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Moore's Federal Practice, Time-Computation Amendments to Federal Rules & Statutes (2010)

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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
PROCEDURES AND DEADLINES

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**§ 163A.syn Synopsis to Chapter 163A: PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES
AFFECTING TIME-COUNTING PROCEDURES AND DEADLINES**

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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
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163A SYNOPSIS

Effective December 1, 2009, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure will be amended. A companion statute has been passed by Congress and signed into law by the President, whose changes also become effective on December 1, 2009. n1 The changes affect time deadlines and are important to all lawyers practicing in federal courts.

The changes address two related matters:

- The method for calculating or counting time periods set out in the rules, such as deadlines for actions; and
- The specific time periods set out in the various federal rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & Procedure Appeals Procedures Time Limitations

FOOTNOTES:

(n1)Footnote 1. *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607.



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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
PROCEDURES AND DEADLINES

163A-163A Moore's Fed Practice Time-Computation Amendments I

I. CHANGES IN METHODS FOR CALCULATING TIME PERIODS

A. Adopting "Days Are Days" Approach

The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. The amended rules are consistent and simple: they count every day, including intermediate weekends and holidays for all time periods.

Under the pre-December 2009 version of the federal rules, the methods used for calculating time periods vary depending on whether the time period in question is 10 days or fewer or 11 days or more. For periods of 10 days or fewer, weekend days and legal holidays that occur during the period are not counted. For periods of 11 days or more, these "intermediate" weekend days and legal holidays are counted. n2 This made calculating time periods unnecessarily complex. As the drafters note: n3

[A] 10-day period and a 14-day period that started on the same day usually ended on the same day--and the 10-day period not infrequently ended later than the 14-day period.

Under the proposed amended rules, this distinction is completely eliminated. As amended, the rules explicitly state: n4

[C]ount every day, including intermediate Saturdays, Sundays, and legal holidays.

The drafters note that the directive to count every day "is relevant only if the time period is stated in days (not weeks, months, or years)." n5 No other exemption or exception is provided in the amended rules.

The drafters recognized that the change requiring all time periods to be counted the same way will effectively shorten periods of 10 days or fewer, which, under the old rules, would have almost always been stretched out to more than the equivalent number of "calendar" days because the "intermediate" weekend days and holidays were excluded. n6 It was this phenomenon that prompted the drafters to adjust the many short time periods and deadlines in the rules and seek comparable changes to the relevant statutes.

See II., below for a discussion of the changes in individual rule-based or statutory periods.

B. Basic "Exclude-the-First-Day and Include-the-Last-Day" Counting Rule Remains Unchanged

Under all the federal rules, both as currently existing and as proposed to be amended effective December 1, 2009, the most basic counting rule remains the same. n7 In calculating or counting any time period, the "first" day, the day of the act or event that starts the period running, is not counted. n8 The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday. If the "last" day falls on a Saturday, Sunday, or legal holiday, the last day of the period extends to the next day that is not a Saturday, Sunday, or legal holiday. n9

The proposed amendments clarify this basic counting rule in two significant ways. Under the current rules, a time period is extended to the next day when the "last" day falls on a day when the clerk's office is "inaccessible." n10 The provision applies expressly to filing a paper. The proposed amendments expand the provision to explicitly address electronic filings. The provision extending the "last" day of a time period for making a paper filing is preserved in the proposed amended rules. n11 In this era of electronic service and filing, this may seem anachronistic. However, a significant number of filings in the federal courts continues to be made by persons filing pro se, including incarcerated persons, who typically do not have access to a computer. But in most other cases, the crucial test should be whether the electronic filing system is available, rather than whether the "clerk's office" is or is not physically "accessible."

The proposed rule amendments do not define "inaccessible." The drafters recognized that a national rule could not address all conceivable situations, which could be subject to unique local conditions and practice. For this reason, the proposed amendments authorize each court to adopt local rules defining "inaccessible" and providing for shorter or different time-period extensions in such circumstances. n12 By way of an example, the drafters state that the "inaccessibility" provision, as revised, is intended to cover situations in which the "clerk's office" is "inaccessible" because of "an outage of the electronic filing system." The drafters note that a court "might not wish a [temporary or momentary] period of inaccessibility to trigger a full 24-hour extension" of the time to file. In such circumstances, a court is in a better position to determine how long the time period should be extended when an "outage" of the electronic filing system occurs on the last day permitted for filing. Many courts already have elaborate and disparate provisions in their local rules covering this circumstance. n13

