

New Amendments to Federal Rules of Civil Procedure

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Aaron S. Weiss

After a broader set of amendments that took effect Dec. 1, 2015, the Federal Rules of Civil Procedure have once again been amended as of Dec. 1, 2016. These amendments are important because they will impact the timing of responses to almost all filings in federal court. The new amendments are largely technical, but one will have significant impact on the timing of responses to electronically filed documents.

The amendment to FRCP 6(d) will have the biggest practical impact. Federal practitioners — and their administrative staff — have become accustomed to the three additional "mail" days to respond to a motion or other applicable filing if service is completed by any means other than personal delivery.

Even though electronic service through the Case Management/Electronic Case Files, or CM/ECF, system is essentially instantaneous, when the system was rolled out nationally in the early 2000s, the Judicial Council believed the three additional days were necessary to alleviate concerns over the reliability of electronic transmission. The Judicial Council has studied the issue and determined that in the decade-plus since the CM/ECF system was established, it has proved reliable, thus obviating the need for the additional time.

This means that "days are days" when determining the time to respond to papers filed using CM/ECF. But what about papers that are required to be served — but not filed — such as discovery requests? As amended, FRCP 6(d) does not specifically address this situation. However, litigants in the Southern District of Florida should be aware that the Local Rules of the U.S. District Court for the Southern District of Florida were also amended, effective the same day — Dec. 1, 2016 — to address this situation.

Newly added Southern District of Florida Local Rule 5.1(e) states: "Consent to service. Registration as an electronic filing user pursuant to Southern District of Florida CM/ECF Administrative Procedures §3B constitutes consent to receive service electronically pursuant to Fed. R. Civ. P. 5(b)(2)(E) and Fed. R. Crim. P. 49 and waiver of any right to receive service by any other means. Service of papers required to be served pursuant to Fed. R. Civ. P. 5(a) and Fed. R. Crim. P. 39 but not filed, such as discovery requests, may be made via email to the address designated by an attorney for receipt of notices of electronic filings."

This rule means that discovery papers — and other papers required to be served but not filed — may be served on the attorney of record by email sent to the email address that the receiving attorney designated to receive CM/ECF notices. Litigants should be aware that this rule is specific to the Southern District of Florida and should consult the local rules for each district. The Middle District of Florida does not have such a rule, and at least one published decision has specifically rejected this approach.

Other Changes

The other two FRCP amendments are less significant. Rule 4(m) mandates dismissal of complaints that are not served within 90 days after they are filed. However, the Rules Committee has long observed that 90-day period is impractical where service must be effected overseas, so the rule does not apply to service on an individual in a foreign country under Rule 4(f) or on a foreign state under Rule 4(j)(i). Prior to the new amendment, FRCP 4(m) did not address service on corporate entities in a foreign territory; the amendments to the rule resolve this ambiguity, clarifying that the 90-day rule does not apply where service on a corporation, partnership or association takes place in a foreign territory pursuant to Rule 4(h)(2).

The minor amendment to FRCP 82 brings the rules into accord with the Federal Courts Jurisdiction and Venue Clarification Act of 2011. Rule 82 has thus been amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of 28 U.S.C. §

1392.

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