

December 2009 Amendments to Federal Civil Rules

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Absent unanticipated action by Congress, amendments to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure will take effect December 1, 2009. Perhaps the most significant amendments are to the times for taking particular actions and the means of calculating time—changes that should simplify the calculation for all (and particularly for Michigan practitioners, since federal procedure will now largely parallel Michigan's). This article summarizes the 2009 amendments.

Timing Amendments

The most important changes are to Civil Procedure Rule 6 and Appellate Procedure Rule 26, for which an unnecessarily complicated and frequently inconsistent method of calculating time has been removed in favor of a much simpler system. Currently, periods of less than 11 days are calculated excluding intervening weekends and holidays, while periods of 11 days or more are calculated counting all intervening days. Effectively, most 10-day periods are really 14 days, excluding two intervening sets of weekend days, or even 15 days when a holiday also occurs.

Civil Rule 6 and Appellate Rule 26 now adopt what is being called a “days are days” approach, under which all days are counted at all times. As when currently calculating days, the day triggering the count is excluded and the last day of the period is included unless it is a weekend or holiday, in which case the next non-weekend or holiday is the deadline. (Interestingly, this rule is maintained even though electronic filing ordinarily makes it possible to file on a weekend or holiday.) Civil Rule 6 and Appellate Rule 26 will now also include a method for counting hours; although no

periods of the federal rules are expressed in hours, some orders or statutes impose deadlines expressed that way. As with days, “hours are hours,” i.e., all are counted. Finally, Civil Rule 6 and Appellate Rule 26 clarify that, for electronic filing, the deadline is midnight in the court's time zone. In addition, when the clerk's office is “inaccessible”—a term unfortunately not defined—for filing on the deadline, the deadline is extended until the next accessible date.

To compensate for periods that would be shortened by the “days are days” approach, the amended rules revise and extend a number of deadlines, with most due dates now expressed in multiples of seven (as has been done in Michigan for a number of years). The following periods are revised:

- **Time extended from 10 to 14 days:** Minimum time before hearing for filing a motion (formerly 5 days) [6(c)(1)]; time to answer if motion for more definite statement denied, or to answer a more definite statement [12(a)(4)(A) and (B)]; time to file a more definite statement if so ordered [12(e)]; third-party complaint without leave of court [(14)(a)(1)]; response to an amended pleading [15(a)(3)]; petition for permission to appeal an order granting or denying class action status [23(f)(2)]; use of a deposition taken on short notice (from 11 days to 14 days) [32(a)(5)(A)]; service of written demand for jury [38(b)(1) and (c)]; notice for clerk to tax costs (formerly 1 day) [54(d)(1)]; affidavit in opposition to motion for new trial [59(c)]; automatic stay of proceedings to enforce judgment [62(a)]; maximum duration of *ex parte* temporary restraining order [65(b)(2)]; time before trial date for offer of judgment [68(a) and (c)]; objections to magistrate judge's order on nondispositive matters or recommendations on dispositive motion and response thereto [72(a) and (b)(2)]; filing of jury demand after removal or receipt of notice of removal [81(c)(3)(B)].
- **Time extended from 20 to 21 days:** Filing a responsive pleading, answer to a counterclaim or a crossclaim, or a reply to an answer [Rule 12(a)(1)(A), (B) and (C)]; filing a motion to strike [12(f)(2)]; amending as a matter of course [15(a)(1)(B)]; petition for deposition to perpetuate testimony [27(a)(2)]; objecting to or moving to adopt or modify Master's report [53(f)(2)]; answer to complaint to condemn property by eminent domain [71.1(d)(2)(A)(v) and 71(e)(2)]; alternative period to answer after removal [81(c)(2)(A) and (B)].
- **Time extended to 7 days:** Minimum time before hearing to serve affidavit opposing motion (formerly 1 day) [6(c)(2)];

Amendments to the rules include adopting what is being called a “days are days” and “hours are hours” approach, under which all days and hours are counted at all times.

written objection to written deposition question (formerly 5 days) [32(d)(3)(C)]; motion to review taxation of costs (formerly 5 days) [54(d)(1)]; service of motion for default judgment upon party who has appeared (formerly 3 days) [55(b)(2)]; alternative time to answer after removal notice (formerly 5 days) [81(c)(2)(C)].

