ASIDE

COUNTING THE DAYS GONE BY: A EULOGY FOR FORMER RULE 6(A)(2)

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On December 1, 2009, Rule 6(a)(2) of the Federal Rules of Civil Procedure—and similar rules in other sets of Federal Rules—were substantially amended. Prior to that time, these rules provided that when counting short periods of time (less than eleven days), one did not count weekends or holidays. Now, these rules follow a “days-are-days” approach in which all days count for purposes of counting time periods, regardless of how short.

This brief Aside takes a wry look at the change and its authors (the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States). It points out that the old Rule provided excellent opportunities for clever lawyering and suggests that the authors’ purported rationale for the Rule—that counting days in whole numbers, while skipping weekends and hol-

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idays, was too complicated for the average practitioner—is a bit condescending and probably untrue. In a light-hearted vein, it discusses some of the old rules’ conundrums and how they were resolved.

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INTRODUCTION

On December 1, 2009, Rule 6(a) of the Federal Rules of Civil Procedure (FRCP) changed dramatically. Specifically, Rule 6(a)(2)—which provided that in computing periods of time that were less than eleven days, one should exclude intermediate Saturdays, Sundays, and legal holidays—was repealed.¹ In its stead is a new Rule 6(a)(1), under which all days are counted for any time period, regardless of length.²

In this Aside, I express my fondness for old Rule 6(a)(2) and bid it a fond farewell. Former Rule 6(a)(2) was responsible for the intriguing conundrums and clever arguments that made me proud to be a lawyer. New Rule 6(a) is a drab, ordinary provision that lacks the same potential for excitement. Moreover, the replacement of old Rule 6(a) with new Rule 6(a) is the product of a group of people who thought that counting what the rest of society might call “business

² FED. R. CIV. P. 6(a)(1).
While it was indeed too complicated for them, I submit that attorneys of normal intelligence were having no problem at all. Indeed, they were having fun.

I. A BRIEF OVERVIEW

Former Rule 6(a)(2) stated that, in computing any time period, one should “[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.” In contrast, new Rule 6(a)(1)(B) states that, when a period is stated in days, one should “count every day, including intermediate Saturdays, Sundays, and legal holidays.”

The Committee has stated that the new Rule was part of a “time-computation project” in which a “days-are-days” approach was adopted in all the Rules over which the Committee exercised jurisdiction. Thus, for example, a similar change was made to Rule 26 of the Federal Rules of Appellate Procedure.

I began to question the brilliance of those in charge of the Federal Rules back in 1991 when they changed the time period associated with responding to a subpoena duces tecum from ten days to fourteen days. In explaining this revision, the Advisory Committee Notes

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3 See Comm. on Rules of Practice and Procedure, supra note 1, at 1 (discussing the amendment as a “simplifying change”). Charles Alan Wright once called this group—the various committees of the Judicial Conference that propose rules—the “grandees of the Federal Procedural Establishment.” Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litig. 1, 2 (1994). Lacking Professor Wright’s stature, I will call them, collectively, the “Committee.”


6 See Comm. on Rules of Practice and Procedure, supra note 1, at 1 (explaining that the Appellate, Bankruptcy, Civil, and Criminal Rules’ Advisory Committees proposed similar amendments and that “[t]he principal simplifying change in the amended time-computation rules is the adoption of a ‘days-are-days’ approach”); see also Fed. R. App. P. 26 advisory committee’s note to the 2009 amendments (explaining that former Rule 26(a) “[made] computing deadlines unnecessarily complicated and led to counterintuitive results”); Memorandum to Hon. John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court 1 (Dec. 1, 2008), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2008-Supreme%20Courtsummary.pdf (describing the proposed amendments to the various federal rules and noting that they are meant to “replace the inconsistent and often unclear approach of the existing rules”).

7 The current Rule now requires that “[w]hen the period is stated in days,” one should “count every day, including intermediate Saturdays, Sundays, and legal holidays.” Fed. R. App. P. 26(a)(2).

8 See Memorandum from Hon. John F. Grady, Chair, Advisory Comm. on Civil Rules, to Hon. Joseph F. Weis, Jr., Chair, Standing Comm. on Rules of Practice &
stated that “[t]he 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short time periods under Rule 6 and to allow a bit more time for such objections to be made.”

Was I the only person left bewildered by this explanation? “Complex calculations?” Counting to ten, while skipping weekends and holidays? And yet, to demonstrate the complexity of it all, the Committee told us that the change from ten to fourteen will allow “a bit more time.” A bit? Were the days to be measured in drill sizes?