The proposed amendments also explain how to determine the "next day" for both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time after an event. A backward-looking time period requires something to be done within a period of time before an event. n14 The definition of "next day" comes into play when a deadline falls on a weekend or holiday, because the proposed amendments then directs that the deadline continues to run until the "next day" that is not a weekend or holiday. Under the proposed amendments, if the deadline is measured after an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count forward. But if the deadline is measured before an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count backward, for example, from Saturday the 31st to Friday the 30th. n15

For forward-counted periods, that is, periods that are measured after an event, the rule includes state holidays within the definition of legal holidays. However, state legal holidays are not recognized in counting backward-counted periods. n16 For both forward- and backward-counted periods, the rule thus protects those who may be unaware of the effect of state holidays, some of which may be arcane and little known. n17

C. New Definitions for Expiration of "Last Day"

The proposed amendments provide a definition for when the "last day" of a period expires. For paper filing, the last day of a time period expires "when the clerk's office is scheduled to close." n18 For electronic filing in a district court, the last day of a time period expires "at midnight in the court's time zone." n19 For electronic filing in a court of appeals, the last day of a time period expires at "midnight in the time zone of the circuit clerk's principal office." n20

D. New Rules for Time Periods Stated in Hours

The amended federal rules contain new provisions for calculating time periods or deadlines stated in hours rather than in days, week, months, or years. The time period for a deadline stated in hours starts to run "immediately" on the occurrence of the event that triggers the period. n21 All hours are counted, including those during "intermediate" Saturdays, Sundays, and legal holidays. n22 If the last hour of the period or deadline falls on a Saturday, Sunday, or legal holiday, the period extends until the same time on the next day that is not a Saturday, Sunday, or legal holiday. n23

Although the federal rules as amended will now contain rules for calculating time periods or deadlines stated in hours, there are no such time periods in any of the existing or soon-to-be-amended federal rules. n24 Nonetheless, the possibility of such deadlines is more probable in the era of electronic service and filing than it was previously. Furthermore, as the drafters note, time periods or deadlines stated in hours do exist already in a few statutes and are reasonably common in emergency court orders. n25

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil Procedure Pleading & Practice Motion Practice Time Limitations Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview Civil Procedure Pleading & Practice Pleadings Time Limitations Computation Civil Procedure Pleading & Practice Pleadings Time Limitations Extensions Civil Procedure Appeals Reviewability Time Limitations Criminal Law & Procedure Appeals Procedures Time Limitations

FOOTNOTES:

(n1)Footnote 2. Fed. R. Civ. P. 6(a)(2); Fed. R. Crim. P. 45(a)(2); Fed. R. App. P. 26(a)(2).

(n2)Footnote 3. Fed. R. Civ. P. 6, advisory committee note of 2009.

(n3)Footnote 4. *Proposed* Fed. R. Civ. P. 6(a)(1)(B); *proposed* Fed. R. Crim. P. 45(a)(1)(B); *proposed* Fed. R. App. P. 26(a)(1)(B).

(n4)Footnote 5. Fed. R. Civ. P. 6, advisory committee note of 2009.

(n5)Footnote 6. Fed. R. Civ. P. 6, advisory committee note of 2009 ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays.").

(n6)Footnote 7. *See* 1 *Moore's Federal Practice*, §§ 6.02, 6.03 (basic counting rule has its origins in common law and applies not only to time periods set out in federal rules, but also to calculation of federal statutory periods except when those statutes explicitly provide for different method of calculating time periods).

(n7)Footnote 8. Fed. R. Civ. P. 6(a)(1); Fed. R. Crim. P. 45(a)(1); Fed. R. App. P. 26(a)(1); *proposed* Fed. R. Civ. P. 6(a)(1)(A); *proposed* Fed. R. Crim. P. 45(a)(1)(A); *proposed* Fed. R. App. P. 26(a)(1)(A).

(n8)Footnote 9. Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3); *proposed* Fed. R. Civ. P. 6(a)(1)(C); *proposed* Fed. R. Crim. P. 45(a)(1)(C); *proposed* Fed. R. App. P. 26(a)(1)(C).

(n9)Footnote 10. Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3).

(n10)Footnote 11. *See proposed* Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3).

(n11)Footnote 12. *See, e.g.*, Fed. R. Civ. P. 6, advisory committee note of 2009.

(n12)Footnote 13. *See* 1 *Moore's Federal Practice*, § 5.31[5]; 14 *Moore's Federal Practice*, § 77.02.

(n13)Footnote 14. *Proposed* Fed. R. Civ. P. 6(a)(5); Fed. R. Crim. P. 45(a)(5); Fed. R. App. P. 26(a)(5).

(n14)Footnote 15. *See* Fed. R. Civ. P. 6, advisory committee note of 2009 ("In determining what is the 'next' day ... , one should continue counting in the same direction--that is, forward when computing a forward-looking period and backward when computing a backward-looking period.").

