



RECENT AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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Effective December 1, 2005, the following rules were amended: Rules 6(e), 27(a)(2) and 45(a)(2) of the Federal Rules of Civil Procedure, and Rules B(1)(a) and C(6)(b)(i)(A) of the Supplemental Rules for Certain Admiralty and Maritime Claims. These amendments not only simplify the language of the rules and update statutory cross-references, but also may have a practical effect on your practice.

Civil Rule 6(e) (Additional Time After Certain Kinds of Service). An important part of every attorney's job is to meet deadlines. Attorneys and their staff cautiously and repeatedly count the days they have to respond to various pleadings. Of course, the first step to not missing a deadline is to know the deadline. That is why Civil Rule 6(e) was amended to clarify the method of counting the additional three days given to respond if service is by one of the methods provided in Civil Rule 5(b)(2)(B), (C) or (D).

Rule 5(b)(2)(B), (C) and (D), respectively, provide for service by mail, by leaving a copy with the clerk if the person served has no known address, and by electronic or other means consented to by the party served. Under the prior language of Rule 6(e), these methods of service required three days to be "added to" the prescribed period.

The prior "added to" language of Rule 6(e) led to confusion regarding how to calculate the additional three days. Some practitioners would add the additional three days after counting the days in the prescribed period without regard to whether the last day of the prescribed period fell on a Saturday, Sunday or legal holiday. Under this method, for example, if the last prescribed day was a Saturday, day 1 under Rule 6(e) would be Sunday, day 2 would be Monday (even if Monday was a legal holiday) and day 3 would be Tuesday. Therefore, the response would be calculated to be due on Tuesday. In this example, if Monday was a legal holiday, the additional three days would not extend the time to respond, since without the additional three days, the last day of the prescribed period would have also fallen on Tuesday given the weekend and holiday.

Other practitioners would count the additional three days differently. They would first look to the last day of the prescribed period to respond *before* counting the additional three days. Under this method, for example, if the last prescribed day was a Saturday, under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, the period expires on Tuesday. The three additional days would then be added – Wednesday, Thursday and Friday, with Friday being the third and final day to respond. This latter method was adopted, because the calculation provided a true three-day extension under all scenarios, and it is consistent with corresponding Appellate and Bankruptcy Rules.

To resolve the ambiguity in favor of the latter method, Rule 6(e) was amended to require three days to be "added after" the prescribed period. The amendment also simplifies the language of the rule to make it easier to understand. The amended rule now reads:

(e) Additional Time After Certain Kinds of Service.

Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the period.

Civil Rule 27(a)(2) (Depositions Before Action or Pending Appeal: Notice and Service). As rules evolve over time, cross-references by other rules are sometimes missed and must be updated. That is the primary purpose of the amendment to Civil Rule 27(a)(2), which corrects the outdated cross-reference to former Civil Rule 4(d).

Former Rule 4(d) is now allocated to various subdivisions of Rule 4. The current Rule 4 also covers more categories of defendants and modes of service than did former Rule 4(d). Therefore, amended Rule 27(a)(2) now cross-references Rule 4, rather than Rule 4(d).

The amendment to Rule 27(a)(2) also simplifies and conforms the language of the rule to current style conventions. The amended rule now reads:

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Civil Rule 45(a)(2) (Subpoena: Form: Issuance). The amendment to Civil Rule 45(a)(2) requires that deposition subpoenas served on nonparty witnesses state the method that will be used for recording their testimony.

Parties are afforded notice of the method for recording their testimony pursuant to Civil Rule 30(b)(2). Prior to this amendment, however, nonparties were not entitled to this notice in deposition subpoenas. Unless the nonparty was able to obtain the information from a party, the nonparty would not discover the recording method until he or she appeared to testify. Amended Rule 45(a)(2) now requires this information to be in the deposition subpoena.

The prior omission in deposition subpoenas could, in some circumstances, cause complications and delay. For example, a nonparty witness may have grounds for seeking a protective order with regard to the recording method pursuant to Civil Rule 26(c)(3). Providing advance notice of the method allows any protective issues to be raised and resolved before the deposition.

The amendment to Rule 45(a)(2) also conforms the language of the rule to current style conventions. The amended rule now reads: