absorbed, and assimilated into practice. The new rule would continue to be a trap for the unwary for an extended period.

The Committee does not believe that there are significant problems in practice under the current time-computation rule. It is simple and easy to apply

for lawyers and nonlawyers alike. To the extent that the current rule requires resort to a calendar to determine which intermediate days fall on weekends or holidays, the same would also be true under the proposed amended rule, under which time periods that end on a weekend or a holiday are extended to the next business day.

To the extent that there is any concern that some lawyers and court personnel may have difficulty making the necessary computations under the existing time-computation rule – which we have not observed to be the case – a more efficient solution would be to incorporate the necessary software for making such computations directly into the Electronic Case Filing system, thus providing an authoritative means of making and recording the necessary computations.

2. The Proposed Time-Computation Amendments Do Not Adequately Mitigate the Adverse Effects That Would Be Caused by Their Introduction

The Committee recognizes that the drafters of the proposed time-computation amendments have sought to mitigate their adverse effects by, for example, lengthening most five-day periods to seven days and lengthening most ten-day periods to fourteen days. These changes, however, would only offset the adverse effects caused by including weekend days in the new time computations. They would not offset other significant adverse effects of the new rule, including its application to holiday periods and its effect on time periods prescribed by statutes and by local rules.

A. Time Periods That Include Holidays

One would like to believe that motions served on the eve of holiday

periods would be a problem seldom met with and easily solved. Sadly, the Committee's experience teaches that this is not always the case. By including intervening holidays in the time computation, the proposed amendments would exacerbate this problem.

Consider, for example, a motion with a ten-day response period (which, as noted below, is more reflective of current practice than the four-day period prescribed by Fed. R. Civ. P. 6(d)) which is served by hand at 5:00 P.M. on Christmas Eve. Even the current exclusion of holidays does not begin to offset the burden and disruption of responding to such a motion during the year-end holiday period. Including holidays in the time computation would make matters even worse.

B. Time Periods Prescribed by Statute

Large numbers of short time periods are prescribed by statutes that have been enacted against the backdrop of the present time-computation rule. With commendable industry, the Standing Committee has tabulated some (but not all) of these statutes in a 108-page attachment to its proposal. Our Committee believes that, if the proposed amendments are transmitted to Congress (which our Committee hopes will not occur), they should be transmitted with a provision that they will only become effective if Congress passes and the President signs a technical corrections bill making corresponding changes in all the statutory time periods listed by the Standing Committee, as well as in all other litigation-related statutory time periods of ten days or less that can be unearthed by exhaustive research. Otherwise, these statutory time periods will cause persons relying upon

the existing time-computation rule that they have known and used for many years to incur a serious risk of losing substantive rights.

C. Time Periods Prescribed by Local Rule

For the same reasons, no new time-computation rule should become effective without corresponding changes in time periods of ten days or less that are contained in local rules, standing orders, and standard-form orders. Ensuring that such changes are made in a timely fashion, and are publicized to everyone who needs to be aware of them, would be a monumental task in itself.

In addition, any amendments should clarify whether district courts may continue to have local rules that measure time periods in business days. One such local rule is Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which (in the Committee's experience) has worked satisfactorily for more than a decade since it was adopted in its current form in 1997.

3. The Committee Supports the Proposed Lengthening of Certain Time Periods

As part of the time-computation project, the Rules Committees have reviewed the time periods provided in the existing rules, and have proposed certain changes in those time periods that are independent of the merits of the time-computation project itself. Although our Committee is unable to support the time-computation project generally, it does support some of the independent changes that have been proposed in certain time periods.

The Committee supports the lengthening of the time periods for moving and responding papers in civil motions under Fed. R. Civ. P. 6(d) from five days

and one day to fourteen days and seven days, as a more realistic reflection of the time needed for most motions. Although our Committee is not unanimous on this point, we suggest that the Civil Rules Committee may wish to consider specifying a longer period for substantive motions than for discovery motions, as is done, for example, by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York.

The Committee also supports the lengthening of the time for post-trial motions under Fed. R. Civ. P. 50, 52, and 59 from ten days to 30 days. Again, this is a more realistic time period than is provided by the present rules.

4. Time Periods That Count Backward Should Be Changed to Time Periods That Count Forward

When a time period which counts backward ends on a weekend or holiday, the proposed amendments would continue to count backward until a weekday is reached. This would exacerbate the adverse effects of the proposed amendments by shortening still further a response period that may already be shorter than it would be under the current rules.

In addition, when time periods are counted backward, the rules contain no provisions for giving the other parties extra days when service is made by mail. Nor is it clear how a workable rule could be drafted that would do this.

The way to avoid these and other practical problems caused by counting backward is to amend the rules that currently count backward so that they count forward. As a practical matter, the most important rule that would be affected by this change is Fed. R. Civ. P. 6(d), which currently determines the times for serving motion papers on civil motions by counting backwards from "the time

specified for hearing" (despite the fact that most civil motions today are not determined at a hearing). How Fed. R. Civ. P. 6(d) could be amended to count forward is demonstrated by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which was amended in 1997 to do exactly that, and which has worked smoothly for more than a decade.

5. Conclusion

We thank the Standing Committee for the opportunity to comment on the proposed time-computation amendments. For the reasons set forth above, although we support changes in the time periods in certain rules, we urge the Standing Committee to disapprove the time-computation amendments as a whole.

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