(n15)Footnote 16. *Proposed* Fed. R. Civ. P. 6(a)(6)(C), Fed. R. Crim. P. 45(a)(6)(C), Fed. R. App. P. 26(a)(6)(C).

(n16)Footnote 17. *See* Fed. R. Civ. P. 6, advisory committee note of 2009 ("For forward-counted deadlines, ... someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself, rather than the day before.").

(n17)Footnote 18. *Proposed* Fed. R. Civ. P. 6(a)(4)(B), Fed. R. Crim. P. 45(a)(4)(B), Fed. R. App. P. 26(a)(4)(D).

(n18)Footnote 19. *Proposed* Fed. R. Civ. P. 6(a)(4)(A); Fed. R. Crim. P. 45(a)(4)(A), Fed. R. App. P. 26(a)(4)(A).

(n19)Footnote 20. *Proposed* Fed. R. App. 26(a)(4)(B).

(n20)Footnote 21. *Proposed* Fed. R. Civ. P. 6(a)(2)(A); Fed. R. Crim. P. 45(a)(2)(A); Fed. R. App. P. 26(a)(2)(A).

(n21)Footnote 22. *Proposed* Fed. R. Civ. P. 6(a)(2)(B); Fed. R. Crim. P. 45(a)(2)(B); Fed. R. App. P. 26(a)(2)(B).

(n22)Footnote 23. *Proposed* Fed. R. Civ. P. 6(a)(2)(C); Fed. R. Crim. P. 45(a)(2)(C); Fed. R. App. P. 26(a)(2)(C).

(n23)Footnote 24. Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

(n24)Footnote 25. Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.



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163A-163A Moore's Fed Practice Time-Computation Amendments II

II. PRINCIPLES USED IN ADJUSTING INDIVIDUAL TIME PERIODS

A. General Scheme Underlying the Time-Period Changes

One of the primary goals of the drafters was to ensure that the changes to the time computation method did not shorten, as a practical matter, any time period in the rules. n26 Another goal, though less important, was to make the time periods in the rules more convenient by setting them in multiples of seven days whenever possible. n27 The drafters reviewed every time period in the rules with these two purposes in mind. They paid particular attention to every period that was less than 11 days because such periods would be effectively shortened by the change in the time-computation method. n28 After a comprehensive review, they proposed amending time periods in a total of 52 Appellate, Civil, and Criminal Rules.

Though the drafters generally adjusted the time periods to meet the two goals, they did not mechanically extend every short period of time and change every period to a multiple of seven days. Instead they reviewed and evaluated each time period independently. They recognized that some periods were deliberately short and only limited extensions would be appropriate to account for the inclusion of weekends. Practical experience with time periods in other rules, however, called for significant extensions. The drafters took advantage of the top-to-bottom review of the rules to make appropriate adjustments to time periods if there was a good reason to do so.

The bottom line is that practitioners must be aware that virtually all time periods in the federal rules have been adjusted. Most of the adjustments will, as a practical matter, either slightly extend a time deadline or maintain the status quo. A handful of amendments are made for reasons independent of those required to account for the change in the time-computation method. n29 Because the principles were not applied with anything resembling mechanical consistency, a prudent practitioner must check every single deadline, and review all calendaring systems to make sure that every possible deadline change is anticipated.

Practitioners also must be aware that the change in the method of computing time in the federal rules applies to time periods contained in local rules and in statutes affecting court proceedings. Courts were asked to amend their local rules consistent with the changes to the federal rules. Courts also were advised to make these changes effective on the same date as the federal rule changes and the changes to the relevant statutory time periods, December 1, 2009, to prevent confusion.

B. Shorter Deadlines Lengthened to Account for Changes in Counting Rules

Most of the changes in the federal rules that will take effect in December 2009 are intended either to offset the inclusion of weekends and holidays in the computation of short time periods or set the periods in multiples of seven days. A good example of the extension of a short time period given by the drafters of the amendments to the Federal Rules of Civil Procedure is Rule 14(a)(1).ⁿ³⁰ As currently drafted, a defending party may serve a third-party summons and complaint on a nonparty without leave of court if the defending party acts not more than 10 days after serving its original answer in the action.ⁿ³¹ To keep the deadline essentially the same under the new methods for counting time periods, this time period will be extended to 14 days to account for the four days in the two intermediate weekends.ⁿ³²

C. In Adjusting Deadlines, Week-Long Periods (Multiples of 7 Days) Were Preferred

In adjusting deadlines, the drafters of the amendments expressed a preference for time periods measured in weeks, that is, in 7-day increments. For example, in Appellate Rule 5(d)(2), a 10-day period was replaced with a 14-day period.ⁿ³³ In Appellate Rules 28.1(f) and 31(a), 3-day periods were replaced with 7-day periods.ⁿ³⁴ The advantage of such time periods is explained in the context of changing 10-day periods to 14-day periods:ⁿ³⁵

A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period--the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods.

