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A "DAY" IS A DAY AGAIN: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure

by: *Kevin W. Holt*
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The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed changes to 21 of the Federal Rules of Civil Procedure as part of the Committee's "Time-Computation Project." The changes result from a decision to modify the way days are counted under the Federal Rules of Civil Procedure. The proposed rule changes were approved by the United States Supreme Court in March and will take effect on December 1, 2009, absent Congressional action.

Under the current Rule 6, when a time period in which to take action is shorter than 11 days, intermediate Saturdays, Sundays, and legal holidays are not counted. If the time period is 11 days or longer, all days are counted. This rule can cause no small amount of confusion, especially once concepts like adding additional time for responses after certain kinds of service are considered. Further, it can yield bizarre results. For instance, last year, 10 days from May 15 under the Federal Rules would have been June 4, a total of 20 actual days. However, 14 days from May 15 would have been June 1, 17 actual days. While the federal courts are extremely powerful, their ability to bend space

and time in this manner can leave a practitioner perplexed. This will change under the proposed new Rule 6.

The proposed new Rule 6 adopts what the Committee calls a "days are days" approach to computing all time periods, and makes no distinction between weekdays, weekends, and legal holidays that fall within time periods. The proposed new Rule 6 states, "When the period is stated in days or a longer unit of time:...exclude the day of the event that triggers the period; ... [and] count every day including intermediate Saturdays, Sundays, and legal holidays." Even as the Committee recognizes the "days are days" approach, the proposed new Rule 6 retains the current provision that if the last day being counted falls on a Saturday, Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.¹

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Letter From The Chair

by Gregory J. Haley

Virginia lawyers take the smooth operation of the Virginia State Bar for granted. The Bar, however, is a diverse operation with many discrete programs, including its specialized Sections. The Bar periodically asks the Sections to define and refocus each Section's mission and plan how the Section intends to accomplish its mission. Under the gentle direction of Manny Capsalis, the Litigation Section Board of Governors approved a new Five Year Strategic Plan in April, 2009. A copy of the Section's Five Year Strategic Plan is set out below.

The Section also conducted an e-mail survey of its members to find out what the members wanted the Section to be doing. Members responded that they want high quality, practical, timely, and inexpensive resources—including publications and continuing legal education programs, that will improve their litigation practice. The Section has turned its focused attention to meeting these expectations.

The Section's top priority will be publishing the Litigation Newsletter with a variety of high quality articles and features addressing litigation topics and skills. Joe Rainsbury has done incredible work as the Newsletter Editor. The Section is also working on providing a word-search feature available on the Section's website to allow quick research of old newsletter issues.

The Section will also present a continuing legal education program at the Annual Meeting in Virginia Beach in June 2010. Scott Ford is leading that effort. The Section typically presents its Annual Meeting Program in cooperation with another Section, often the Bench Bar Committee.

The Appellate Committee presented CLE programs in Alexandria and Richmond in July and October, 2009. Justice Barbara Keenan and Senior

Justice Elizabeth Lacy participated in these programs, which Monica Monday organized. The Appellate Committee will also be presenting an "Appellate Summit" in Richmond in 2010, in conjunction with the Virginia Bar Association's Appellate Section. Finally, the Appellate Committee will release a new edition of the Appellate Handbook after the Supreme Court's approval of new appellate rules in Virginia.

The Section is also involved in important efforts to further relationships among groups in the Bar. Representatives of the Senior Lawyers Conference and the Young Lawyers Conference serve as members of the Section's Board of Governors. The Section also promotes a dialogue between lawyers and judges through the participation of judicial members on the Board of Governors. Circuit Court Judge Rod Delk and United States Magistrate Judge Waugh Crigler serve as judicial members of the Section's Board of Governors.

