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MEMORANDUM

DATE: June 29, 2007

TO: Judge David F. Levi
Standing Committee on Rules of Practice and Procedure

CC: John K. Rabiej

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to introduce the package of Time-Computation amendments that will be published for comment in August 2007.

Two years ago, the Standing Committee created the Time-Computation Subcommittee and asked it to examine the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules, with a view to simplifying those provisions and eliminating inconsistencies among them. The project was launched in response to frequent complaints by practitioners about the time, energy and nervous anxiety expended in calculating time periods, and to comments by judges about the anomalous results of the current computation system.¹

¹ "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, 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. This case presents sort of an issue of first impression for this Court regarding the timeliness of motions for attorney fees under Federal Rule of Civil Procedure 54(d)(2)(B). After considering Federal Rules of Civil Procedure 6, 54, 59, 83, and a sprinkle of Federal Rule of Appellate Procedure 4, we reverse." *Miltimore Sales, Inc. v. International Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

The Subcommittee, in consultation with the Advisory Committees and the Standing Committee, drafted a proposed template for an amended time-computation rule. The template's principal simplifying innovation is its adoption of a "days-are-days" approach to computing all periods of time, including short time periods. Under the current rules, intermediate weekends and holidays are omitted when computing short time periods but included when computing longer periods. By contrast, under the template rule, intermediate weekends and holidays are counted no matter the length of the specified period.² The examples at the end illustrate this and other aspects of the proposed time-computation rules.

Versions of the template rule are now being published for comment as proposed amendments to Appellate Rule 26(a), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a). Also published for comment are proposed amendments to numerous deadlines set by the Appellate, Bankruptcy, Civil and Criminal Rules; the goal of those amendments is to offset the effect of the change in time-counting approach by lengthening most short rule-based deadlines. In large measure, the rules-provided deadlines have been sufficiently lengthened to make the change to a days-are-days approach neutral to practitioners; moreover, in a few notable instances – such as the proposal to lengthen the current 10-day deadlines in Civil Rules 50, 52, and 59(b), (d) and (e) to 30 days – the deadlines proposals will give practitioners significantly more time than they now have.

We would like to draw the attention of the bench and bar to three issues in particular. First, we solicit input on the proposed time-computation rules, which are described in Part II of this memo. Second, as noted above and as discussed in Part III.A., the shift to a days-are-days approach will be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. Third, as discussed in Part III.B., we wish to point out that the new time-computation rules will govern a number of statutory deadlines that do not themselves provide a method for computing time, and we solicit input concerning key statutory deadlines that the Standing Committee should recommend that Congress lengthen in order to offset the change in time-computation approach.

I. Summary of the time-computation proposals

Time-computation rules in the Appellate, Bankruptcy, Civil and Criminal Rules.

Each Advisory Committee (other than the Evidence Rules Committee) is publishing for comment proposed amendments that adopt the time-computation template. The Advisory Committees have taken a uniform approach – adopting the same version of the template – except where necessary to account for peculiarities in the relevant set of Rules. The template is further discussed in Part II below.

² The proposed time-computation rules apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, the date for filing is "no later than November 1, 2007," the time-computation rules will not apply. But if a filing is required to be made "within 10 days" or "within 72 hours," the relevant time-computation rule explains how to compute that period.

The Federal Rules of Evidence do not currently include a time-computation rule, and the Advisory Committee on Evidence Rules has recommended that no such rule be adopted in the Evidence Rules. There are only a few time periods in the Evidence Rules that are measured by a day-based time period, and the relevant Rules allow for flexibility in that the deadline can be extended upon a showing of good cause. *See* Fed. R. Evid. 412-415. The time-counting project will not affect rules, such as Fed. R. Evid. 404(b) and 807, that set a “reasonable” length of time but provide no specific time limit. Finally, though the few year-based time periods in the Evidence Rules – *see* Rules 609(b), 803(16) and 901(b)(8) – could potentially be affected by a time-counting rule, that would only occur in cases where the argument is that the year-based period ended on a particular day rather than a day before or after (e.g., a party offers a newspaper published exactly 20 years ago on the day in which it is offered into evidence as an ancient document). Such instances are likely to be rare and could presumably be addressed by waiting one more day before introducing the evidence at issue. Research indicates no reported cases raising a problem about time-counting under the Evidence Rules.