The drafters of the amendments explain their methodology as follows:ⁿ³⁶

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method--two Saturdays and Sundays were excluded, giving 14 days in all.

This explanation accounts for the almost universal practice of transforming 20-day periods into 21-day periods.ⁿ³⁷ After all, 20-day periods would not be affected by the change in time-period calculation methods, but as the charts in this pamphlet show, most (if not all) 20-day periods were changed to 21-day periods.

The drafters did not apply their preference for deadlines stated in increments of seven days to any period that was already set at 30 days or longer because it is more convenient to compute such longer time periods in months or years.ⁿ³⁸

D. Adjusting Seven-Day Periods Raises Issues

There are a few 7-day periods in the rules, for example, Criminal Rules 29(c)(1), 33(b)(2), 34, and 35(a), which raised unique issues. Adding two days to these time periods would offset the inclusion of an intermediate weekend, but a 9-day period would fall short of meeting the drafters' intent to set time periods in multiples of 7 days, whenever possible. Extending 7-day periods to 14-day periods would be consistent with the preference for 7-day multiples, but it might provide too much time in a given situation. For example, the drafters did not extend the 7-day period in Appellate Rule 5(b)(2) from 7 days to 14 days. Instead, they changed it to 10 days.ⁿ³⁹ In this case, the drafters concluded that the 7-day period had to be extended to account for the practical loss of two days under the new time computation method, but there was good reason to keep it relatively short.ⁿ⁴⁰

The amendments dealing with time periods for filing interlocutory appeals in class actions offer a good illustration of how complicated adjusting 7-day time periods can be. The Statutory Time-Periods Technical Amendments Act of 2009

n41 did not alter the general statute authorizing discretionary interlocutory appeals, 28 U.S.C. § 1292(b), so the statutory period for taking an interlocutory appeal under this provision remains at 10 days. n42 As noted earlier, the change in counting methodology will effectively shorten this "10-day" period when the federal rule amendments become effective on December 1, 2009. n43 The drafters concluded that maintaining a "shortened" 10-day period was appropriate for these types of proceedings. For class actions covered by the Class Action Fairness Act, the statutory provision governing the time period for seeking appellate review of a district court's order on a remand motion was extended to 10 days. n44 The statutory amendment not only extended the time period but also addressed a troublesome drafting error, which had inadvertently called for a seven-day "waiting period" before an application for an appeal could be filed. n45 The amendment provided a clear deadline for filing an application to appeal. However, the time period selected was not 14 days but 10 days. n46

Despite the use of a 10-day period in the statutory provisions governing interlocutory appeals generally and of class-action orders on remand motions specifically, the time period in Rule 23(f) governing interlocutory appeal of an order granting or denying class-action certification was extended from 10 to 14 days. n47 Prior to the proposed amendments, these appeals had, like the general statute on discretionary interlocutory appeals, a 10-day deadline within which to file a "petition" for permission to appeal. n48 However, this 10-day deadline was changed to a 14-day deadline in the proposed amendments. n49 Thus, one form of discretionary appeals affecting class actions has a 10-day deadline for filing an application to appeal (in conformity with the general statute on interlocutory appeals), but another form of discretionary appeals in class actions has a 14-day deadline to take the same action.

E. Some Deadlines Were Reconsidered on the Merits and Restated Accordingly

1. "Jurisdictional" Time Limits for Civil and Criminal Post-Trial Motions Expanded

The time periods or deadlines for filing post-trial motions in civil cases, such as a motion for new trial, n50 are frequently considered "jurisdictional" in the sense that (1) a court may not grant an untimely motion, n51 and (2) neither the court nor the parties have the power to extend the deadlines for these motions. n52 The drafters did not merely restate these deadlines as the same or similar periods, adjusted for the new counting rules. Instead, the drafters decided to make a more significant change and expanded the time for filing these types of motions from 10 to 28 days: n53

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

A similar expansion of the time periods governing post-trial motions in criminal cases was also made. These filing deadlines were expanded from seven to 14 days. This might have been justified under the principles of adjusting for counting-rule changes to a same or similar period (*see* II.B., *above*) that is a multiple of seven days (*see* II.C., *above*). However, given the "jurisdictional" nature of the deadlines for these post-trial motions, the drafters adjusted the deadlines by selecting what they determined was a more substantively appropriate deadline: n54

Former [Criminal] Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuance, and the filing of bare bones motions that required later supplementation. The 14-day period (including intermediate Saturdays,

Sundays, and legal holidays as provided by [Criminal] Rule 45(a)) sets a more realistic time for the filing of these motions.