- **Time extended to 28 days:** Renewed motion for judgment as a matter of law after trial (formerly 10 days) [50(b)]; time after judgment for new trial motion (formerly 10 days) [50(d)]; time after judgment for motion to amend findings (formerly 10 days) [52(b)]; motion for new trial (formerly 10 days) [59(b)]; sua sponte order for new trial (formerly 10 days) [59(d)]; motion to alter or amend judgment (formerly 10 days) [59(e)].
- **Appellate time revisions:** Similar technical revisions were made in appellate rules, although fewer appellate deadlines are expressed in multiples of seven. Briefing periods are not changed. Of most concern to practitioners is the change in the time to answer a motion from 8 to 10 days [Rule 27(a)(3)(A)]; however, since intervening weekends and holidays were not previously counted, this may amount to a reduction of time to answer. In addition, 3-day periods in Rules 28.1(f) and 31(a) become 7-day periods; the 5-day period in Rule 27(a)(4) likewise becomes a 7-day period; the 7-day period in Rule 4(a)(6) becomes 14 days; the 7-day periods in Rules 5(b)(2) and 19 become 10 days; the 8-day period in Rule 27(a)(3)(A) becomes 10 days; the 10-day period in Rule 4(a)(4)(A)(vi) becomes 28 days; the 10-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30, and 39 become 14 days; and the 20-day period in Rule 15(b) becomes 21 days.

Other Amendments to the Federal Rules of Civil Procedure

Rule 13 has been amended so that subdivision (f) is deleted. Subdivision (f) allowed for an unintentionally omitted counterclaim to be added to a pleading. Because Rule 15 already provides relief for a party

wishing to add an omitted counterclaim, subdivision (f) is redundant and its abrogation simply makes uniform the standards to be applied to the amendment of pleadings.

The amendment to Rule 15(a) restricts the time within which a party may amend a pleading to which a responsive pleading is required. Pursuant to current Rule 15(a), a responsive pleading cuts off the right to amend, while a Rule 12 motion prolongs the time to amend a pleading until the motion is decided. Under the 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. Subsequent amendments may be filed only upon leave of court.

Two new rules have been added by the 2009 amendments: Rules 48(c) and 62.1. Rule 48(c) adds a provision similar to that found in Criminal Rule 31 allowing for a juror poll. The poll may be taken on the court's own initiative and must be taken upon request of a party. Rule 62.1 is integrated with the parallel new Appellate Rule 12.1 and speaks to motions made in the district court after being divested of jurisdiction by a pending appeal. When such a motion is filed, the new rule gives the district court three options: (1) defer a ruling, (2) deny the motion, or (3) either indicate that the district court would be inclined to grant the motion if the case were remanded (known as an "indicative ruling") or state that the motion raises a substantial issue. Requests for indicative rulings typically occur after a party files a Rule 60(b) motion, and the new procedure is designed to facilitate cooperation between the district and appellate courts in determining whether it is better to decide the appeal before ruling on the motion. As explained below, the moving party must notify the Court of Appeals if the district court indicates that it would grant the motion or if the district court determines that the motion raises a substantial issue.

The procedure relating to Rule 56 summary judgment motions has been simplified by the changes to subdivisions (a)–(c). Under the new rule, any party may move for summary judgment up until 30 days following the close of discovery. Absent different times established by local rules or

court orders, a response to a summary judgment motion must be filed 21 days after the motion is filed, and the movant may file a reply brief 14 days following service of the response.

Rule 81 is amended to clarify that the definition of "state" includes not just the District of Columbia, but also any United States commonwealth or territory.

Other Amendments to the Federal Rules of Appellate Procedure

The only substantive civil Appellate Rule amendment relates to the creation of new FRAP 12.1. This new rule mirrors new Rule 62.1 relating to post-appeal motions brought in the district court. As discussed above, the new framework is designed to facilitate cooperation between the appellate and district courts in dealing with district court motions brought while an appeal is pending. Moving parties are tasked with notifying the circuit court clerk if the district court issues an indicative ruling or if the district court concludes that the motion raises a substantial issue. Upon receiving notice, the Court of Appeals may remand to the district court for further proceedings while retaining jurisdiction unless the Court of Appeals expressly dismisses the appeal. If a remand occurs, the parties must notify the circuit court clerk when the district court decides the motion on remand. ■



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