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Litigation & Dispute Resolution Update
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Changes to the US Federal Rules of Civil Procedure and the US Federal Rules of Appellate Procedure

A variety of technical, but quite significant, changes to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure go into effect on December 1, 2009. Because these new rules will affect a wide range of cases, and because in-house counsel will want to ensure that all of their outside counsel are aware of and understand these changes, we have prepared this brief summary of the most important amendments.

Calculation of Time Periods Under the Rules

The new rules implement the Judicial Conference's "Time-Computation Project," and are designed to simplify—but in the process substantially alter—the method of calculating various deadlines.

Most important, under the new rules intermediate weekend days and holidays count no matter how many days are provided for any given deadline. Thus, if a rule provides for 7 days to file a brief, that really means 7 days, not more. *See* Fed. R. Civ. P. 6(a); Fed. R. App. P. 26(a).[1] (Under the prior rules, 7 days would usually mean at least 9 days, as intermediate weekend days did not count when calculating short time periods.)

While the point of this change is to simplify time calculations, absent any other modifications to the rules the result would be that a wide variety of time periods would be significantly shortened. To counteract this, the new rules also extend many short time periods—for example, most 7- to-10-day periods will become 14-day periods under the revised rules. (The time periods for specific actions are beyond the scope of this Client Update.)

The rules continue to specify that due dates are automatically extended to the next business day. *See* Fed. R. Civ. P. 6(a)(1)(C); Fed. R. App. P. 26(a)(1)(C). To minimize the frequency with which extra days must be added to time calculations, however, many time periods in the rules have been altered to multiples of 7 (e.g., 7, 14, 21 or 28 days). Thus, if an event that triggers future due dates happens on a Wednesday, follow-up events will likely also happen on a Wednesday.

One small but important rule has *not* changed in the revision; the rules continue to provide that when a party must act within a specified amount of time after being served with a paper, the party receives an additional 3 days to respond if served via any means other than personal service—and importantly, receive an additional 3 days if served electronically. *See* Fed. R. Civ. P. 6(d); Fed. R. App. P. 26(c).

There has been quite a lot of discussion of eliminating this additional period after electronic service via a court's CM/ECF system, but the Judicial Conference apparently believes that the rule continues to be useful. (The primary concern is that eliminating the additional time period would create an incentive for attorneys not to register for electronic service.) We expect that there will be continued discussion of eliminating this rule in the future, however, as it is inconsistent with several of the guiding principles of the time-computation project.

Amended Pleadings

The revised version of Federal Rule of Civil Procedure 15 substantially alters when plaintiffs may amend their complaints without leave of court. Under prior practice, plaintiffs could amend their complaints once "as a matter of course" so long as they did so before being served with the defendant's answer. Thus, plaintiffs could amend their complaints without leave of court even if the defendant had filed a motion to dismiss under Rule 12(b)(6), and even if the court had

granted that motion (so long as the court did not specifically preclude amendment in its order). The mere act of filing an answer, however, would automatically terminate the right to amend the complaint.

The new rule provides that a party may file an amended complaint without leave of court within 21 days after being served with an answer *or* within 21 days after being served with a Rule 12 motion, whichever comes first. In other words, plaintiffs may now amend their complaints even if an answer has been filed—but they will have a limited period in which to amend their complaints after being served with a motion to dismiss under Rule 12(b). As the Civil Rules Advisory Committee explained in its Note on this change, "[t]his provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in [a] motion [to dismiss]."

Courts will retain the right to allow plaintiffs to file amended complaints at other times (for example, after the plaintiff has already filed one amended complaint, or after the court has granted a motion to dismiss), but this new rule will, we expect, change the dynamic and alter the frequency with which amendment is allowed.

Note that this new rule also alters when defendants will be allowed to file amended answers, but we anticipate that this aspect of the amendment will have little practical effect.

Post-Judgment Motions

Under the current version of the Federal Rules of Civil Procedure, most post-judgment motions are due 10 days after judgment is entered, a time period that under Rule 6(b)(2) could not be extended. (This deadline has applied in particular to motions for judgment as a matter of law under Rule 50(b), motions for a new trial under Rule 50(d) or 59(b), motions to amend findings of fact or conclusions of law under Rule 52(b) and motions to alter or amend the judgment under Rule 59(e).)