Rule-based deadlines in the Appellate, Bankruptcy, Civil and Criminal Rules. The Advisory Committees are also publishing for comment amendments designed to adjust short deadlines set by the Rules in order to offset the change in time-computation approach. For example, under the current time-counting approach a five-day time period will always span at least seven days, because the intervening weekend days will not be counted. Accordingly, the proposed amendments typically lengthen five-day periods to seven days. Likewise, ten-day periods will typically be lengthened to 14 days, and similar changes are proposed for almost all the other short time periods set by the Rules. When adjusting brief time periods, the Advisory Committees have applied a presumption in favor of multiples of seven days, so as to minimize the number of instances when the end point of a time period falls on a weekend. Rule-based deadlines are discussed at more length in Part III.A. below.

Statutory deadlines and coordination with Congress. The time-computation methods stated in current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) apply to litigation-related time periods set by statute as well as to time periods set by the Rules themselves. Criminal Rule 45(a) does not currently encompass statutory time periods, but the proposed amended Criminal Rule 45(a), like the other proposed time-computation rules, would apply to such periods. To the extent that the time-computation rules currently are applied to short statutory periods, application of the proposed time-computation rules would have the effect of shortening the time provided under such statutory time periods. We therefore recommend that the Standing Committee recommend to Congress that certain of those statutory deadlines be lengthened to offset the shift in time-computation approach. Assuming that Congress is willing to enact legislation along those lines, it would be advisable to coordinate the effective dates of the legislation and the Rules amendments. These issues are discussed in Part III.B. below.

Coordination with local rulemaking bodies. The shift in time-computation approach may cause hardship if short time periods set in local rules are not adjusted accordingly. Thus, local rulemakers should be alerted to review short time periods in their local rules. In addition, they should be encouraged to give particular attention to the treatment of inaccessibility of the clerk’s office, especially with respect to electronic filing; though the enclosed amendments do

not attempt to address this issue in the time-computation rules, it is apparent that members of the bar desire clarity and certainty in this area.

II. The time-computation template

This part summarizes the key features of the proposed time-computation rule. Further details can be found in the committee notes accompanying the proposed amendments.

Days-are-days approach. The current Rules' time-computation approach can be confusing and counter-intuitive, because they direct one to omit intermediate weekends and holidays when computing short time periods. For example, under current Civil Rule 6(a) a 10-day period and a 14-day period that start on the same day will frequently end on the same day – and the 10-day period may even end later than the 14-day period. Under subdivision (a)(1) of the proposed time-computation rules, all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days – including intermediate weekends and holidays – are counted. However, if the period ends on a weekend or holiday, the deadline falls on the next day that is not a Saturday, Sunday or holiday. (The application of this principle to backward-counted time periods is discussed below.)

Deadlines stated in hours. The current time-computation rules do not specifically discuss periods stated in hours. Such periods are set by some statutes and also may be set by court orders in expedited proceedings. Accordingly, subdivision (a)(2) of the proposed amendments addresses those periods.

Inaccessibility of the clerk's office. Subdivision (a)(3) of the proposed amendments carries forward and refines existing provisions that extend filing deadlines in the event that the clerk's office is inaccessible.

Definition of the "last day." Proposed subdivision (a)(4) defines the end of the "last day" of a filing period. It distinguishes between electronic filing and filing by other means. Proposed Appellate Rule 26(a)(4) adds further distinctions based upon other methods of filing contemplated by the Appellate Rules.