And, of course, as any third grader who can both count and skip could have explained, the Committee was simply wrong. Under former Rule 6(a)(2), a ten-day period was counted excluding weekends and holidays; a fourteen-day period was (and is) counted including weekends and holidays. Since any given fourteen-day period includes four weekend days, under the former Rule, fourteen days would almost never be “a bit more”—not even a teeny, tiny bit more—than ten days excluding weekends. (The rare exception would be for documents served on a weekend, a maneuver that should really be illegal altogether.) And, of course, in some instances, if one or more holidays fell within a fourteen-day period, such a fourteen-day period would in fact be fewer calendar days than the old ten-day period.

The 2009 Advisory Committee Note to the proposed change to Rule 6(a)—while still maintaining that old Rule 6(a) “made computing deadlines unnecessarily complicated”—did note that “a 10-day period and a 14-day period that started on the same day usually ended on the same day—and the 10-day period not infrequently ended later than the 14-day period.” Thus, to its credit, I suppose, the Committee finally figured out how Rule 6(a)(2) worked—albeit eighteen years later, and only in the context of explaining how difficult all of these complex calculations made the practice of law.

II. FUN WITH OLD RULE 6(A)(2)

Old Rule 6(a)(2) had plenty of interesting applications, some better known than others. Here are a few of my favorites.


9 FED. R. CIV. P. 45 advisory committee’s note to the 1991 amendments.

10 FED. R. CIV. P. 6(a) advisory committee’s note to the 2009 amendments.
Counting the Days Gone By

A. Rule 6(a)(2) and the Three Days of Mystery

For a long time, one question the Rules themselves left unclear was how to combine Rule 6(a)(2) and Rule 6(e).\textsuperscript{11} Just prior to its amendment in 2005, Rule 6(e) provided:

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 under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.\textsuperscript{12}

Although the types of service that triggered the three-day extension varied from time to time, service by mail was always one of them.

If the “prescribed period” were ten days, and three days were added pursuant to Rule 6(e), did that addition take the period outside of the purview of Rule 6(a)(2)? Was it two separate periods (one of ten-day length, the other of three), or one period of thirteen days?

Of course, if it were the latter, that result would create an obvious anomaly. The deadline for a paper served by mail would be earlier than the deadline for a paper served by hand: ten days from the day the paper was served, but excluding weekends and holidays. Indeed, since a paper served by mail (i.e., “snail mail”) is deemed “served” upon mailing under Federal Rule of Civil Procedure 5(b)(2)(C), the recipient would have considerably less time to prepare and serve the required response.\textsuperscript{13} A number of courts, viewing this as an absurd result, concluded that the Rules could not be so interpreted. That is, they said “very clever, but no dice” to the witty attorneys making such arguments, usually employing some colorful adjective to describe the result that the argument sought.\textsuperscript{14} As one court, after referring to the argument as “sophistry” (which it apparently meant as a pejorative), put it: “That may make for a fun syllogism to toy with while we all tap

\textsuperscript{11} Rule 6(e) was either renumbered or relettered as Rule 6(d) in 2007 as part of the comprehensive restyling of the Rules. See Rosenthal Memorandum, supra note 1, at 26 (illustrating this change with a side-by-side chart). Because most of the cases and authorities that I refer to were written before that change, I will refer to it as Rule 6(e).


\textsuperscript{13} See FED. R. CIV. P. 5(b)(2)(C).

dance on the head of this particular procedural pin, but it is not going to make the mail go any faster.\textsuperscript{15}

But “sophistry” had its adherents. Several courts insisted that the plain meaning of the Rule required that the period be considered one period of thirteen days.\textsuperscript{16} Indeed, each of the appellate court cases that considered the issue reversed the district court holdings, and district court rulings occasionally reversed the holdings of magistrate judges.\textsuperscript{17}

In 2005, the Committee purported to resolve this question by amending Rule 6(e). It changed the phrase “3 days shall be added to the prescribed period” to “3 days are added after the prescribed period would otherwise expire under subdivision (a).”\textsuperscript{18} Thus, the Committee purported to resolve the one-period-versus-two-periods question.\textsuperscript{19} “Two periods” won. One must first calculate the initial period pursuant to Rule 6(a) and then add three days.

