

# In Federal Court, Reconsider Merely Serving Your Motion for Reconsideration

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Under Rule 4 of the Federal Rules of Appellate Procedure, in most federal civil actions, a notice of appeal must be filed with the district court clerk within 30 days after entry of the judgment or order being appealed, as required by Rule 4(a)(1). There is a caveat, however: where a party timely files a motion seeking reconsideration such as a motion to alter or amend the judgment under Rule 59, a motion for new trial under Rule 59, or a motion for relief under Rule 60, the 30-day deadline for filing a notice of appeal will be tolled so that it runs from the entry of the order disposing of the last of these motions, as provided in Federal Rule of Appellate Procedure 4(a)(4). But to have this tolling effect, Federal Rule of Civil Procedure 59(d) and (e) requires that the motion for reconsideration be filed within 28 days of the judgment or order. While at first glance this may seem like a straightforward rule, there may be instances where even the most experienced attorneys could overlook it. Consider the case *Malek v. Feigenbaum*. In *Malek*, the plaintiff served a motion for reconsideration of the district court's dismissal order within 28 days. However, the district court's local rules requested that "[a]s a courtesy to the Court" "the parties refrain from filing motion papers until the motion has been fully briefed, unless doing so might cause a party to miss an applicable deadline." Seeking to comply with this so-called bundling rule, the plaintiff did not file the motion for reconsideration until it had been fully briefed, 37 days after the dismissal order had been entered. After the district court denied the motion for reconsideration, the plaintiff appealed and the appellee-defendant moved to dismiss the appeal for lack of jurisdiction because the motion for reconsideration had not been filed within 28 days of the order being appealed and, therefore, the deadline to appeal was never tolled. The Second Circuit Court of Appeals agreed with the appellee-defendant, dismissing the appeal. In doing so, the Second Circuit held that the requirement to timely file a motion for reconsideration within 28 days of the order or judgment "is a mandatory claim-processing rule that is subject to forfeiture and waiver but not subject to equitable tolling or

harmless error analysis.” There are two takeaways from *Malek*:

- An attorney who intends to appeal an adverse order or judgment should ensure that any motion for reconsideration is filed within 28 days after the order or judgment has been entered, regardless of whether the district court’s individual or local rules request (or even mandate) that such motion not be filed until it is fully briefed. There should be no hesitation in this regard because local district court rules cannot trump Rule 4 or any other Federal Rule of Appellate Procedure, per Federal Rule of Civil Procedure 83(a)(1).
- Where an attorney receives a favorable judgment or order but the opposing side moves for reconsideration, the attorney should always determine whether the motion for reconsideration was actually filed (not merely served) within 28 days after the judgment or order was entered. If not, the failure will provide a basis for dismissal of a later appeal.

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