Finally, the Section sponsors the Law in Society Award essay competition for high school juniors and seniors. The Section's involvement includes judging the essays, participating in the award ceremony at the Annual Meeting, and providing funds for scholarship awards. The Law in Society Award competition is an important program for the Bar's outreach efforts, sparking the interest of high-school students in legal issues that affect them. The hard work for the Law in Society Award program is done by Bar staffers Nancy Brizendine and Rod Goggin.

Patricia Sliger has provided staff and Bar liaison services for the Section for many years. Pat will be retiring at the end of 2009. The Section will miss her knowledge, skill, competence and guidance in the future.

This review illustrates that the Section works on many programs that benefit the practice of litigation

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lawyers in Virginia. The Section could not operate without the support of its members and the Bar staff. Many great lawyers participate in the Section's activ-

ities. I believe they do so because they expect that the knowledge, experience and relationships that result will improve the quality of their practice. ■

LITIGATION SECTION VIRGINIA STATE BAR • FIVE YEAR STRATEGIC PLAN

The Litigation Section is a voluntary association of members of the Virginia State Bar. The purposes of the Section include:

- (a) Improving the practice of litigation attorneys at both the trial and appellate court levels.
- (b) Improving the ability of Virginia lawyers to serve their clients.
- (c) Facilitating the administration of justice by promoting the public understanding of the justice system and improving the access of litigation services to the public.

The Section shall further its purposes by:

- (a) Promoting and presenting continuing legal education and training programs including the Annual Meeting Program, the Mid-Year Legal Seminar, the Appellate Symposia, the Appellate Summit, and regional training with the Young Lawyers Conference.
- (b) Promoting publishing efforts including the Litigation Section Newsletter, the Virginia Lawyer Magazine and the Appellate Handbook.
- (c) Fostering relationships among attorneys, the judiciary, the Young Lawyers Conference, and senior lawyers.
- (d) Promoting professionalism and Bar leadership activities and opportunities.
- (e) Fostering public understanding of the justice system through participation in programs such as the Law in Society essay contest.
- (f) The Section has amended its Bylaws to bring them current including establishing the separate offices of Secretary and Treasurer and a new Purposes Section.
- (g) The Section will continue to consider specific future initiatives and special projects as the need or opportunity for such efforts are identified.

Approved by the Board of Governors, April 3, 2009.

A "Day" is a Day Again *cont'd from page 1*

In order to ensure that the change to Rule 6 does not shorten any deadlines, almost all of the time periods of less than 11 days under the Federal Rules of Civil Procedure will be lengthened under the new rules, as will certain of the longer time periods. Most deadlines will be stated in multiples of seven, in an effort to avoid having deadlines fall on weekends. As a result, most deadlines occur some number of calendar weeks after the event to which it relates. For example:

- The deadline to file an Answer or to serve a Counterclaim or Cross-claim will be 21 days, instead of 20 days, after service of the Complaint; Rule 12(a)(1)(A)(C).
- The deadline to serve a responsive pleading after the denial of a Motion to Dismiss or the granting of a Motion for a More Definite Statement will be 14 days instead of 10 days; Rule 12(a)(4).
- A plaintiff may amend as a matter of course 21 days, instead of 20 days, after serving a pleading if no response is required; Rule 15(a) (other changes to this rule are discussed below).
- The deadline to respond to an amended pleading will be 14 days, not 10 days, after service or the time remaining to respond to the original pleading, whichever is longer; Rule 15(a)(3).
- A party must give 14 days', instead of 11 days', notice of the taking of a deposition to avoid an objection; Rule 32(a)(5)(A).
- A party must serve a jury demand within 14 days, instead of 10 days, after service of the last pleading directed to the issue; Rule 38(b)-(c).
- A party must file a motion for a new trial within

28 days of the verdict instead of within 10 days; Rule 59(b).

- The clerk may tax costs on 14 days' notice (instead of 1), and the other party may ask for court review within 7 days (instead of 5); Rule 54(d).
- Temporary restraining orders will expire after 14 days, instead of 10 days, unless extended; Rule 65(b)(2).

