The Approaching Dawn of a New 'Day' Under the Federal Appellate Rules

The Legal Intelligencer
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April 13, 2009

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UPON FURTHER REVIEW

If you are among the many who think it is often far too difficult or confusing to calculate time periods under federal procedural rules, help is on the way. On Dec. 1, amendments to the Federal Rules of Appellate Procedure are scheduled to take effect that will adopt what is known as the "days-are-days" approach to calculating all time periods.

Currently, when the Federal Rules of Appellate Procedure specify a period of time that is fewer than 11 days in duration, intervening weekends and federal holidays are to be excluded from calculating that period of time. Unfortunately, the current time computation rules have caused unnecessary uncertainty.

For example, the rule governing motion practice gives the opposing party eight days to respond to a motion. If the motion is served by electronic means, an additional three calendar days are added to the period. The proper way in which to calculate the deadline is to count eight days, excluding all intervening weekends and federal holidays, and then to add three calendar days on at the end of the eight-day period. But some people might instead incorrectly view the deadline as 11 calendar days after the motion was filed, which would be calculated without excluding intervening weekends and holidays.

To avoid this and various other similar uncertainties, as of Dec. 1, when the rules speak of "days" in the calculation of time, the rules will mean calendar days regardless of the length of the period at issue. Thus, as the advisory committee's notes to the new rule amendments explain, "under the proposed rule amendments, intermediate weekends and holidays are counted regardless of the length of the specified period."

Because counting intervening weekends and holidays for time periods of fewer than 11 days will often have the effect of shortening the time available, the federal appellate rules are also being amended in various instances to increase the specified number of days for taking action. In the case of responding to a motion, the time for responding will, under the amended rule, be 10 days instead of eight days. And three additional days will continue to be available if the motion is served by means other than hand delivery.

One of the most noteworthy timing changes for appellate lawyers is actually being made to the Federal Rules of Civil Procedure. In place of the current 10-day period for filing a timely post-judgment motion for judgment as a matter of law, for a new trial, to amend a district court's factual findings, or to alter or amend the judgment, the Federal Rules of Civil Procedure effective Dec. 1, will provide a 28-day period for filing these motions. As the advisory committee's note explains, "The adjustment extends the present inadequate time allowed to prepare and file postjudgment motions. To prevent unfair results from these unrealistic short time periods, courts have avoided the rule by delaying entry of judgment or permitting timely filing of a barebones motion but permitting the brief to expand the stated grounds."

Although these types of post-judgment motions are filed in the trial court, they often represent a critical stage in the appellate process, because it is necessary to preserve various sorts of appellate challenges by asserting them in post-judgment motions. The 10-day period currently provided was so short in duration that often it was impractical for trial lawyers to get appellate lawyers involved during that period in helping to decide what issues should be raised in the post-judgment motions. Now that the period is expanding to 28-days, trial lawyers will have the added luxury of time to obtain appellate assistance to ensure that all of the necessary and appropriate issues are being preserved for appeal by means of the post-judgment motions.

As I have hinted at above, the "days-are-days" approach to calculating time under the Federal Rules of Appellate Procedure will also apply, effective Dec. 1, to the Federal Rules of Civil, Criminal and Bankruptcy Procedure. In all, the time computation project's amendments will affect more than 90 time-computation provisions found in the appellate, bankruptcy, civil and criminal rules. In advance of these changes, lawyers who practice in federal courts will need to become familiar with these changes, as they are scheduled to take effect in all pending cases Dec. 1

These time calculation changes are important for two related reasons. First, time periods that you may have grown accustomed to under the current rules are likely to be changed as a result of the impending amendments. And second, despite the ease of calculating time under the new amendments, the process of deciding how best to implement these changes was surprisingly difficult. Nevertheless, simplicity finally prevailed in an endeavor for which lawyers were

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responsible, which is always cause for celebration.

Also taking effect Dec. 1 will be new Federal Rule of Appellate Procedure 12.1, titled "Remand After an Indicative Ruling by the District Court on a Motion for Relief That is Barred by a Pending Appeal." As that new rule's title suggests, Rule 12.1 provides a procedure whereby the appellate court may choose to allow the district court to decide a motion that the district court would otherwise lack jurisdiction to decide because of the existence of the appeal.

Update

In the December 2008 installment of this column, I reported on the electronic case filing system that the 3rd U.S. Circuit Court of Appeals was then on the verge of implementing. On March 17, the 3rd Circuit issued an order, available on the court's Web site, which relaxed the requirement that the appendix on appeal must be filed electronically. As matters now stand, the appendix may still be filed electronically, or it may be filed only in paper form.

If the appendix is filed only in paper form, copies of the paper appendix must also be served on other counsel. And citations in the briefs to an appendix filed only in paper form must provide additional information intended to allow the 3rd Circuit to access by electronic means the underlying district court documents.

This change came in reaction to a chorus of complaints that the 3rd Circuit received about how difficult and time-consuming it was to prepare and file an electronic appendix on appeal. Although it is a positive sign that the 3rd Circuit was willing to alter its requirements in response to this groundswell of dissatisfaction, many of the long-term advantages of electronic case filing on appeal are lost if significant parts of the case are filed only in paper format. Only time will tell whether attorney satisfaction or achieving all of the advantages of ECF will prevail in the end. •

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