

COMPUTATION OF TIME UNDER COURT ORDERS SHOULD BE NO GUESSING GAME

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Ever receive a court order electronically directing you to act within a prescribed period of time? Ever been concerned about the proper method for computing the time within which to comply with the order? The relatively new electronic filing system in federal court may create additional pause for concern.

One of your primary worries may be the effect Rule 6(e) has on your compliance date. Rule 6(e) permits you to add three days to your computation when service is by mail to the last known address, Fed. R. Civ. P. 5(b)(2)(B); when service is effected by leaving the document with the court clerk, Fed. R. Civ. P. 5(b)(2)(C); or when service is made by delivering a copy of the document “by any other means, including electronic means, consented to in writing by the person served.” Fed. R. Civ. P. 5(b)(2)(D).

Before beginning your computation, you should consider *Epperly v. Lehman Co.*, 161 F.R.D. 72 (S. D. Ind. 1994). In *Epperly*, the court considered the timeliness of the defendant’s objection to a court order the defendant had received in the mail. *Id.* The court discussed the proper manner in which to add the three-day extension provided by Rule 6(e). The court first recognized that Rule 6(e) is written “‘to protect parties who are served notice by mail from suffering a diminution of time to respond through the application of Rule 5(b), which provides that service is complete upon mailing, not receipt.’” *Epperly*, 161 F.R.D. at 75 (quoting 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1171 at 514 (1987) (further citation omitted)).

The *Epperly* court, thereafter, found that the policy and purpose of Rule 6(e) “is best served by adding the three ‘mail days’ at the beginning of the designated period and by including weekends and holidays in the computation of the mail days.” *Epperly*, 161 F.R.D. at 75 (citing 4A *Federal Practice and Procedure* § 1171 at 520-21 (“To assure consistent application, and to reflect accurately the presumption that the three days allowed under Rule 6(e) represent transmission time in the mail, the three days always should be counted first, followed by the ten-day period”).

The Court in *Mullins v. Hinkle*, 953 F. Supp. 744 (S.D. W.Va. 1997), relying on Wright & Miller and the “excellent analysis” in *Epperly*, adopted the “three-days first rule.” *Id.* at 748. Similarly, the court in *Kruger v. Apfel*, 25 F. Supp. 2d 937 (E.D. Wis. 1998) (reversed on other grounds), agreed with the *Epperly* approach, concluding that the three-day mail transmission time is added first and that the mail transmission time includes weekends and holidays. *Id.* at 940.

For purposes of demonstration, let’s assume it’s December 5, 2003, and you just received an order electronically from the United States District Court for the Southern District of Indiana directing you to produce discovery documents to your opponent within ten days. Some practitioners would assume, incorrectly, that the discovery is due December 15. Being the procrastinator that you are, you reach for

your calendar and begin to calculate the latest possible date for complying with the order.

In addition to computing Rule 6(e), your calculation requires you to factor in a few widely known concepts. As Rule 6(a) stipulates, its directives apply to periods of time prescribed “by order of court.” Thus, Federal Rule of Civil Procedure 6(a) removes from your computation December 5, 2003, that is, the date of the court order. Second, Rule 6(a) tells you that generally the last day of the prescribed period is included in your computation unless it is a Saturday, a Sunday, or a legal holiday. Finally, Rule 6(a) informs you that, because the court has ordered production in less than eleven days, “. . . intermediate Saturdays, Sundays and legal holidays . . .” are to be excluded from your computation.

The court order that you are computing arrived through the federal court’s relatively new electronic filing system, but you still get the benefit of Rule 6(e)’s three-day extension. The notes of the Advisory Committee on the 2001 amendments to the Federal Rules confirm this: “The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means.”

Applying the Federal Rules of Civil Procedure and relevant case law to the electronic order you just received, you calculate as follows: Friday, December 5 — the date of the order — does not count in your computation. Saturday and Sunday, December 6 and 7, count as two of Rule 6(e)’s mail transmission days because the mail moves on the weekends. Monday, December 8, represents the third and final mail day provided by Rule 6(e). The order allots ten days for your production, but Rule 6(a) excepts intervening weekends from the ten-day period. (Remember this is so under the federal rules whenever the time period in question is fewer than eleven days.) Therefore, Tuesday, December 9, through Friday, December 12, are the first four days subtracted from your ten-day allotment; Monday, December 15, through Friday, December 19, are days five through nine; and the tenth and final day for compliance is Monday, December 22.

Your diligence finally is paying some dividends. Due to your knowledge of the federal rules and related case law, you, unlike your less-informed colleague who assumed the discovery was due December 15, have an additional week to comply with the court order.

The Indiana Trial Rules differ somewhat from the Federal Rules of Civil Procedure and application of them results in an earlier compliance date. For purposes of this discussion, the state court order — giving you ten days to produce — arrived through the mail.

As with Rule 6(a) in the federal rules, Indiana Rule of Trial Procedure 6(A) excludes from your computation the date of the act or event —that is, the date of the court order — and includes the last day of the period unless it is “a Saturday, Sunday, legal holiday or a day the office in which the act is to be done is closed during regular business hours.” Ind. R. Tr. P. 6(A)(1)-(4).

In contrast to Federal Rule of Civil Procedure 6(a), Indiana Rule of Trial

Procedure 6(A) does not exclude intermediate Saturdays, Sundays, legal holidays, and days on which the office is closed unless the period of time in issue is less than *seven* days. Ind. R. Tr. P. 6(A). This difference is significant in the context of the court order you have in hand. Because the court gave you ten days for production, you do not get the benefit of excluding intermediate weekends and legal holidays from your computation.

Akin to its federal counterpart, Indiana Rule of Trial Procedure 6(E) adds three days to your calculation when receipt of the notice or other paper — here, a court order — is served by mail. Ind. R. Tr. P. 6(E). Notably, however, application of Indiana Rule of Trial Procedure 6(E) is limited only to service by mail. The Indiana Rules of Trial Procedure do not include service by leaving a copy with the clerk of the court (when the person served has no known address), as in Federal Rule of Civil Procedure 5(b)(2)(C), or service by electronic means, as in Federal Rule of Civil Procedure 5(6)(2)(D).

There appears to be no Indiana case law establishing the proper way to add Rule 6(E)'s three-day mail transmission time. In *Lincoln v. Board of Commissioners of Tippecanoe County*, 510 N.E.2d 716 (Ind. Ct. App. 1987), the court added the mail days to the end of its calculation, but the actual method by which to add those days was not at issue. *Id.* at 724. Thus, *Lincoln* is of little assistance. In *Lincoln*, the due date would not have changed even if the convention later established in *Epperly* had been used. Frequently, however, applying the three days at the beginning, rather than the end, of the designated period results in a different due date. These differences appear in designated periods of less than seven days. Proper application, then, is of great importance.

If Indiana state courts follow the *Epperly* rule, your computation for production is as follows: Friday, December 5, is excluded because that is the date of the event. Saturday and Sunday, December 6 and 7, and Monday, December 8, are your three mail days. Tuesday, December 9, through Thursday, December 18, represent your ten-day period for production. Therefore, production under the state court order is due four days before production under the same federal court order.

You must keep in mind that without benefit of Indiana case law on point, you cannot be certain that the state court will follow *Epperly* in adding Rule 6(E)'s mail transmission time. Indiana courts could add these days at the end of the designated period and/or could conclude that weekends and holidays are not included on Rule 6(E)'s computation. Any such differences would alter your latest compliance date. To ensure compliance, you should produce the discovery to your opponent under the formula giving you the least time.

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