Definition of the "next day," and backward-counted periods. Proposed subdivision (a)(5) explains how to determine the "next day." This definition comes into play when a deadline falls on a weekend or holiday, because subdivision (a)(1) then directs that the deadline continues to run until the "next day" that is not a weekend or holiday. Under subdivision (a)(5), if the deadline is measured after an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count forward. But if the deadline is measured before an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count backward – e.g., from Saturday the 31st to Friday the 30th.

Legal holidays. Proposed subdivision (a)(6) carries forward the time-computation rules' current definition of legal holiday. As under the current rule, the proposed rule defines "legal

holiday” to include certain state holidays. Proposed Appellate Rule 26(a)(6)(B), Bankruptcy Rule 9006(a)(6)(B), and Civil Rule 6(a)(6)(B) define “state” to include the District of Columbia and any U.S. commonwealth, territory or possession. (The definition in Civil Rule 6(a)(6)(B) will be unnecessary if the proposed amendment to Civil Rule 81(d) is adopted. No definition is needed in Criminal Rule 45(a)(6)(B) because Criminal Rule 1(b)(9) already defines the term “state.”)

III. Effect on deadlines set by Rules or statutes

The change in time-computation approach will affect both rule-based and statutory time periods. In particular, short time periods will be computed under the proposed time-computation rules using the “days-are-days” approach, with the result that a nominal period of, say, seven days will really mean seven days – not the nine or more days that result from a nominal seven-day deadline under the current time-counting rules. For this reason, as explained in Part III.A., the Advisory Committees have reviewed all rule-based deadlines in their respective sets of rules and propose to lengthen almost all the short deadlines in order to offset the shift in computation method. The question of statutory deadlines is discussed in Part III.B.

A. Rule-based deadlines

The proposed changes to the rule-based deadlines can be summarized as follows:

Appellate Rules deadlines. References to “calendar days” in Rules 25, 26 and 41 become simply references to “days.” Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 30 days to correspond with changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

The Appellate Rules Advisory Committee considered Rule 29(e)’s seven-day deadlines for amicus brief filings and decided not to recommend a change to them.

Bankruptcy Rules³ deadlines. Five-day periods in Rules 2006, 2007, 2008, 2015.3, 6004, 9006, and 9027 become seven-day periods. Ten-day periods in Rules 1007, 2003, 2015.1, 2015.2, 2016, 3020, 4001, 6004, 6006, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9027, and 9033 become 14-day periods, as do the 15-day periods in Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009. Twenty-day periods in Rules 1011, 2002, 2003, 2007.2, 2015, 2015.3, 3001, 3015, 3019, 6003, 7012, 8002, 9027, and 9033

³ Citations to the Bankruptcy Rules refer to the rules as amended by the package of amendments that will take effect December 1, 2007, absent contrary action by Congress.

become 21-day periods. Twenty-five day periods in Rules 2002, 3017, and 4004 become 28-day periods.

The Bankruptcy Rules Advisory Committee considered the following time periods and decided not to recommend changes to them: Rule 1007(d)'s two-day period; Rule 4001(a)(2)'s two-day period; Rule 4001(d)(3)'s five-day period; Rule 7054(b)'s five-day period; and Rule 8011(a)'s seven-day period.

Civil Rules⁴ deadlines. The one-day period in Rule 6(c) becomes seven days. The one-day period in Rule 54(d) becomes 14 days. The three-day period in Rule 55 becomes seven days. Five-day periods in Rules 32, 54, and 81 become seven days. The five-day period in Rule 6(c) becomes 14 days. Ten-day periods in Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, 81, and Supplemental Rule C become 14 days. Ten-day periods in Rules 50, 52, and 59(b), (d) and (e) become 30-day periods. The less-than-11-day period in Rule 32 becomes less than 14 days. Twenty-day periods in Rules 12, 15, 27, 53, 71.1, 81, and Supplemental Rules B, C and G become 21 days.

