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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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September 26, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544-0001

Re: Proposed Amendment to Rule 6, F.R.Civ.P (December 2005 Class)

Dear Mr. McCabe:

It is respectfully suggested that perhaps the Advisory Committee rejected what is the simplest approach, adding the three days to the prescribed period, too quickly in its attempt to clarify the application of Rule 6(e). The perceived impact on Rule 6(a) could easily be avoided by simply adding in the third sentence the words "determined without regard to subsection (e)" after the word "days" and before the comma (.). In so doing, the 10 days would not become 13 as the Committee feared. In tracking response times, this court uses the method of adding the three days to the prescribed number of days and, where the prescribed period is less than 11 days, uses business days instead of calendar days. For example, if the prescribed period is 10 days, count out 10 business days, then add three calendar days. If the prescribed period was 11 days or more, simply add the three days and count calendar days, *e.g.*, a 15-day prescribed period becomes 18 calendar days. In either instance, if after adding the three calendar days the last day falls on a Saturday, Sunday or Holiday, the response is due on the next business day. This is a very straightforward, uncomplicated method. In addition, in using that method, the "business" days available for response (disregarding any possible intervening holidays) for a 15-day period is fairly uniform: 13 days if served on Monday, Tuesday or Wednesday, and 12 days if served on Thursday or Friday.

The Committee appears to have focused almost exclusively on the interaction between 6(e) and 6(a). What the Committee does not appear to have addressed is the effect of substituting "after" for "to" in 6(e) when the last day of the prescribed period ends on a Saturday: as will be the case in every instance where the prescribed period is 15 days (a commonly used prescribed number of days) and the day of service is a Friday. If one simply adds three days "to" the 15 days results in the response being due 18 days after mailing, or on a Tuesday (even if Monday is a holiday). However, if the prescribed period is computed as provided in Rule 6(a), the 15 days would not end on Saturday but on the following Monday (if not a holiday) or Tuesday (if the following Monday is a holiday). Adding the three days to that would make the response due on the following Thursday (if Monday is not a holiday) or Friday (if Monday is a holiday). This is going to require those responsible for tracking response time (court and law office support staff) to remember that, if the service date is

a Friday, one can not simply count out the requisite of days (if service is effected on a day other than Friday, it makes no difference which method is used unless the last day of the prescribed period is a Tuesday that is also a holiday). In addition, if service is on Friday, the period in which to respond is 14 business days compared to 12 days if served on a Thursday or 13 days if served on any other day.^{1/} The rule in many offices will be "serve on Thursday and never on Friday." If something is mailed late on Thursday, it will probably not be delivered until the following Monday. If mailed on Friday, it will also probably be received on the following Monday. The difference is that the recipient has 13 full business days to respond to the Friday service and only 11 full business days to respond to the Thursday service! Surely this is an unintended result. It also provides one more gambit for attorneys to employ in the game of one-upmanship that far too many practitioners employ these days.^{2/}

A similar situation arises when the last prescribed day falls on a Tuesday that also happens to be one of the traditional holidays. Although the effect on the number of days to respond is not that dramatic, it does impose somewhat of a greater burden on those tracking response times. If the three days is simply added to the prescribed days, the response would come due on a Friday without further checking. However, the proposed amendment to 6(e) requires the "tracker" to note that the preceding Tuesday was a holiday and, therefore, the response is not due until the following Monday. Just one more intermediate count to be made and item to be checked; another potential area for errors to occur.

I suggest that there is an easier and less confusing method of clarifying the situation:

1. Amend subsection (e) by substituting "number of days" for "period" at the end of the sentence; and
2. To eliminate any adverse impact on the 11-day rule, in the third sentence of subsection (a), add "determined without regard to subsection (e)" after the word "days" and before the comma (,).

This approach eliminates the need to check whether the last day of the prescribed number of days falls on a Saturday, Sunday or holiday before adding the three days under Rule 6(e) yet results in uniformity. It also eliminates the significant disparity between Thursday or Friday service in those situations where the prescribed time is 15 days (or any other situation where the last prescribed day otherwise falls on a Saturday).

^{1/} For Friday service: five days of each of the first two following weeks plus four days of the third week following service. For Thursday service: one day of the week of service, five days in each of the first and second weeks following plus one day in the third week following service.

^{2/} The cynicism stemming from more than three decades in the practice of law and three score years of living does tend to surface from time to time.

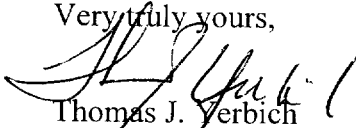
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One comment on counting the days if the time is determined in reverse, *i.e.*, preceding an event. The easiest solution to that is to have the prescribed period be “not later (or less) than the (number of days) before (the triggering date of event).” That way if the number of days counted backwards fall on a Saturday, Sunday or holiday, the due date would always be the last business day preceding. Perhaps this could be accomplished by adding a new subsection (f) to Rule 6 reading:

Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

Thank you and the Advisory Committee for considering the foregoing comments.

Very truly yours,



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