

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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TIME-COMPUTATION PROJECT

In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 to make the method of computing time consistent, simpler, and clearer. In tandem with this work, each advisory rules committee also reviewed and proposed changes to the time periods in all the rules to ensure that every deadline is reasonable and that changing the time-computation method did not have the effect of shortening existing time periods.

The time-computation project was launched in response to frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions.

Proposed Rules Changes

The principal simplifying change in the amended time-computation rules is the adoption of a "days-are-days" approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the proposed rules amendments, intermediate weekends and holidays are counted regardless of the length of the specified period.

Other changes in the amended time-computation rules clarify how to count forward when the period measured is after an event (for example, 21 days after service of a motion) and the

deadline falls on a weekend or holiday; and how to count backward when the period measured is before an event (for example, 14 days before a scheduled hearing) and the deadline falls on a weekend or holiday. The proposed amendments also provide for computing hourly time periods, to address recent legislation affecting court proceedings in which deadlines are expressed in hours (for example, 72 hours for action).

The amended time-computation rules also fill a gap in the present rules by addressing the special timing considerations that accompany electronic filing. Under the proposed amendments, unless a statute, local rule, or court order provides otherwise, the last day of a period for an electronic filing ends at midnight in the court's time zone, while the last day for a paper filing ends when the clerk's office is scheduled to close. (Additional refinements to these principles are made in proposed Appellate Rule 26(a)(4) for reasons specific to appellate practice.) Filing deadlines are extended if the clerk's office is inaccessible. The proposed amendments provide a court with flexibility to define when a deadline should be adjusted or a failure to comply with a deadline should be excused because the clerk's office was "inaccessible." The proposed amendments and the Committee Notes do not specify the meaning of "inaccessibility," which can vary depending on whether a filing is electronic or paper, leaving the definition to local rules and case law development.

The advisory committees also reviewed every rule to ensure that all time periods would be reasonable taking into account the effect of changing the time-computation method. The advisory committees concluded that virtually all short time deadlines should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify time-counting, the advisory committees proposed changing most periods of less than 30 days to multiples of 7 days. The advisory committees adopted 7, 14, 21, and 28-day periods when possible, so that deadlines will usually fall on weekdays. The advisory

committees' comprehensive review of time-computation rules and the rules containing time periods resulted in proposed amendments to a total of 91 rules.

In August 2007, proposed amendments to each set of rules were published for comment from the bench and bar. Scheduled public hearings on the amendments were canceled because no one asked to testify. The specific proposed amendments are discussed later in this report in the respective sections describing the advisory committees' recommendations.

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FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 13(f), 15(a), 48(c), and 81(d), and proposed new Rule 62.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rule were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed changes were canceled because no one asked to testify. The proposed amendment to Rule 8(c), which deletes the reference to a "discharge in bankruptcy" from the rule's list of affirmative defenses, was withdrawn for further consideration in light of concerns expressed by the Department of Justice.

The proposed amendment to Rule 13 deletes subdivision (f), which sets out standards for amending pleadings to add a counterclaim. The subdivision is redundant of Rule 15, which sets out standards for amending pleadings in general. The proposed change codifies courts' practice of applying uniform standards to the amendment of pleadings.

The proposed amendment to Rule 15(a) limits the time when a party may amend a pleading to which a responsive pleading is required once as a matter of course. The proposal eliminates the distinction drawn by present Rule 15(a), under which a responsive pleading

immediately cuts off the right to amend, while a Rule 12 motion does not cut off the right and prolongs the time to amend a pleading until the motion is resolved. Significant problems can arise when a party files an amended pleading as a matter of right on the eve of a court's ruling on a dispositive Rule 12 motion. Under the proposed amendment, a party may file an amended pleading without leave of court within 21 days after service of a responsive pleading or 21 days after service of a Rule 12 motion, whichever is earlier. After that, a party may file an amended pleading only with leave of court.

The proposed amendment to Rule 48 adds a provision similar to that in corresponding Criminal Rule 31 that allows a court to poll the jury individually on its own and requires a poll at a party's request.

Proposed new Rule 62.1 is integrated with the parallel proposed new Appellate Rule 12.1. Proposed Rule 62.1 codifies and makes consistent practices followed in almost all circuits when a motion is made regarding a matter that the district court is in a better position to determine than the court of appeals, but the district court judge cannot rule on the motion because an appeal has been filed and jurisdiction invested in the court of appeals. The district court may defer ruling, deny the motion, or either indicate that it would be inclined to grant the motion if the case were remanded (the so-called indicative ruling) or state that the motion raises a substantial issue. Requests for indicative rulings typically arise when a party files a Rule 60(b) motion after an appeal has been filed. The procedure facilitates cooperation between the district court and the court of appeals, enabling them to determine whether it is better to decide the appeal before deciding the motion. A party must notify the court of appeals if the district court states that it would grant the postjudgment motion or that the motion raises a substantial issue.

The proposed amendment to Rule 81 clarifies the definition of "state" to include not only the District of Columbia but also any United States commonwealth or territory.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 13(f), 15(a), 48(c), and 81(d), and new Rule 62.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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The advisory committee also proposed amendments to Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the time-computation project with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendment to Rule 6 simplifies and clarifies the general time-computation method. The proposed amendments to the other rules adjust time periods consistent with the change to the time-computation method.

The proposed adjustments to the time periods in the rules are minor — accounting for the inclusion of holidays and weekends in the time-computation method and the preference for expressing periods in multiples of seven days — with some exceptions noted below. The following adjustments are proposed:

- The one-day period in Rule 6(c)(2) becomes seven days. The adjustment would extend the time for a party to serve any affidavit opposing a motion to seven days before a hearing.
- The one-day period in Rule 54(d) becomes 14 days. The increased time period corrects an unrealistic short time period for the clerk to give notice before taxing costs.
- The three-day period in Rule 55 becomes seven days.
- Five-day periods in Rules 32, 54, and 81 become seven days.

- The five-day period in Rule 6(c)(1) becomes 14 days. The adjustment extends the time for a party to serve a written motion and notice of hearing before the scheduled hearing date.
- Ten-day periods in Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, 81, and Supplemental Rule C become 14 days.
- Ten-day periods in Rules 50, 52, and 59(b), (d), and (e) become 28-day periods. The adjustment extends the present inadequate time allowed to prepare and file postjudgment motions. To prevent unfair results from these unrealistic short time periods, courts have avoided the rule by delaying entry of judgment or permitting timely filing of a barebones motion but permitting the brief to expand the stated grounds.
- The less-than-11-day period in Rule 32 becomes less than 14 days.
- Twenty-day periods in Rules 12, 15, 27, 53, 71.1, 81, Forms 3, 4, and 60, and Supplemental Rules B, C and G become 21 days.
- Rule 6(b)'s reference to provisions for extending the times set by enumerated provisions in Rules 50, 52, 59, and 60, and Rule 59(c)'s reference to a 20-day extension are eliminated.
- The timing provisions in Rules 56(a) and (c) are replaced by new provisions that recognize authority to set deadlines for summary-judgment motions by local rule or by court order and, in default of a local rule or court order, that allow a motion to be made at any time until 30 days after the close of all discovery. The new provisions also establish default times for response and reply.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the project to improve the time-computation rules and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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