Rule 6(b)'s reference to (nonexistent) provisions for extending the times set by enumerated provisions in Rules 50, 52, 59, and 60, and Rule 59(c)'s reference to a 20-day extension, are eliminated. The timing provisions in Rules 56(a) and (c) are replaced by new provisions that recognize authority to set time requirements by local rule or by court order, and in default of a local rule or court order allow a motion to be made at any time until 30 days after the close of all discovery. The new provisions also establish default times for response and reply.

The Civil Rules Advisory Committee considered the following time periods and decided not to recommend changes to them: Rule 31(a)'s seven-day periods, and Rule 65(b)'s two-day period.

Criminal Rules deadlines. The five-day period in Rule 47 becomes seven days. Seven-day periods in Rules 12.3, 29, 33, 34 and 35 become 14 days. The 10-day periods in Rules 5.1, 7, 12.1, 12.3, 41(e)(2)(A), 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 become 14 days. The 20-day periods in Rules 5.1 and 12.3 become 21 days.

The Criminal Rules Advisory Committee considered the following time periods and decided not to recommend changes to them: Rule 32(g)'s seven-day period, and Rule 46(h)(2)'s ten-day period.

B. Statutory deadlines

Current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) explicitly apply to statutory time periods. Prior to the 2002 restyling, Criminal Rule 45(a) covered "any

⁴ Citations to the Civil Rules refer to the restyled set of rules scheduled to take effect December 1, 2007, absent contrary action by Congress.

period of time”; Rule 45(a) now governs “any period of time specified in these rules, any local rule, or any court order.” Under the template’s proposed approach, Criminal Rule 45(a) would once again apply to statutory periods, as would the other time-computation rules.

In order to ascertain the possible effect on statutory deadlines of the proposed change in time-computation approach, the Subcommittee searched for short statutory time periods that might be governed by one of the time-computation rules. The search disclosed some 168 short time periods set by statutes that do not themselves specify a method of computing time.⁵ A chart showing those time periods can be found at <http://www.uscourts.gov/rules/index.html>. The provisions cover, inter alia, the time for taking an appeal to a U.S. Court of Appeals from an agency determination;⁶ the time for taking an appeal to a U.S. Court of Appeals from a lower court determination;⁷ the time for seeking district court review of agency action;⁸ the time limit for seeking district court review of a magistrate judge’s determinations;⁹ time limits¹⁰ or presumptive time limits¹¹ within which a court is to take a particular action; time limits¹² or presumptive time limits¹³ on the duration of a court’s temporary restraining order; provisions setting the time when the consequences of a challenged agency action take effect after judicial

⁵ The proposed amended time-computation rules would not apply to the roughly 15 litigation-related brief time periods set by statutes that themselves provide a method of computing time. See, e.g., 2 U.S.C. § 394.

⁶ See 12 U.S.C. § 1817(j)(5).

⁷ See 28 U.S.C. §§ 1292(b), (d)(1) & (d)(2); 26 U.S.C. § 7482(a)(2)(A); 38 U.S.C. § 7292(b)(1); 45 U.S.C. § 159; Classified Information Procedures Act, § 7(b), 18 U.S.C.A. App. 3.

⁸ See 12 U.S.C. § 1708(c)(6)(B); 12 U.S.C. § 1786(g)(6); 12 U.S.C. § 1786(h)(3); 12 U.S.C. § 1787(a)(1)(B); 12 U.S.C. § 1818(c)(2); 12 U.S.C. § 1818(f); 12 U.S.C. § 2262(b); 12 U.S.C. § 2264(e); 12 U.S.C. § 4632(d); 15 U.S.C. 650(g)(3)(C); 15 U.S.C. § 687e(c)(3).

⁹ See 28 U.S.C. § 636(b)(1).

¹⁰ See 18 U.S.C. § 3771(d)(3); 28 U.S.C. § 1453(c)(3); 11 U.S.C. § 521(e)(3); 11 U.S.C. § 704(b)(1); 18 U.S.C. § 3060(b); 42 U.S.C. § 1971(e); Classified Information Procedures Act, § 7(b), 18 U.S.C.A. App. 3.

