

The Times They are a'Changin' – with Apologies to Bob Dylan

By Trey Pauley and Judge Michael Merz

In this article, we do not attempt to explain the nuances of each new amendment to the Federal Rules of Civil Procedure. Rather, our goal is to delineate some of the more significant amendments that became effective on December 1, 2009. Further, while this article focuses on the time calculation changes, a few other important amendments are discussed.

Last December 1st brought about numerous time calculation amendments to the Federal Rules.¹ The purpose of the amendments was to “make the method of computing time consistent, simpler, and clearer.”² The amendments should help simplify our lives as attorneys by making it easier to calculate what is due when. Thus, the new amendments should be welcomed by all with open arms. Seasoned practitioners with the old time periods deeply embedded, however, have some adjustments to make.

It all starts with Fed. R. Civ. P. 6. Prior to December 1, 2009, Rule 6 excluded intermediate weekends and holidays for calculating time periods fewer than eleven days, but included weekends and holidays for calculating longer time periods. Judge Boyce F. Martin, Jr. of the Sixth Circuit accurately described the complexity of computing time under the former rules:

“If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure [prior to the 2009 amendments], time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days. And this does not even take into account inclement weather. As we sometimes say in Kentucky, there’s eight

ways to Sunday.”³

Instead of this prior tangle, which sometimes provided a “trap for the unwary,” we are now directed to “count every day, including intermediate Saturdays, Sundays, and legal holidays.”⁴ This is known as the “days-are-days” approach. Further, because the new time-computation approach would have shortened many time periods, several deadlines were extended to compensate for these shortened periods. For the most part, many deadlines of less than 30 days were amended to be in multiples of seven. For example, what were previously 1-, 3- or 5-day deadlines under the rules before the 2009 amendments are now 7-day deadlines. What used to be 10- or 11-day deadlines have now become 14-day deadlines. Finally, what were 20-day deadlines are now 21-day deadlines. Because there are exceptions to every rule, one should refer to the specific rule in question to determine the applicable deadline.

Another significant amendment involves the time in which parties may move for summary judgment. Absent a local rule or court order to the contrary, any party “may move for summary judgment at any time until 30 days after the close of all discovery.”⁵ Importantly, the 20-day waiting period for the claiming party, which existed before the 2009 amendments, has been abrogated. Additionally, a memorandum in opposition is due by a non-moving party “within 21 days after the motion is served or a responsive pleading is due, whichever is later.”⁶ The moving party then has 14 days to file a reply. Although it may be altered by local rule or court order, this is the first time the Federal Rules have set forth a briefing schedule for summary judgment. This amendment makes the usual scheduling used in federal court in Dayton the default timing rule on summary judgment.

Other important amendments to the Federal Rules include:

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- Under Fed. R. Civ. P. 15(a)(1), a party may amend a pleading once as a matter of course within 21 days of service or, if a responsive pleading is required, within 21 days after service of the responsive pleading or within 21 days after service of any motion under Fed. R. Civ. P. 12(b), (e) or (f), whichever is earlier. Unlike the rule prior to the 2009 amendments, a party now has 21 days to amend a pleading regardless of whether an answer is filed – an answer no longer forecloses a party's ability to amend as of right.
- Fed. R. Civ. P. 59(b) and 59(e) – post-judgment motions for new trial or to amend the judgment – may now be filed 28 days after judgment, compared to the former 10 days. Under Fed. R. Civ. P. 6(b)(2), this is one of the time periods a judge cannot extend.
- The phrase “last day” is now defined: Unless defined differently by statute, local rule or court order, the last day for electronic filing ends at midnight in the court's time zone or, for other filing methods, when the clerk's office is scheduled to close.⁷
- When computing hours, we are directed to begin counting “immediately on the occurrence of the event that triggers the period[.]”⁸ Notably, every hour is included in the calculation (even hours during weekends and legal holidays). Further, if the period ends on a weekend day or legal holiday, the period continues until the same time on the next day that is not a weekend day or legal holiday.⁹
- Prior to the amendments, Fed. R. Civ. P. 13(f) provided a “safe harbor” of sorts for attorneys who failed to file a compulsory counterclaim if such failure was due to “oversight, inadvertence, or excusable neglect.” The safe harbor, however, has been abrogated by the 2009 amendments.

To be consistent with the Federal Rules changes, the Local Rules of the Southern District were amended at the same time to change time periods of less than thirty days to multiples of seven. For example, a memorandum in opposition to a motion is now due 21 days after service instead of 20 days.¹⁰ In a wonderful example of collaboration with the courts, Congress amended dozens of time periods which interact with the Federal Rules to achieve consistency. For example, objections to a magistrate judge's report and recommendations must now be filed 14 days after the report instead of 10 days.¹¹

Despite the numerous amendments, certain aspects of the Federal Rules remain unchanged. For example, when calculating any time period consisting of days or a longer unit, the first day of the period, *i.e.*, the event that triggers the time period, is not counted.¹² The last day will be included in the calculation, unless the last day falls on a Saturday, Sunday, or legal holiday, when the period will run to the end of the following day that is not a Saturday, Sunday, or legal holiday.¹³ Further, Fed. R. Civ. P. 6(d), which adds three days to the time period when service is made under Fed. R. Civ. P. 5(b)(2) (C) (service by mail), (D) (leaving with clerk if no known address), (E) (electronic service if consented to in writing) or (F) (any other means if consented to in writing), remains untouched.

As stated above, this article provides only a brief look at the recent amendments to the Federal Rules of Civil Procedure. As always, an attorney should consult the actual rule in question to determine the nuances of the rule before deciding how (and when) to proceed. ●

Bankruptcy Procedure, and Criminal Procedure as well, but this article is limited to the Federal Rules of Civil Procedure.

- 2 *Excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedure (2009)*, at http://www.uscourts.gov/rules/Supreme%20Court%202008/Excerpt_ST_CV.pdf.
- 3 *Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005) (Martin, J.) (writing of the interaction between Fed. R. Civ. P. 54 on the time for filing a motion for attorney fees and Fed. R. Civ. P. 59 for filing a motion to amend the judgment). The Southern District resolved this problem by adopting S.D. Ohio Civ. R. 54.2 on August 1, 2008.
- 4 Fed. R. Civ. P. 6(a)(1)(B)
- 5 Fed. R. Civ. P. 56(c)(1)(A)
- 6 Fed. R. Civ. P. 56(c)(1)(B)
- 7 Fed. R. Civ. P. 6(a)(4)
- 8 Fed. R. Civ. P. 6(a)(2)(A)
- 9 Fed. R. Civ. P. 6(a)(2)(C)
- 10 S.D. Ohio Civ. R. 7.2
- 11 28 U.S.C. § 636(b)(1)
- 12 Fed. R. Civ. P. 6(a)(1)(A)
- 13 Fed. R. Civ. P. 6(a)(1)(C)

Endnotes

- 1 December 1, 2009, brought about changes to the Federal Rules of Appellate Procedure,

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