

Comments on the Proposed Changes to Federal Rules Related to Computation of Time

The Time-Computation Subcommittee has done an admirable job in analyzing the issues related to computation of time. However, as such substantial changes are currently under consideration, we believe that this is an opportune time to examine some additional issues related to the computation of time and holidays that continue to cause problems for practitioners. Below we have set out comments on some of the proposed amendments, together with additional issues we believe should be considered.

Proposed new Civil Rule 6(a)(5)

The addition of Rule 6(a)(5) will finally remove the ambiguity that has existed when calculating backward-counting deadlines that land on a non-court day. We support its addition.

Proposed amendment to Civil Rule 6(c)

Proposed Rule 6(c) sets new deadlines for the service of notice of motion and motion opposition papers, yet most district courts currently set their own motion deadlines by local rule which may differ from the current and the proposed new deadlines. The rule is ambiguous as to whether the Federal rule takes precedence over such local rules. We propose that in order to eliminate any confusion as to how to apply the Federal motion rules, and to be consistent with Rule 56, Rule 6(c)(1)(C) be amended as follows:

“(C) When a court order ~~which a party may, for good cause, apply for ex parte~~ sets a ~~different time~~ different time is set by local rule or court order.”

Proposed Civil Rule 6(a)(6) - Holidays

We believe proposed Rule 6(a)(6)(B) to be confusing as it is uncertain whether state holidays are always considered legal holidays, irrespective of whether the district court is closed. Although this issue is not created by the proposed amendment to Rule 6(a)(6)(B), but exists under the current rule, we believe that this rule should be clarified to resolve the uncertainty.

Proposed Rule 6(a)(6)(B) defines a legal holiday as

“. . . any other day declared a holiday by the President, Congress, or the state where the district court is located.”

Many states observe holidays other than the federal holidays set forth in proposed Rule 6(a)(6)(A). However, these holidays may not be observed by the U.S. District Court in that state¹. Under the current and proposed rules it can be interpreted that such state holidays are legal holidays for the purposes of counting time, even though the court is open on such days.

¹ For example, Alabama observes Confederate Memorial Day, Maine and Massachusetts observe Patriots' Day, Nebraska observes Arbor Day, yet the district courts in those states do not close on these holidays.

Furthermore, in recent years we have observed a trend for more and more district courts to close on state holidays or other non-Federal holidays, yet not declare the day an official holiday. This was observed in 2007 when courts closed on the day before Christmas, yet determined this was not a legal court holiday. We therefore have a situation where courts are officially open on legal holidays (state holidays) and closed on non-legal holidays (day after Thanksgiving, day before Christmas, etc.).

Occasionally, courts may publish an official notice that they are observing such a state holiday and that it is deemed an official holiday pursuant to FRCP 6(a)(4)(B). However, the majority of the district courts will not list such a holiday on their official published holiday calendar. Instead, at a time close to the date, they will issue a notice stating that the court is closed on such a day. Often, the court notice will state that the court will be open in some limited capacity for emergency filings, or that their Electronic Case Filing (ECF) system will still be available for filing. The fact that the court may be open for certain types of filing further clouds the issue as to whether the court is officially closed or not, and whether that day should be counted for purposes of calculating deadlines.

To clarify this issue, we propose Rule 6(a)(6)(B) be further amended as follows.

“any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court.”

Bankruptcy Rule 9006(f)

As part of the 12/1/07 amendments to the Civil Rules, Civil Rule 5(b)(2) was rearranged so that what was 5(b)(2)(B), (C) and (D) is now 5(b)(2)(C), (D), (E) and (F). Bankruptcy Rule 9006(f) was not amended to reflect this, with the result that Bankruptcy Rule 9006(f) no longer references authority for service by electronic means or delivery by other means. This may cause confusion because Bankruptcy Rule 9006(f) relates to the computation of time after certain types of service.

Bankruptcy Rule 9006(f) references Civil Rule 5(b)(2)(C) and (D) in the title and the text of the subsection. Civil Rule 5(b)(2)(C) now authorizes service by mailing to the person's last known address and 5(b)(2)(D) authorizes service by leaving a copy with the clerk of the court, if the person served has no known address. In the earlier version, subsection 5(b)(2)(D) authorized service by “[d]elivering a copy by any other means, including electronic means, consented to in writing by the person served.” The current version moves the authority for service by electronic means to subsection 5(b)(2)(E) and service by other means to subsection 5(b)(2)(F).

According to the Advisory Committee Notice to the 2007 Amendments, the changes to Civil Rule 5 were meant to be stylistic only. Therefore, it appears that the revision was not meant to have a substantive affect on Bankruptcy 9006(f). We note that Federal Rule of Criminal Procedure 45(c) was not amended to reflect the 12/1/07 amendment to Civil Rule 5(b)(2). We are aware that the Committee on Rules of Practice and Procedure and the Judicial Conference of the United States have approved a technical amendment to align Criminal Procedure Rule 45(c) with Civil Rule 5(b)(2). This revision is part of the amendments pending approval by the United States Supreme Court that will take effect on 12/1/08 absent contrary Congressional action.

To remedy the discrepancy between the Civil Rule 5(b)(2) and the Bankruptcy Rule, we propose that Bankruptcy 9006(f) be amended as follows.

(f) Additional time after service by mail or under Rule 5(b)(2)(C) or (D), (E) or (F).
When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5 (b)(2)(C) or (D), (E) or (F) F.R.Civ P , three days are added after the prescribed period would otherwise expire under Rule 9006(a).