¹¹ See 28 U.S.C. § 3101(d)(2); 28 U.S.C. § 3202(d); 28 U.S.C. § 3205(c)(5); 28 U.S.C. § 3205(c)(7); 29 U.S.C. § 2937(a)(2); 11 U.S.C. § 521(i); 11 U.S.C. § 1113(d)(1); 11 U.S.C. § 1114(k)(1); 15 U.S.C. § 1116(d)(10)(A); 28 U.S.C. § 2243; 28 U.S.C. § 3205(c)(9)(B).

¹² See 29 U.S.C. § 107; 29 U.S.C. § 160(l); 29 U.S.C. § 662(b); 30 U.S.C. § 818(b); 46 U.S.C. § 41306(c); 46 U.S.C. § 41307(a); see also 18 U.S.C. § 3771(d)(3).

¹³ See 18 U.S.C. § 983(j)(3); 18 U.S.C. § 1963(d)(2); 18 U.S.C. § 1514(a)(2)(C); 15 U.S.C. § 2310(c)(1).

review;¹⁴ provisions that set a required period for notice to litigants or other entities;¹⁵ time limits for parties or others to make motions or take other actions;¹⁶ deadlines for non-judicial government entities;¹⁷ and timing requirements for participants in bankruptcy proceedings.¹⁸

The Advisory Committees reviewed the list of statutory deadlines; each Advisory Committee gave particular attention to the deadlines that affected the areas of practice relevant to that Committee's set of Rules. It was noted that courts have applied each of the existing time-computation rules to a number of statutory periods. Often, however, the aspect of the time-computation rule applied in a given case is not the provision that excludes intermediate weekends and holidays, but some other aspect such as that which excludes the day of the event that triggers the deadline. From a survey of the case-law it is evident that courts' willingness to apply the Rules' computation provisions to statutory time periods varies depending on the nature of the deadline and the wording of the statute.¹⁹ It is also apparent that in many of the instances when courts have applied the Rules' computation method, the effect has been to determine the start

¹⁴ See 7 U.S.C. § 18(f); 7 U.S.C. § 499g(d).

¹⁵ See 7 U.S.C. § 2023(a)(17); 9 U.S.C. § 4; 28 U.S.C. § 1605(b)(2); 28 U.S.C. § 1715(b); 28 U.S.C. § 2001(b); 28 U.S.C. § 2284(b)(2); 28 U.S.C. § 3203(g)(1)(B)(iii); 18 U.S.C. § 3432; 18 U.S.C. § 3552(d); 18 U.S.C. § 3612(b)(2); 18 U.S.C. § 4114(a); 18 U.S.C. § 2252A(c); 28 U.S.C. § 2349(b); 47 U.S.C. § 402(d); 15 U.S.C. § 1118; 18 U.S.C. § 1514(a)(2)(E); 18 U.S.C. § 2518(9); 18 U.S.C. § 3492(a); 26 U.S.C. § 7429(b)(3); 27 U.S.C. § 207; see also 18 U.S.C. § 3486(9).

¹⁶ See 12 U.S.C. § 3410(a); 15 U.S.C. § 16(g); 18 U.S.C. § 3492(a); 18 U.S.C. § 3509(b)(1)(A); 18 U.S.C. § 3771(d)(5); 18 U.S.C. § 4244(a); 28 U.S.C. § 144; 28 U.S.C. § 1867(a); 28 U.S.C. § 1867(b); 28 U.S.C. § 1867(c); 28 U.S.C. § 3205(c)(1)(E); 28 U.S.C. § 3205(c)(9)(B); 43 U.S.C. § 1062; 45 U.S.C. § 159.