2. General Civil Motion Deadlines Reconsidered

Prior to the 2009 amendments to the Federal Rules of Civil Procedure, Rule 6 permitted written motions to be made on a mere five days' notice, n55 and any opposing affidavit to the motion could be served a mere one day before the "hearing." n56 In most courts, this "default" provision was impractical. Local rules in most courts set much different limits on notice for motions and on the deadlines for responding to motions. n57 This will probably not change, but the "default" provisions of Rule 6 setting deadlines for notice of and opposition to motions have been deliberately altered to a more realistic 14 days of notice for motions and a 7-day deadline for filing opposition. n58

Along the same line, the "unrealistically short" amount of notice on which the court clerk could tax costs other than attorney's fees has been extended from a single day to 14 days under Rule 54. n59

3. Time Limits on Amendments of Pleadings Without Leave of Court Completely Revised

Prior to the 2009 amendments Federal Rules of Civil Procedure, Rule 15(a)(1) permitted a pleader to amend a pleading once without leave of court ("as a matter of course") under the following two circumstances: n60

- The amendment was made before a "responsive pleading" was served; or
- If a responsive pleading was not allowed, the amendment was made within 20 days of serving the pleading.

This scheme has generated a large amount of confusion and resulting litigation. n61 Under the pre-amendment scheme, the service of a responsive answer immediately cut off the right to amend as a matter of course, but the service of a responsive Rule 12 motion, or, for that matter, a responsive summary judgment motion, would not cut off the right to amend because these motions do not fall under the definition of a "pleading." Thus, if a defendant challenges the complaint by moving to dismiss without filing an answer, the right to amend as a matter of course continues while the motion remains under consideration. n62

The drafters did not merely correct the time periods to conform to the new time-counting rules; they substituted an entirely new scheme of deadlines for amendments to pleadings without leave of court. Under proposed amended Rule 15(a), a pleader has a right to make one amendment without leave of court within 21 days of serving the pleading. n63 If the pleading is one that does require a response, and if either a responsive pleading or a Rule 12 motion is filed, there is no immediate cutoff of the right to amend without leave. Instead, the right to amend without leave of court survives both a responsive pleading and a responsive Rule 12 motion if the amendment is made within 21 days of the service of the responsive pleading or Rule 12 motion, whichever is earlier. n64 The 21-day periods to amend after service of a response to the pleading are not cumulative. If a responsive pleading is served after a Rule 12 motion, there is no new 21-day period. n65

There are three related, substantial differences in the new scheme:

- The distinction between responsive "pleadings" and responsive Rule 12 "motions" as they affect the time to file is eliminated. A response to the pleading in either form has the same procedural effect; n66
- Service of a response to the pleading, even in the form of a responsive "pleading," does not immediately terminate the right to amend without leave of court. The right to amend without leave of court persists for another 21 days; n67 and

- The right to amend is cut off after 21 days following service of a response to the pleading, regardless of whether response is in "motion" or "pleading" form. The right to amend without leave will not persist through potentially lengthy litigation of Rule 12 motions until some responsive "pleading" is served. n68

4. Default Scheduling Rules for Making and Responding to Summary Judgment Motions Completely Revised

Prior to the 2009 amendments to the Federal Rules of Civil Procedure, Rule 56(b) permitted a "defending" party to make a motion for summary judgment "at any time." n69 In contrast, under the pre-amendment version of Rule 56(a), a "claiming" party could move for summary judgment only after 20 days elapsed from the commencement of the action or after an opposing party served a motion for summary judgment. n70 The pre-amendment version of Rule 56 required only 10 days' notice of the motion, and permitted opposing affidavits to be served at any time "before the day of the hearing." n71

As the drafters note, "[t]he timing provisions for summary judgment are outmoded." n72 The amendments totally revise Rule 56(c), setting out an entirely new timing scheme. n73 Rule 56(a) and (b) are revised to eliminate the timing distinction between motions by "claiming" and "defending" parties. n74

The revised scheme for timing of summary judgment motions provides:

- Any party may move for summary judgment "at any time until 30 days after the close of all discovery." n75 A motion may be filed at the same time the action is commenced. If the motion is premature, the time for response may be extended. n76
- Any response to the motion must be filed within 21 days of service of the motion, or when a responsive pleading is due, whichever is later. n77
- The moving party may reply to the response to the motion within 14 days after the response is served. n78

The drafters are well aware that these Rule 56 provisions are, for all practical purposes, "default" provisions. n79 The proposed rule itself notes that its deadlines will not apply if "a different time is set by local rule or the court otherwise orders." n80 In fact, the timing of summary judgment motions is almost always a matter addressed at a Rule 16(b) scheduling conference and in the Rule 16(b) scheduling order itself. n81

