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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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