¹⁷ See 10 U.S.C. § 7726(b); 10 U.S.C. § 7726(c); 16 U.S.C. § 4307(c)(2); 18 U.S.C. § 2518(5); 18 U.S.C. § 2518(7); 18 U.S.C. § 3125(a); 18 U.S.C. § 3125(b); 18 U.S.C. § 3125(c); 18 U.S.C. § 2704(a); 18 U.S.C. § 3161(h)(1)(H); 18 U.S.C. § 3501(c); 18 U.S.C. § 3664(d)(5); 21 U.S.C. § 880(d)(3); 28 U.S.C. § 2243; 28 U.S.C. § 3007(b); 28 U.S.C. § 3102(e)(1); 28 U.S.C. § 3105(f)(1); 28 U.S.C. § 3203(d)(3); 28 U.S.C. § 3205(c)(9)(B); 42 U.S.C. § 1971(e); 49 U.S.C. § 32707(c)(1).

¹⁸ See 11 U.S.C. § 322(a); 11 U.S.C. § 332(a); 11 U.S.C. § 342(e)(2); 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 749(b); 11 U.S.C. § 764(b); 11 U.S.C. § 1116(1); 11 U.S.C. § 1308(a).

¹⁹ Thus, for example, courts have refused to apply the time-computation rules to state statutes of limitations. Though a number of courts have applied the time-computation rules to Bail Reform Act and Speedy Trial Act provisions, cases can be found refusing to apply the rules to those statutory periods. Courts have applied Bankruptcy Rule 9006(a) to some bankruptcy-related statutory time periods but not to others.

and/or end points of the period; the time-computation project's most dramatic change – namely, the shift to the days-are-days computation approach – would leave such applications unaffected.

It is not at all clear how many lawyers rely on the rules when computing statutory time periods, and we welcome input on this question during the comment period. There may currently be more reliance on the time-counting rules in some areas – such as bankruptcy practice – than in others. Some indications suggest that lawyers may be less likely to rely on the notion that the current time-counting rules apply to statutory time periods when planning their compliance with those deadlines than they are to offer the time-counting rules after the fact to rebut the contention that they have missed a statutory deadline.

After consulting with the Advisory Committees and the Standing Committee, the Subcommittee will compile a list of key statutes with short deadlines that could be affected by the change in the Rules' time-computation method. That list would be submitted to Congress with the proposal that legislation be enacted to lengthen those deadlines to offset the effect of the time-computation rule amendments. This approach is most likely to be effective if it focuses on a small number of key, widely used statutory deadlines.

The list should include statutory time periods that are also reflected in Rules, where the Rules are being amended to alter the relevant time period. *See, e.g.*, 28 U.S.C. § 636(b) (ten-day period – mirrored in Civil Rule 72 and Criminal Rule 59 – to seek review of a magistrate judge's order or recommendation); 28 U.S.C. § 2107(c) (seven-day deadline – mirrored in Appellate Rule 4(a)(6)(B) – limiting time to move to reopen time to file civil appeal to the earlier of 180 days after entry of judgment or order or seven days after movant receives notice of the entry). It should also include short statutory time periods that would pose a hardship if not lengthened to offset the shift in time-computation approach. We welcome comment concerning the statutory periods that should be included in the list.

IV. Conclusion

We look forward to obtaining public comment on the enclosed amendments.

- Attachment A — Illustrative Examples
- Attachment B — Federal Rules of Appellate Procedure
- Attachment C — Federal Rules of Bankruptcy Procedure
- Attachment D — Federal Rules of Civil Procedure
- Attachment E — Federal Rules of Criminal Procedure
- Attachment F — Statutory Periods

Illustrative examples

The following examples illustrate how time computation currently works in federal litigation and how it would work under the proposed amendments to the time-computation rules.

Example 1: Responsive pleading after denial of motion to dismiss

Smith has sued Jones in federal district court. Instead of answering Smith's complaint, Jones moves to dismiss the complaint for failure to state a claim. The court denies Jones's motion to dismiss, and Jones receives notice of the denial on Tuesday, March 4, 2008.