Practitioners should also be aware that the timing provisions in Rule 56 that will go into effect on December 1, 2009, will likely be altered again on December 1, 2010. The 2010 changes are part of a comprehensive revision of Rule 56 that is currently pending approval under the rulemaking process. Under the 2010 changes, the provision governing the time to file a summary judgment motion remains unaltered, but the provisions governing the time to file a response to the motion and reply to the response will be eliminated, leaving such times to local court determinations. The rulemakers recognize that such consecutive amendments may cause confusion, but concluded that the benefits from the 2010 changes would outweigh the temporary confusion.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice Time Limitations Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview Civil Procedure Pleading & Practice Pleadings Time Limitations Computation Civil

ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureAppealsReviewabilityTime LimitationsCriminal Law & ProcedureAppealsProceduresTime Limitations

FOOTNOTES:

(n1)Footnote 26. Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept. 2008, Rules, p. 2 ("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.").

(n2)Footnote 27. Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept. 2008, Rules, p. 4 ("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.").

(n3)Footnote 28. *See, e.g.*, Fed. R. Civ. P. 6, advisory committee note of 2009 ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays").

(n4)Footnote 29. *See, e.g., proposed* Fed. R. App. P. 4(a)(A)(vi) (adjusting time to file a Fed. R. Civ. P. 60 motion that tolls appeal time); Fed. R. App. P. 4(a)(6)(B) (adjusting time for motion to reopen time to file appeal); Fed. R. Civ. P. 6(c) (adjusting time to serve motion and any affidavit supporting motion in opposition); Fed. R. Civ. P. 50, 52, and 59 (adjusting time to file certain posttrial motions); Fed. R. Civ. P. 54(d)(1) (adjusting time of taxation of costs); Fed. R. Civ. P. 56 (establishing presumptive deadline for motions); Fed. R. Crim. P. 29, 33, and 34 (adjusting time to file certain posttrial motions for judgment of acquittal); and Fed. R. Crim. P. 35 (adjusting deadline to file motion to correct errors in sentencing).

(n5)Footnote 30. *See* Fed. R. Civ. P. 6, advisory committee note of 2009.

(n6)Footnote 31. Fed. R. Civ. P. 14(a)(1).

(n7)Footnote 32. *Proposed* Fed. R. Civ. P. 14(a)(1).

(n8)Footnote 33. *Compare* Fed. R. App. P. 5(d)(2) *with proposed* Fed. App. P. 5(d)(2).

(n9)Footnote 34. *Compare* Fed. R. App. P. 28.1(f), 31(a) *with proposed* Fed. App. P. 28.1(f), 31(a).

(n10)Footnote 35. Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

(n11)Footnote 36. Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

(n12)Footnote 37. *See, e.g.*, Fed. R. Civ. P. 12(a) (normal time for responding to complaint changed from 20 to 21 days).

(n13)Footnote 38. Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009 ("Thirty-day and longer periods, however, were retained without change.").

(n14)Footnote 39. *Compare* Fed. R. App. P. 5(b)(2) *with proposed* Fed. R. App. P. 5(b)(2).

(n15)Footnote 40. Fed. R. App. P. 5, advisory committee note of 2009 ("Under former [Appellate] Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current [Appellate] Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offset the change in computation approach.").

(n16)Footnote 41. *See* Pub. L. No. 111-16, 123 Stat. 1607.

(n17)Footnote 42. 28 U.S.C. § 1292(b) ("The Court of Appeal ... may ... permit an appeal ... if application is made within ten days after entry of the order.").

(n18)Footnote 43. Fed. R. App. P. 26, advisory committee note of 2009 ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all time periods.").

(n19)Footnote 44. Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(2), 123 Stat. 1607.

(n20)Footnote 45. *See Moore's Federal Practice*, §§ 23.63A[5][b], 107.43A[2].

(n21)Footnote 46. *See* 28 U.S.C. § 1453(c)(1), as amended in 2009.

(n22)Footnote 47. *Compare* Fed. R. Civ. P. 23(f) *with proposed* Fed. R. Civ. P. 23(f).

(n23)Footnote 48. Fed. R. Civ. P. 23(f).

(n24)Footnote 49. *Proposed* Fed. R. Civ. P. 23(f).

(n25)Footnote 50. *See* Fed. R. Civ. P. 59(a).

(n26)Footnote 51. *See Moore's Federal Practice*, §§ 50.42[1], 50.51, 52.61, 59.11[1][a], [2][a], 59.31, 60.65[2][a].

(n27)Footnote 52. Fed. R. Civ. P. 6(b)(2).

(n28)Footnote 53. Fed. R. Civ. P. 50, 52, 59, advisory committee notes of 2009.

