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cc

Subject August 2007 Rules Package

I have only a few brief comments on these proposals.

The time-computation rules are nicely done. I recommended changes along these lines during my time on the Standing Committee and am pleased to see that the task is largely complete. These amendments should take effect in 2009, "only" 16 years after a majority of the Standing Committee urged that changes of this kind be accomplished as soon as possible.

The benefits of using real days are so apparent that I am left to scratch my head about the survival (and proposed amendment in this cycle) of Fed. R. App. P. 26(c), which adds 3 days whenever time is calculated from a document's service rather than its filing. Why should this rule persist? Build the time into the deadline for briefs; don't leave it up in the air whether three days should be added to some other period. (For 3 days are *not* added if the document is "delivered" on the service date.)

The rule makes little sense. It was originally designed to accommodate delay in the Postal Service. Today briefs and similar documents regularly are delivered by FedEx or courier; increasingly they are delivered electronically with zero waiting. Yet Rule 26(c), which says that no days are added if a courier plops the document on counsel's desk, provides that 3 days *are* added if the document arrives as an email attachment, or via message from a court's e-filing site That's inconsistent.

My court has concluded that the entire routine is absurd and has overridden Rule 26(c)--not by a local rule, which wouldn't be cricket (see Fed. R. App. P. 47(a)(1)), but by setting a briefing schedule by order in almost every case. Each order gives a date on which the brief must be *filed*

When a deadline applies to filing rather than service, Rule 26(c) drops out of the picture. Although the Seventh Circuit has been doing this for more than 20 years, lawyers regularly are confused by the difference between "filing" dates, to which Rule 26(c) does not apply, and "service" dates, to which it does, so each of these orders includes a warning that the conversion to a filing date means that no time is added on account of service by mail.

That the Seventh Circuit must add this proviso to each order shows the potential for confusion caused by the differing rules for computation of time following filing versus service.

Note, by the way, that the three extra days *also* interferes with the goal of allocating time in 7-day parcels, which then end on weekdays. Adding three days to a 30-day or 45-day period is not likely to increase the chance that the last day will be a weekend, but adding 3 days to a 14-day period (used for some motions) will.

So the Standing Committee should complete the time-computation project by rescinding rather than amending Rule 26(c), with adjustments in other deadlines if appellees and respondents otherwise would have too little time.

One other brief comment, concerning both Fed. R. App. P. 4(a)(1)(B) and Fed. R. App. P. 40(a)(1). The draft amendments to these two rules refer to "the United States; a United States agency; [and] a United States officer". United States is a proper noun; the first usage ("the United States") is therefore correct. Treating a proper noun as an adjective ("a United States agency") is not correct; it is an example of noun plague. We should not have stylistic backsliding so soon after the style project rewrote all of these rules. "Federal agency" is better, using a real adjective as an adjective. If you have some compelling need to use "United States," then say "agency of the United States" (etc.). Sometimes Congress writes this error into a statute ("United States Court of Appeals"), and there is nothing the judiciary can do about the legislature's poor drafting. But the Constitution gets it right ("We the People of the United States"; "the Congress of the United States"; "the judicial Power of the United States"; "the Chief Justice of the United States"), and the federal judiciary should do no less

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