

07-AP-001
07-CV-001



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Subject Comments on new proposed rules

I have two comments, in addition to one I submitted earlier:

1. The change in FRAP 27, from 8 court days to 10 calendar days, will have the result of generally shortening the amount of time available to respond to motions in courts of appeals. If the motion is not served by hand, when the 3 days for electronic or mail service are added, there will be 13 calendar days to respond under the new rule. Under the current rule, when the three days are added, the result is: 14 days to respond if the motion is served on a Monday, 13 if on a Tuesday, 15 if on a Wednesday, 15 if on a Thursday, and 17 if on a Friday (assuming, in all cases, that there is no intervening holiday).

While some appellate motions are quite simple and easy to respond to, others motions are major substantive motions that require a long time to properly respond. For example, there are motions to dismiss cases based on mootness, standing, and other jurisdictional grounds, and even motions for summary affirmance or reversal. On the other hand, procedural motions are ones that practitioners tend to respond to quickly anyway, because appellate courts often rule on them quickly without necessarily awaiting a response.

I would therefore suggest changing the general response time of FRAP 27 to a higher number, such as 12 or 14 calendar days. An alternative would be to provide different response times for substantive and procedural motions, such as 7 calendar days for procedural ones and 21 for substantive ones (though I realize that it might take some work to create a rule that clearly distinguishes substantive and procedural motions).

2. I suggest setting up some sort of formal procedure, with deadlines, for individual district courts and courts of appeals to amend their local rules in response to the change from court to calendar days in the new rules. Many district courts have their own rules for matters such as the times to file a response to a motion. Some of the rules have periods that are ten days or less, and the effective lengths of these periods will be drastically shortened when the new federal rules go into effect. To ensure that local courts adjust the time periods in their rules appropriately in response to the new federal rules, and that local practitioners aren't hit with any unfortunate surprises when the new federal rules go into effect, local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes.

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Subject comment on time-counting rules

With respect to the proposed time-counting amendments, the new rules should be revised to clarify how to properly add the three days that must be added based on mail or electronic service. There can be confusion on this point both right now and under the new rules. Consider the following example (under the proposed new rules):

A motion in a court of appeals is served by mail on Wednesday, September 5. Is it proper to add the three days for mail service to the 10-day default period to respond (of the proposed new rules) to get a 13-day period, and count 13 days from September 5 so that the opposition brief is due Tuesday, September 18? Or is it correct to first determine when the original 10-day period would expire, which would be Monday, September 17 (because the 10 days run to Saturday, September 15, which is not a business day), and then count three days from Monday, September 17, to get a due date of Thursday, September 20?

Under the current Appellate Rule 26(c), it seems the due date is September 18, if the rule is read literally, as the rule states that the three days are "added to the prescribed period." But, under the current Rule 6 of the Federal Rules of Civil Procedure, if we were considering a September 5 filing in a district court and the local rule required a response within 10 calendar days, then the due date (if you read Rule 6 literally) would seem to be September 20, as Rule 6 provides that "3 days are added after the period would otherwise expire under Rule 6(a)."

I suggest that the amended rules clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules.

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