(n29)Footnote 54. Fed. R. Crim. P. 29, 33, 34, advisory committee note of 2009.

(n30)Footnote 55. Fed. R. Civ. P. 6(c)(1).

(n31)Footnote 56. Fed. R. Civ. P. 6(c)(2).

(n32)Footnote 57. *See* 1 *Moore's Federal Practice*, § 6.07 ("As a practical matter, the five-day period for notice of motions is frequently superseded by provisions of local rules."); § 6.08[1] ("Local rules typically require opposition to be filed a considerably longer time before the hearing.").

(n33)Footnote 58. *See proposed* Fed. R. Civ. P. 6(c)(1), (2).

(n34)Footnote 59. *Compare* Fed. R. Civ. P. 54(d)(1) *with proposed* Fed. R. Civ. P. 54(d)(1); *see* Fed. R. Civ. P. 54, advisory committee note of 2009 ("Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response.").

(n35)Footnote 60. Fed. R. Civ. P. 15(a)(1).

(n36)Footnote 61. *See 3 Moore's Federal Practice*, §§ 15.10-15.13.

(n37)Footnote 62. Fed. R. Civ. P. 15, advisory committee note of 2009 ("Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a 'pleading' as defined in Rule 7."); *see also 3 Moore's Federal Practice*, § 15.11.

(n38)Footnote 63. *Proposed* Fed. R. Civ. P. 15(a)(1)(A).

(n39)Footnote 64. *Proposed* Fed. R. Civ. P. 15(a)(1)(B).

(n40)Footnote 65. Fed. R. Civ. P. 15, advisory committee note of 2009.

(n41)Footnote 66. Fed. R. Civ. P. 15, advisory committee note of 2009 ("The distinction drawn in former Rule 15(a) is changed").

(n42)Footnote 67. Fed. R. Civ. P. 15, advisory committee note of 2009 ("the right to amend is no longer terminated by service of a responsive pleading.").

(n43)Footnote 68. Fed. R. Civ. P. 15, advisory committee note of 2009 ("the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f).").

(n44)Footnote 69. Fed. R. Civ. P. 56(b).

(n45)Footnote 70. Fed. R. Civ. P. 56(a).

(n46)Footnote 71. Fed. R. Civ. P. 56(c).

(n47)Footnote 72. Fed. R. Civ. P. 56, advisory committee note of 2009.

(n48)Footnote 73. *See proposed* Fed. R. Civ. P. 56(c).

(n49)Footnote 74. *See proposed* Fed. R. Civ. P. 56(a), (b).

(n50)Footnote 75. *Proposed* Fed. R. Civ. P. 56(c)(1)(A).

(n51)Footnote 76. Fed. R. Civ. P. 56, advisory committee note.

(n52)Footnote 77. *Proposed* Fed. R. Civ. P. 56(c)(1)(B).

(n53)Footnote 78. *Proposed* Fed. R. Civ. P. 56(c)(1)(C).

(n54)Footnote 79. Fed. R. Civ. P. 56, advisory committee note of 2009 ("The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule.").

(n55)Footnote 80. *See proposed* Fed. R. Civ. P. 56(c)(1).

(n56)Footnote 81. Fed. R. Civ. P. 56, advisory committee note of 2009 ("Scheduling orders are likely to supersede the rule provisions in most cases."); *see* Fed. R. Civ. P. 16(b)(3)(A); *see also 3 Moore's Federal Practice*, § 16.13[1][b]; *Manual for Complex Litigation (Fourth)* § 11.34 (2004).



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Moore's Federal Practice, Time-Computation Amendments to Federal Rules & Statutes (2010)

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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
PROCEDURES AND DEADLINES

163A-163A Moore's Fed Practice Time-Computation Amendments III

**III. AMENDMENTS OF TIME PERIODS IN SELECTED STATUTORY PROVISIONS AFFECTING
COURT PROCEEDINGS**

The Statutory Time-Periods Technical Amendments Act of 2009 amends 28 statutory provisions affecting court proceedings in cases litigated in federal courts, including 9 bankruptcy provisions, to coincide with the changes to the method of computing time in the rules in two important ways. n82 First, the legislation changes certain statutory deadlines to offset any shortening of the time periods resulting from the rules changes that count every day, in effect maintaining the same time period in the statutes. Second, the legislation changes some statutory deadlines that would otherwise be inconsistent with the amended rules deadlines and lead to confusion. The changes, like the proposed rule amendments, take effect on December 1, 2009. n83