Civil Rule 6(d) – Backward-Counting Deadlines

When the rules set a deadline to act prior to an event, as is required in Rules 6(c) and 68(a), there is confusion as to whether the deadline should be moved further back if the act is to be performed by service other than by hand.

Rule 6(d) states:

“When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).”

A plain reading of this rule would indicate that the only circumstance in which additional time is added to a deadline is when a party has been served with a document and the rule expressly states that the period of time is counted from the date of service. In that case, deadlines calculated by counting back from an event in order to determine the last day an act may be performed would not fall under Rule 6(d), as the party is not required to act within a specified time after service. However, from a logical point of view, the purpose of Rule 6(d) is to afford a party served by methods other than hand the same amount of time to act as it they had been served by hand.

For example, under proposed Rule 6(c), a party may serve notice of motion by any method on the 14th day before the hearing. If the moving party chooses to serve notice by mail, the party served would have less time to review the moving papers and prepare an opposition than if they were served by hand, especially if intervening holidays and weekends delayed the delivery of the moving papers even more than the 3 days afforded by Rule 6(d). As another example, under proposed Rule 68(c), parties may serve an offer of judgment 14 days prior to trial and the party served is allowed 14 days to serve an acceptance of the offer. We presume that the two deadlines were written to ensure that any acceptance of the offer is made prior to the start of trial. However, under the current and proposed rules, it can be argued that the time to serve an offer is not extended to an earlier date if the offer is served by mail, but that the party served with the offer by mail is allowed an extra 3 days under Rule 6(d). This would mean that the party served could respond to the offer three days after the trial has begun.

Some district courts have resolved this issue by stating separate deadlines for parties to perform acts by mail. For example, Central District of California Local Rule 6-1

“If mailed, the notice of motion shall be served not later than twenty-four (24) days before the Motion Day designated in the notice. If served personally, the notice of motion shall be served not later than twenty-one (21) days before the Motion Day designated in the notice.”

Some states resolve this issue in their time rule by extending any period of notice that must be given when service is made by means other than by hand. For example, California Code of Civil Procedure § 1013(a):

"The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail .."

This issue can be clarified once and for all by either amending Rule 6(d) to add that any period of notice is extended if service is made by methods other than by hand, or by adding provisions for extending time to each rule that has a backward-counting deadline. The first option would be more beneficial as it would provide a uniform system of time calculation for all rules, including local and judges' rules

Proposed Civil Rule 6(a) - Implementation

The Time-Computation Subcommittee recognizes that the proposed changes to the Federal Rules may cause hardship if the short time periods set in local rules are not adjusted accordingly. The local rulemaking bodies and judges should consider the reason why court days were used in the first place, as well as why most state courts continue to use court days when counting short periods of time. The reason for the use of court days is twofold. First, if short periods of time were not counted in court days, then intermediate holidays and weekends would have too large an impact on the total number of court days in a given period, affording parties or the court a smaller number of actual business work days to complete an act than the number of days envisaged by the authors of the rule. For example, a four-day deadline to perform an act prior to a hearing may allow a party four business days if the hearing is on a Friday, but only two business days if the hearing is on a Tuesday. The Committee has accounted for this issue in the Federal Rules by enlarging shorter time periods for Federal Rules

Second, if court days are not used when calculating two or more deadlines triggered by the same event, such as the deadline to serve notice of a motion hearing and the deadline to serve the motion opposition under Rule 6(c), one deadline may be affected by intervening non-court days while the other is not. For example, some district courts now observe the day after Thanksgiving as a legal holiday² pursuant to Rule 6(a)(4)(B). This creates four consecutive non-court days. Under proposed Rule 6(c), if a motion hearing was noticed on November 21, 2008, for a December 5, 2008, hearing, the opposing party would need to serve their opposing papers by November 26. This would give them only three business days to review the moving papers, assuming they were served at the end of the business day on November 21st, 2008. If they were served by mail and extra time was not added to the notice deadline under Rule 6(d), then they may get no time at all (see "Backward-counting Deadlines" above)

Even though this example may occur only on such four-day weekends, courts need to take this issue into consideration when amending local rule deadlines to conform to the proposed new Federal time rules. To ensure that parties are given at least the minimum amount of time that was allowed when counting in court days, courts should take into account the maximum number of consecutive non-court days that may occur in their jurisdiction.

The local rulemaking bodies and judges should also be advised to use multiples of seven when changing deadlines that are currently calculated in court days to calendar days, as the

² The Northern and Central Districts of California both observe the day after Thanksgiving, a California state holiday as a legal court holiday

Committee has done with the proposed deadline changes to the Federal Rules. This will help alleviate the potential issue of parties picking certain days to perform an act in order to afford opposing parties a lesser amount of time to act, review or respond to the papers with which they were served, or to give the serving party additional time, based on intervening non-court days. Such gamesmanship was experienced in California State Courts when court days were removed from certain deadlines in the past³.

Finally, consideration needs to be given to the oversight of the implementation of the new time standards by the district courts. Often, district courts are not aware of federal changes that affect their local rules, or are aware but fail to amend their local rules accordingly⁴. We propose the creation of an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules.

Thank you for your consideration of these comments

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³ In 1999, the California Legislature amended the State code to change the deadlines for service and filing of notice of motions and motion opposition and replies from a number of court days before the hearing to a number of calendar days. The Legislature was forced to change these deadlines back to court days in 2005 in order to stop such manipulation of deadlines.

⁴ The Middle and Northern Districts of Georgia still follow their local rules which contradict the 2005 amendments made to Rule 6(d) to clarify date calculation methods.