B. Is Three Less than Eleven?

Did Rule 6(a)(2) apply to the three-day add-on period itself because, after all, it was less than eleven days? Prior to 2005, the slim weight of authority said “no.” That view held that the three days were calendar days—that is, if the original period ended on a Friday, the


\textsuperscript{16} See, e.g., THK Am., Inc. v. NSK, Ltd., 157 F.R.D. 651, 654 (N.D. Ill. 1994) (reading Rules 72(a), which then provided that a party could serve and file objections to a magistrate judge’s order “[w]ithin ten days after being served with a copy,” and Rule 6(e) together to create a thirteen-day period); Pagan v. Bowen, 113 F.R.D. 667, 668 (S.D. Fla. 1987) (“Rule 6(e) simply means that the three additional days allowed where service has been made by mail should be added to the original period and the total taken as the period for purposes of computation.”).

\textsuperscript{17} See, e.g., Lerro, 84 F.3d at 242, 246 (affirming the district court’s decision but disagreeing with its determination that the plaintiff’s objection was not timely); Tusher, 829 F.2d at 855 (reversing the trial court’s method of time calculation); Mullins v. Hinkle, 953 F. Supp. 744, 748 (S.D. W. Va. 1997) (reversing the magistrate judge’s determination that certain objections were not timely).


extended period would go until Monday. But there were not a lot of cases considering the question, and there was at least one prominent disagreement with this trend under an analogous provision.

Further, a decent argument could be made for applying Rule 6(a)(2) to the three days. In 1996, the analogous add-three-days provision of the Federal Rules of Appellate Procedure (FRAP), Rule 26(c), was amended to add the word “calendar” before the word “days.” The Advisory Committee notes stated that the change was made to clarify that weekends and holidays should be included in the count. In an example of belt-and-suspenders rule amendment, FRAP 26 was amended again two years later so that the FRAP analog to FRCP 6(a)(2) (FRAP Rule 26(a)(2)) explicitly said that it did not apply when periods were stated in “calendar days.” Neither change was ever adopted for the Federal Rules of Civil Procedure, although the same Standing Committee proposes rules to the Judicial Conference.

20 See, e.g., CNPq-Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc., 50 F.3d 56, 58 (D.C. Cir. 1995) (per curiam) (“Rule 6(e) does not . . . establish a ‘period of time’ within the meaning of Rule 6(a). . . . [Thus when] the Rules provide for a period of less than even days, its run should be computed excluding weekends and holidays, pursuant to Rule 6(a), and the three-day extension—counting weekends and holidays—should then be added at the end.”); Mullins, 953 F. Supp. at 747 n.6 (dictum) (“[W]eekends and holidays are excluded under Rule 6(a) from the 10-day calculation but not from the 3-day service addition under Rule 6(e).”); Vaquillas Ranch Co., Ltd. v. Texaco Exploration & Prod., Inc., 844 F. Supp. 1155, 1159 (S.D. Tex. 1994) (dictum) (“This Court . . . will not exclude weekends and holidays from the computation of the three day mailing extension of Rule 6(e) . . . .”); Nat’l Savings Bank of Albany v. Jefferson Bank, 127 F.R.D. 218, 222 n.7 (S.D. Fla. 1989) (dicta) (“[I]t would be unreasonable to conclude that a party may exclude intermediate weekends and holidays when computing the separate 3-day mailing period.”).

21 See Faggins v. Fischer, 853 A.2d 132, 139 (D.C. 2004) (per curiam) (“With all respect to the federal contrary holdings [interpreting Fed. R. Civ. P. 6(e)], we deem ourselves guided by the language and the spirit of the precedents interpreting our own rules.”). The decision in Faggins should be lauded for its inclusion of calendar excerpts, so those who like to count along with the court can do so. Id. at 135.

22 See Fed. R. App. P. 26 advisory committee’s note to the 1996 amendment (“The amendment also states that the three day extension is three calendar days.”).


the interpretive maxim of *expressio unius,* the Committee must have intended to apply the *opposite* rule (i.e., counting only business days for the three-day extension) to the Federal Rules of Civil Procedure.

Curiously, the Advisory Committee Notes to the 2005 amendment to FRCP 6(e) suggested that the Committee believed that *those* amendments resolved this question. But there was no actual change in the language of the Rule itself that would affect how one viewed the question. The 2005 amendments certainly did not make obvious changes, like the amendments to FRAP 26 that were made in the 1990s. The Advisory Committee Notes to the 2005 Amendment, then, appear to be what the Committee’s critics have long decried: making changes (or, at least, clarifications) in the Committee Notes, rather than in the Rules themselves. And, perhaps because the Committee hid it so well, courts and commentators didn’t really notice.