Ten days is often painfully short to prepare such motions (especially if appellate counsel is brought in to assist with their preparation). Thus, courts have sometimes authorized creative ways to avoid these time periods—for example, by allowing a party to file a bare-bones motion within the time period and thereafter supplementing that motion with a supporting brief.

The Judicial Conference has now amended each of these rules to allow 28 days to file these motions. That is a far more plausible time frame, though we caution that Rule 6(b)(2) continues to bar extending these time periods and we expect that judges will be far more reluctant in the future to allow extensions of time for filing supporting briefs.

Indicative Rulings

It is well established that district courts lack jurisdiction to consider Rule 60(b) motions for "Relief from a Judgment or Order" if an appeal has been filed. The new rules codify an informal practice that most courts have followed for years to address situations in which the district court would like to amend its prior judgment but lacks jurisdiction to do so.

New Federal Rule of Civil Procedure 62.1 allows district courts to enter "indicative rulings" when the court lacks jurisdiction over a case, and provides that the district court may (i) defer consideration of the motion pending any eventual return of the mandate by the court of appeals, (ii) deny the motion or (iii) "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." If the district court states either that it would grant the motion or that the motion raises a "substantial issue," the movant is obligated under Rule 62.1(b) and new Federal Rule of Appellate Procedure 12.1(a) to notify the court of appeals of the district court's position. Appellate Rule 12.1(b) then grants the court of appeals the power to remand to the district court for further proceedings, while retaining jurisdiction.

Other Changes

There are a number of other changes that, while less important than the foregoing, are worth noting.

TIMING FOR REPLY BRIEFS IN THE COURTS OF APPEALS

The Federal Rules of Appellate Procedure have been amended to provide that, absent leave of court, all reply briefs must be filed at least 7 days before oral argument, rather than at least 3 days before oral argument as in prior practice. *See* Fed. R. App. P. 28.1(f), 31(a).

DEADLINES FOR ELECTRONIC AND OTHER FORMS OF FILING

The new rules specify that when a paper is due on a specific date, electronic filing will be timely until midnight in the court's time zone, but that filings by other means must be *received* by the clerk's office by the time the clerk's office is scheduled to close. *See* Fed. R. Civ. P. 6(a)(4), Fed R. App. P. 26(a)(4). Briefs in the courts of appeals will still be considered timely if mailed on or before the last day of the filing period, however. *See* Fed. R. App. B. 25(a)(2)(B).

CALCULATING DUE DATES IN THE COURTS OF APPEALS

The new rules fix a lingering ambiguity in Federal Rule of Appellate Procedure 26(c), which governs how to account for the 3 extra days that are accorded parties who have been served with a paper by mail or via electronic service. The rule now specifies that you *first* calculate when the time period would expire, and *then* add 3 days. For example, if you are the appellee in a case and are served with the appellant's brief via overnight delivery, you would calculate your due date by counting the 30 days you have under Fed. R. App. P. 31(a)(1), then adjusting that due date if it falls on a weekend to extend it to the following Monday, and *then* adding 3 days because of the lack of hand service. This amendment parallels a similar amendment made to Federal Rule of Civil Procedure 6(d) in 2005 to eliminate the same ambiguity in the district court rules.

COUNTING BACKWARDS

Most of the time, due dates under the federal rules are determined by counting forward from a triggering event. Occasionally, however, a party must count backwards (10 days before a trial, 7 days before an argument, etc.). The rules have been amended to eliminate any ambiguity in how to account for weekends and holidays when counting backwards, and now specify that the parties should continue to count backwards to arrive at a due date. *See* Fed. R. Civ. P. 6(a)(5); Fed. R. App. P. 26(a)(5). Thus, if a party is ordered to file a brief 10 days before a trial, and the 10-day period would fall on a Saturday, the brief will be due the previous Friday.

Endnote

1 All citations in this Client Update are to the December 1, 2009, versions of the rules.

For more information about the amendments, or any other matter raised in this Client Update, please contact the author, listed below.

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