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adopts what the Committee
calls a "days are days"
approach to computing all
time periods, and makes no
distinction between weekdays,
weekends, and legal holidays
that fall within time periods.**

- A party must serve an objection to an order of a Magistrate Judge within 14 days, instead of 10 days; Rule 72(a).

- A defendant must answer after removal within 21 days (instead of 20 days) after receiving initial pleading, 21 days (instead of 20 days) after service of initial pleading, or 7 days (instead of 5 days) after filing a Notice of Removal, whichever is longest; Rule 81(c).

Because almost all of the deadlines under the Rules of Civil Procedure have been lengthened, there may be some temptation to

simply ignore the changes, under the theory that if one uses the old shorter deadline, there is no way to run afoul of the Rules. This is not so, because not all time periods are calculated from an event into the future. Some, such as the notice period for taking a deposition, are calculated backwards, i.e., notice must be provided at least 14 days before the deposition. When these periods are lengthened, as they will be under the new rules, one must act sooner rather than later.

Similarly, there may be a temptation to equate the Federal Rules with the rules for practice in the Virginia state courts, as the two will soon be much more similar. They will not, however, be identical. Not only are many of the time periods different, the calculation of the additional time one has to respond after certain kinds of service is different. In federal court, 3 days are

added to any time period that begins with the service of a paper by any method other than hand delivery under Rule 6(d). In state court, 3 days are added if the service was by mail, but only 1 day is added after service by fax or electronic means. In short, while days will be counted in the same manner in the Virginia and federal courts under the new rule, the similarity ends there and one must still be cognizant of the differing rules.

In addition to the time calculation amendments, other important new rule changes will take effect.

For example, Rule 15 now provides that a party may amend its Complaint once as a matter of course before being served with a responsive pleading or within 20 days after serving the complaint, if a responsive pleading is not allowed and the action is not yet on the trial calendar. Proposed new Rule 15 will provide that a party may amend its pleading once as a matter of course within 21 days after serving it or, if the pleading is one to which a responsive pleading is required, 21 days after the earlier of service of a responsive pleading or a motion under Rule 12(b), (e), or (f).²

The impact of this change is significant. If a plaintiff files a Complaint and the defendant files a Motion to Dismiss for failure to state a claim under Rule 12(b)(6), the plaintiff, without leave of Court, may serve an Amended Complaint within 21 days after service of the Motion to Dismiss. The plaintiff would be able to cure, or at least attempt to cure, any pleading deficiency that occasioned the Motion to Dismiss. The plaintiff could amend once in response to the Motion to Dismiss before the motion is heard or decided, and without leave of Court. The Committee states that the proposed new rule "will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion." Proposed Rule 15, Committee Note.

Rule 56 will be amended to provide that either a plaintiff or defendant may move for summary judgment at any time.³ Unless the court orders otherwise, a Motion for Summary Judgment may be filed at any time until 30 days after the close of all discovery. The party opposing the summary judgment motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later. The

moving party may file a reply within 14 days after the response is served.

The practical effect of the proposed new Rules is significant. If you have been practicing law for any appreciable period of time, you likely know by heart many of the deadlines in the Federal Rules of Civil Procedure. After December 1, we suggest you crack open your Virginia Rules Annotated, turn to the section containing the Federal Rules of Civil Procedure and double check them. You might be surprised. ■

- ¹ The time-computation provisions apply only when a time period must be computed. They do not apply when a fixed date to act is set by Rule, Court Order or statute. Proposed Rule 6, Committee Notes at Subdivision (a).
- ² As part of the proposed new Rules, Rule 13(f), governing the amendment of pleadings to add an omitted Counterclaim, is deleted because it is deemed to be "largely redundant and potentially misleading." Proposed Rule 13, Committee Note. "An amendment to add a counterclaim will be governed by Rule 15." *Id.*
- ³ "The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action." Proposed Rule 56, Committee Note. ■