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26 The term “*expressio unius*” is a “textual canon” of statutory interpretation suggesting that the “expression of one thing suggests the exclusion of others.” WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION app. B, at 19 (4th ed. 2007).

27 In fairness to the Committee, the Advisory Committee Notes to the 1996 Amendment to FRAP 26 referred to the D.C. Circuit case, CNPq-Conselho Nacional de Desenvolvimento Científico e Tecnológico v. Inter-Trade, Inc., 50 F.3d 56, 58-59 (D.C. Cir. 1995) (per curiam), which held that the three-day extension in FRCP 6(e) was three calendar days and further stated the Committee’s belief that its result was correct. FED. R. APP. P. 26 advisory committee’s note to the 1996 amendment. But why, then, did the Committee propose a change only to the Federal Rules of Appellate Procedure?

28 See FED. R. CIV. P. 6 advisory committee’s note to the 2005 amendment (“Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.”).

29 See supra note 18 and accompanying text (noting the change in language).

30 See Wright, supra note 3, at 5 n.18 (arguing that the new trend of explaining and developing Rules in Advisory Committee Notes is “pernicious,” and in many cases the Notes “have made a point that the Rule itself does not make”).

31 Thus, although the leading federal practice treatise had identified the issue prior to 2005, see 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1171 (3d ed. 2002), none of its post-2005 supplements made any mention of the 2005 Amendment or the Advisory Committee Notes as resolving the issue. See also Long v. Astrue, No. 06-4195, 2007 WL 2407295, at *1 n.3 (E.D. Pa. Aug. 17, 2007) (noting that it was “unclear” whether a ten-day window for response time provided by a local rule had expired because of “unclearli...arising from the question of whether Rule 6(e) . . . includes Saturdays and Sundays in its three-day window”); Am. Hardware Mfrs. Ass’n v. Reed Elsevier Inc., No. 03-9421, 2007 WL 1610455, at *6 (N.D. Ill. Feb. 13, 2007) (suggesting that Rule 6(e) might extend a period otherwise ending on September 28, 2006, to October 3, 2006, because weekend days might not be counted).
C. Backwards Counting: Offer and Acceptance with Rule 6(a)(2)

While the interplay of Rules 6(a)(2) and 6(e) was a great deal of fun and received considerable attention from lawyers and courts alike, the last application of Rule 6(a)(2) that I will discuss garnered much less notice: the application to Rule 68 offers of judgment. Prior to its 2009 amendment, Rule 68 read as follows:

(a) Making an Offer: Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

Both paragraphs (a) and (c) require something to be done before an event—the trial or the damages hearing—begins. Those requirements raised the question whether the counting rules in Rule 6(a) applied to periods going backwards. Most courts found that they did. If the conclusion were otherwise, papers due one or two days before a Monday hearing could have been served over the weekend and then filed with the court, and we know that that is not the correct answer.

More interesting, though, was whether Rule 6(a)(2) should be applied to the period set forth in Rule 68(a): “more than 10 days.” Could an offer of judgment be served ten-and-a-half days before a hearing, thus meeting the more-than-ten-days requirement of Rule 68(a) but nonetheless requiring the application of Rule 6(a)(2)? If that were possible, of course, then an offer of judgment under Rule 68(a) would have to be served at least fourteen-and-a-half calendar days before the trial. But the better view is surely that days can be

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33 See, e.g., Celestine v. Petroleos de Venezuela S.A., 266 F.3d 343, 350 (5th Cir. 2001) (applying Rule 6(a)(2) to the requirement in Rule 56(c) that a summary judgment motion be served at least ten days prior to the hearing); Varsity Gold, Inc. v. Bigham, No. 06-0509, 2007 WL 185089, at *1 (W.D. Wash. Jan. 19, 2007) (applying Rule 6(a)(2) to a local rule requiring papers in opposition to a motion to be served three days before the noting date); Polk v. Montgomery Cnty., 130 F.R.D. 40, 42 (D. Md. 1990) (applying Rule 6(a)(2) to a Rule 68 offer of judgment).
counted in only whole numbers. Accordingly, “more than ten days” was just another way of saying “eleven or more days,” and Rule 6(a)(2) was entirely inapplicable. The offer need be served only eleven days before the hearing. Further, the three added days of Rule 6(e) applied only to periods when a party “must or may act within a prescribed period after service,” so one could serve the offer of judgment by mail without increasing the lead time before trial in which it had to be served.

