Time for Response. Fed R. Civ PR 6

(Begin by consulting your local rules for specified time to respond to motions)

The federal version of rules governing the computation of time have been applied by the Eighth Circuit and other federal courts so that the rule excluding weekends and holidays does not nullify the extra time provided in cases where there has been service by mail. The Federal Rules of Civil and Criminal procedure both include timing rules that are identical in substance to Rules 6.01 and 6.05 of the Minnesota Rules of Civil Procedure.[6] The timing rules of the Federal Rules of Criminal Procedure and those of the Federal Rules of Civil Procedure are substantively identical.[7]

Rule 6(a) of the Federal Rules of Civil Procedure provides in part:

> When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.[8]

The Federal Rules also provide for additional time after service by mail. Rule 6(e) of the Federal Rules of Civil Procedure provides in part:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed
> period.[9]

In construing these rules together, the Eighth Circuit Court of Appeals has held the Rule 6(a) period, excluding weekends and holidays, should be counted off first and then three additional days for mailing should be added. *Treanor v. MCI Telecommunications Corp.*[10] The Eighth Circuit reasoned:

> We note that a different way of applying the Federal Rules of Civil Procedure would lead to a different result. If Rule 6(e) is applied first, the time to respond is increased from 10 to 13 days, but because the time to respond is then more than 10 days, holidays and weekends are counted. We *reject* this approach because "the only way to carry out Rule 6(e)'s function of adding time to compensate for delays in mail delivery is to employ Rule 6(a) first."[11]

Other circuits and federal courts have made the same ruling as the Eighth Circuit did in *Treanor*. The Seventh Circuit has held:

> Rule 6(e) is designed to give a litigant approximately the same effective time to respond whether the papers are served by hand or by mail. […] It would be queer if service by mail, which delays actual knowledge of the decision, would reduce the time to object. Yet that is the effect of adding time under Rule 6(e) first; the time would fall from 14 calendar days for personal service to 13 calendar days for service by mail. And because mail delivery takes time (plaintiffs say that it took five days), the time available to act can be curtailed substantially—here, to eight calendar days. Interactions within a complex set of rules sometimes can have unexpected and unwelcome effects, but we should not create them when the text readily can bear another meaning.[12]

The Ninth Circuit in *Tushner v. United States District Court for the Central District of California*[13] relied heavily upon the reasoning of the court in *Nalty v. Nalty Tree Farm*.[14] The *Nalty* court rejected an application of Rules 6(a) and 6(e), which would take a 10-day prescribed period and add the three days for mailing to it to make one single 13-day time period because the result would prevent the less-than-11-days exception in Rule 6(a) from applying.[15] Instead, the *Nalty* court held the time period should be computed by first applying the less-than-11-day provision, counting the 10 days of the prescribed period, and excluding Saturdays, Sundays, and holidays in the computation of this time period.[16] Then, "[a]fter establishing an initial response date by this method, three additional days should be added pursuant to Rule 6(e)."[17] While Saturdays, Sundays, and holidays are not excluded from the three-day mailing period under the *Nalty* analysis, the court held "[i]f the final day should fall on a weekend or legal holiday, the objections would be due on the first official business day thereafter."[18]

Relying in part upon the Eighth Circuit's reasoning in *Treanor*, the Federal Civil Rules Handbook provides:

> There does, however, appear to be general agreement that Rule 6(a) and Rule 6(e) should never be applied in such a way that a 10-day period (in which intervening Saturdays, Sundays, and legal holidays are excluded) is converted into an 11-day-or-more period (in which intervening Saturdays, Sundays, and legal holidays are counted) by virtue of the added 3 days. Such a reading would defeat the very objectives of Rule 6(e).[19]

Further, Wright and Miller in their treatise, Federal Practice and Procedure, also suggest adoption of the method applied by the Eighth Circuit in *Treanor*.[20] Wright and Miller discuss three different possible methods by which a time period may be calculated using Rules 6(a) and 6(e).[21] These methods are as
follows:

1. Method One: Add the prescribed time period and the three additional days for mailing together to create one, single time period. If this single period is not less than eleven days provided for in the exception to Rule 6(a), then do not exclude intervening Saturdays, Sundays and holidays.[22]
2. Method Two: Treat the prescribed period and the three days for mailing as two separate, less-than-eleven-day time periods and exclude intervening Saturdays, Sundays and holidays from each of the two time periods.
3. Method Three: Treat the prescribed period and the three additional days for mailing as two separate time periods, but exclude Saturdays, Sundays and holidays from the prescribed period only. The three additional days for mailing may be counted first or last.[23]

Wright and Miller reject the first two methods and suggest adoption of the third method, providing:

> [T]he third method still seems preferable, because of its fidelity to the purposes of Rules 6(a) and 6(e), and because it avoids creating undesirable incentives for parties to choose one form of service over another.[24]

Thus, according to Wright and Miller, the reasoning adopted by the Eighth Circuit in *Treanor*, provided in *Tushner* and *Nalty*, is preferable as they have adopted this third method.[25] Wright and Miller suggest in the interests of consistency that courts make a rule that establishes a convention of always counting the three additional days for mailing first or last.