Example 1A: Time computation under the current rules

Civil Rule 12(a)(4) requires Jones to serve his answer "within 10 days after notice of the court's action." Jones excludes the day of the event that begins the period (Tuesday March 4). Because the period is less than 11 days, Civil Rule 6(a) directs Jones to exclude weekends and holidays. Jones counts Wednesday through Friday, March 5 through 7. He skips March 8 and 9 (because they are weekend days). He counts Monday through Friday, March 10 through 14. He skips March 15 and 16. He counts Monday and Tuesday, March 17 and 18. Thus, the "tenth" day after Jones received notice of the denial of his motion to dismiss is Tuesday, March 18. Jones must serve his answer on Tuesday, March 18 at the latest.

Example 1B: Time computation under the proposed rules

Civil Rule 12(a)(4) requires Jones to serve his answer "within 14 days after notice of the court's action." Jones excludes the day of the event that begins the period (Tuesday March 4). He counts forward 14 days, including weekends and holidays in this count. Thus, Jones counts Wednesday, March 5 through Tuesday, March 18. Jones must serve his answer on Tuesday, March 18 at the latest.

(Note that under the proposed time-computation rules, all intermediate days are counted for all time periods, even short time periods. In other words, Jones could not skip intermediate weekends and holidays even if he were computing a short time period. But to offset this change, the proposed amendments also lengthen most short periods. For example, Civil Rule 12(a)(4)'s 10-day deadlines are lengthened to 14 days, so that the resulting deadline in this hypothetical is the same under the proposed amendments as it is under the current rules.)

Example 2: Same as above, but triggering event on Monday, December 24

Smith has sued Jones in federal district court. Instead of answering Smith's complaint, Jones moved to dismiss the complaint for failure to state a claim. The court denies Jones's motion to dismiss, and Jones receives notice of the denial on Monday, December 24, 2007.

Example 2A: Time computation under the current rules

Civil Rule 12(a)(4) requires Jones to serve his answer “within 10 days after notice of the court’s action.” Jones excludes the day of the event that begins the period (Monday, December 24). Because the period is less than 11 days, Jones also excludes weekends and holidays. Thus, Jones skips Tuesday, December 25 because Civil Rule 6(a) provides that Christmas Day is a legal holiday. He counts Wednesday through Friday, December 26 through 28. He skips December 29 and 30 because they are weekend days. He counts Monday, December 31. He skips Tuesday, January 1, because Civil Rule 6(a) provides that New Year’s Day is a legal holiday. He counts Wednesday, January 2 through Friday, January 4. He skips January 5 and 6 (weekend days). He counts Monday January 7 through Wednesday January 9. Thus, the “tenth” day after Jones received notice of the denial of his motion to dismiss is Wednesday, January 9. Jones must serve his answer on Wednesday, January 9 at the latest.

Example 2B: Time computation under the proposed rules

Civil Rule 12(a)(4) requires Jones to serve his answer “within 14 days after notice of the court’s action.” Jones excludes the day of the event that begins the period (Monday, December 24). He counts forward 14 days, including weekends and holidays in this count. Thus, Jones counts Tuesday, December 25 through Monday, January 7. Jones must serve his answer on Monday, January 7 at the latest.

(As noted with respect to Example 1B above, most short deadlines, such as the 10-day deadlines in Civil Rule 12(a)(4), will be lengthened in order to offset the change to a days-are-days time-counting approach. Most often, lengthening a period from 10 to 14 days will entirely offset that shift. However, sometimes a period will encompass a number of legal holidays as well as weekend days. In those instances, the current time-computation approach may yield a deadline that is a bit later than the deadline that would result under the proposed amendments. Here, the deadline under the current time-computation rules would be January 9, while under the proposed amendments the deadline would be January 7.)

Example 3: Same as above, but triggering event on Tuesday, December 11

Smith has sued Jones in federal district court. Instead of answering Smith’s complaint, Jones moved to dismiss the complaint for failure to state a claim. The court denies Jones’s motion to dismiss, and Jones receives notice of the denial on Tuesday, December 11, 2007.