On the other hand, Rule 6(a)(2) should have applied to the time to make postliability offers under Rule 68(c), which is “at least 10 days.” So, while the authors of the Rules may have thought they were requiring preliability offers to be made further in advance than postliability offers, the application of Rule 6(a)(2) meant that just the opposite was true.

More importantly, both Rule 6(a)(2) and Rule 6(e) also surely applied to the period of time in which the offeree had to accept an offer under Rule 68(a), which was “within 10 days after being served.” Thus, while a Rule 68(a) offer could be made only eleven calendar days before the beginning of a trial, it could be accepted fourteen calendar days after it was made—more if not served by hand. That is, acceptance could come right smack in the middle of the trial. Although the Rule’s various references to a trial or hearing suggest that the offer-and-acceptance process was designed to be completed before trial, the Rule itself has no such explicit requirement. Several courts

35 See McCabe v. Mais, No. 05-0073, 2009 WL 692293, at *7 (N.D. Iowa Mar. 16, 2009) (dictum) (“[T]he period involved in Rule 68(a), ‘[m]ore than 10 days,’ logically cannot be a ‘period [. . .] less than 11 days.’” (second alteration in original) (quoting United States ex rel. Silva’s Excavation, Inc. v. Jim Cooley Constr., Inc., 572 F. Supp. 2d 1276, 1280 n.2 (D.N.M. 2008))), rev’d on other grounds, McCabe v. Parker, 608 F.3d 1068 (8th Cir. 2010).
found this reading intolerable. They squirmed out of it by insisting that Rule 6(a)(2) was applicable to the deadline for making an offer. But those courts never quite explained the feat of verbal or numerical legerdemain whereby a period of time “more than ten days” was actually a period of time “less than eleven days.”

Under new Rule 68, effective December 1, 2009, both the preliability Rule 68(a) offer and the postliability Rule 68(c) offer must be made “[a]t least 14 days before” the date set for the trial or hearing. Rule 68(a) further states that a Rule 68(a) offer can be accepted “within 14 days after being served.” Of course, this provision does not eliminate the possibility of a midtrial acceptance because the three-added-days rule (now Rule 6(d)) still applies only when a deadline is measured after service of a paper. Thus, even under the new Rule, an offer of judgment served by mail or electronically fourteen days prior to trial would be timely, as would an acceptance served seventeen days after service of the offer—on the fourth day of trial.

III. FAREWELL RULE 6(A)(2)—WE HARDLY KNEW YE

I suspect that there is probably hidden potential for fun in new Rule 6. The new Rule’s instruction on how to count hours particularly intrigues me, especially the Advisory Committee’s example of a seventy-two-hour period that falls over the weekend in which daylight savings time ends. Given the examples in the last section, I do won-

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40 See, e.g., Polk v. Montgomery Cnty., 130 F.R.D. 40, 42 (D. Md. 1990) (“[T]his provision [permitting the offeree a full ten days to respond] would be rendered meaningless if, because of the serving party’s failure to provide timely service of the offer, the case were to come on for trial before the expiration of the 10 day acceptance period.”).
41 See, e.g., La. Power & Light Co. v. Fischbach & Moore, Inc., No. 86-0594, 1992 WL 329489, at *1 (E.D. La. Nov. 5, 1992) (finding that an offer of judgment served fourteen days before opening statements was untimely); Polk, 130 F.R.D. at 42 (noting that “[c]learly, the 10 day limitation prescribed under Rule 68 is covered by the exclusion of intervening weekends and holidays” (emphasis added), and further stating that to award costs under Rule 68, “the Court would be compelled to disregard the plain statutory language of one clause of Rule 68”). Needless to say, the Polk court never identified the clear and plain statutory language that compelled its conclusion.
42 FED. R. CIV. P. 6(a), (c).
43 FED. R. CIV. P. 68(a).
44 See FED. R. CIV. P. 6(d) (“When a party may or must act within a specified time after service . . . 3 days are added after the period would otherwise expire under Rule 6(a).” (emphasis added)).
45 See FED. R. CIV. P. 6 advisory committee’s note to the 2009 amendment (“[F]or example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end
der where this attention to detail has been hiding for the last twenty-five years or so.

Whatever the new Rule may have in store for us, it will never be old Rule 6(a)(2). Old Rule 6(a)(2) had the potential for clever arguments that few rules in our day and age provide. Service by mail providing less time to respond than service by hand! Offers of judgment accepted after a week of trial, after you’ve realized that you’ve lost the jury entirely! Modern practice rarely offers litigators the chance to make arguments like these with a straight face, not to mention precedent and logic. I, for one, will miss the old Rule.