Though a large number of statutory time periods could theoretically be affected by the proposed shift in the rules' method of computing time, the number of statutes actually amended is modest. Only statutory time provisions in which the case law applied the rules' method of computing time were amended. Also, only statutes that are frequently used or have time periods that could helpfully be adjusted to offset the effects of the time-computation method were amended. The amendment of 28 U.S.C. § 636(b)(1) provides a good illustration of such a change. n84 The provision sets the period for objecting to a magistrate judge's report and recommendations at 10 days. n85 The proposed amendments to Civil Rule 72 and Criminal Rule 59 extend the time from 10 days to 14 days, n86 recognizing that under the present computation method 10 days has always meant at least 14 calendar days. Section 636(b) is amended to allow 14 days n87 so that the statute and rules remain consistent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice Time Limitations Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview Civil Procedure Pleading & Practice Pleadings Time Limitations Computation Civil Procedure Pleading & Practice Pleadings Time Limitations Extensions Civil Procedure Appeals Reviewability Time Limitations Criminal Law & Procedure Appeals Procedures Time Limitations

FOOTNOTES:

(n1)Footnote 82. See Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, §§ 2-6, 123

Stat. 1607.

(n2)Footnote 83. Pub. L. No. 111-16, § 7, 123 Stat. 1607.

(n3)Footnote 84. *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(1), 123 Stat. 1607.

(n4)Footnote 85. 28 U.S.C. § 636(b)(1).

(n5)Footnote 86. *Proposed* Fed. R. Civ. P. 72(b)(2); Fed. R. Crim. P. 59.

(n6)Footnote 87. Pub. L. No. 111-16, § 6(1), 123 Stat. 1607.



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Moore's Federal Practice, Time-Computation Amendments to Federal Rules & Statutes (2010)

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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
PROCEDURES AND DEADLINES

163A-163A Moore's Fed Practice Time-Computation Amendments IV

**IV. PROPOSED AMENDMENT TO CIVIL RULE 6 AND ADVISORY COMMITTEE NOTE TO RULE 6
AMENDMENTS**

New material is underlined; matter to be omitted is lined through.

Rule 6. Computing and Extending Time; Time for Motion Papers

The material within the following brackets is overstruck in the original. [**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:]

The material within the following brackets is overstruck in the original. [(1)] *The material within the following brackets is overstruck in the original. [Day of the Event Excluded.]* The material within the following brackets is overstruck in the original. [Exclude the day of the act, event, or default that begins the period.]

The material within the following brackets is overstruck in the original. [(2)] *The material within the following brackets is overstruck in the original. [Exclusions from Brief Periods.]* The material within the following brackets is overstruck in the original. [Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.]

The material within the following brackets is overstruck in the original. [(3)] *The material within the following brackets is overstruck in the original. [Last Day.]* The material within the following brackets is overstruck in the original. [Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or--if the act to be done is filing a paper in court--a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.]

The material within the following brackets is overstruck in the original. [**(4)]** *The material within the following brackets is overstruck in the original. ["Legal Holiday" Defined.]* The material within the following brackets is overstruck in the original. [As used in these rules, "legal holiday" means:]

The material within the following brackets is overstruck in the original. [**(A)** the day set aside by statute for observing

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New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and]

The material within the following brackets is overstruck in the original. [**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.]

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

* * * * *

(b) Extending Time.

* * * * *

(2) **Exceptions.** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b) ~~The material within the following brackets is overstruck in the original. [, except as those rules allow].~~

(c) Motions, Notices of Hearing, and Affidavits.

(1) **In General.** A written motion and notice of the hearing must be served at least ~~The material within the following brackets is overstruck in the original. [5]~~ 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) **Supporting Affidavit.** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least ~~The material within the following brackets is overstruck in the original. [1]~~ 7 days before the hearing, unless the court permits service at another time.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory

provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 60(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day--and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days--including intermediate Saturdays, Sundays, and legal holidays--are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method--two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period--the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 28 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction--that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday--no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods--*i.e.*, periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday--no earlier than Tuesday, April 22.

Subdivisions (b), (c). The times set in the former rule at 1 or 5 days have been revised to 7 or 14 days.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice Time Limitations Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview Civil Procedure Pleading & Practice Pleadings Time Limitations Computation Civil Procedure Pleading & Practice Pleadings Time Limitations Extensions Civil Procedure Appeals Reviewability Time Limitations Criminal Law & Procedure Appeals Procedures Time Limitations



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Moore's Federal Practice, Time-Computation Amendments to Federal Rules & Statutes (2010)

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163A PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME-COUNTING
PROCEDURES AND DEADLINES

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V. DEADLINE CHANGES IN CIVIL RULES

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DEADLINE CHANGES IN FEDERAL STATUTES
(Statutory Time-Periods Technical Amendments Act of 2009)
Pub. L. No. 111-16; 123 Stat. 1607

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