Example 3A: Time computation under the current rules

Civil Rule 12(a)(4) requires Jones to serve his answer “within 10 days after notice of the court’s action.” Jones excludes the day of the event that begins the period (Tuesday, December 11). Because the period is less than 11 days, Jones also excludes weekends and holidays. Thus, Jones counts Wednesday December 12 through Friday December 14. He skips December 15 and 16 (weekend days). He counts Monday December 17 through Friday December 21. He skips December 22 and 23 (weekend days). He counts Monday December 24. Although the last day

of the 10-day period would thus be Tuesday December 25, Civil Rule 6(a) provides that Christmas Day is a legal holiday. Under Civil Rule 6(a), because the last day of the period would fall on a legal holiday, Jones counts forward to Wednesday, December 26. Thus, the “tenth” day after Jones received notice of the denial of his motion to dismiss is Wednesday, December 26. Jones must serve his answer on Wednesday December 26 at the latest.

Example 3B: Time computation under the proposed rules

Civil Rule 12(a)(4) requires Jones to serve his answer “within 14 days after notice of the court’s action.” Jones excludes the day of the event that begins the period (Tuesday, December 11). He counts forward 14 days, including weekends and holidays in this count. Thus, Jones counts Wednesday, December 12 through Tuesday, December 25. Although the last day of the 14-day period would thus be Tuesday, December 25, Civil Rule 6(a)(6) provides that Christmas Day is a legal holiday. Civil Rule 6(a)(1)(C) provides that if the period would end on a legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. Thus, Jones counts forward to Wednesday, December 26. Jones must serve his answer on Wednesday, December 26 at the latest.

Example 4: Backward-counted filing deadlines

The federal district judge presiding over *Greene v. Miller* has ordered that pretrial disclosures under Civil Rule 26(a)(3)(A) must be served and filed at least 30 days before the date set for trial. The trial date is set for October 3, 2007. Greene wishes to determine the deadline for serving and filing the pretrial disclosures.

Example 4A: Time computation under the current rules

Civil Rule 6(a) directs Greene to exclude the day of the triggering event (October 3). Greene counts backwards from October 3. Thus, Greene counts Tuesday, October 2, through Monday, September 3. But Monday, September 3, is Labor Day, which counts as a legal holiday under Civil Rule 6(a). Civil Rule 6(a) directs that if the last day of a period is a Saturday, Sunday or legal holiday that day should be excluded, and the period runs “until the end of the next day” that is not a Saturday, Sunday or legal holiday. It is uncertain whether this means that Greene should continue counting backward (to Friday, August 31) or whether it means that he should count forward (to Tuesday, September 4). The deadline for serving and filing might be Friday, August 31, or it might be Tuesday, September 4.

Example 4B: Time computation under the proposed rules

Civil Rule 6(a) directs Greene to exclude the day of the triggering event (October 3). Greene counts backwards from October 3. Thus, Greene counts Tuesday, October 2 through Monday, September 3. But Monday, September 3, is Labor Day, which counts as a legal holiday under Civil Rule 6(a)(6). Civil Rule 6(a)(1)(C) directs that if the last day of a period is a Saturday, Sunday or legal holiday that day should be excluded, and the period runs “until the end of the next day” that is not a Saturday, Sunday or legal holiday. Civil Rule 6(a)(5) explains how

Greene should determine what the “next day” is: The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. Thus, because Greene is calculating a period that is measured before an event, Greene continues to count backward, to Friday, August 31. The deadline for serving and filing the pretrial disclosures is Friday, August 31.

Example 4C: Treatment of inaccessibility of clerk’s office under the proposed rules

Assume the same analysis as in Example 4B above. The deadline for serving and filing the pretrial disclosures is Friday, August 31. However, on Friday, August 31, an unexpected storm closes the courthouse and shuts down its computer system. Under Civil Rule 6(a)(3), because the clerk’s office is inaccessible on the last day for filing, the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday – namely, Tuesday, September 4 (assuming that the clerk’s office is accessible that day).