

LawToolBox Summary of FRCP and FRAP Amendments (effective 12/1/2016)

By John Grow, Esq.
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On December 1, 2016, important amendments to [FRCP](#) and [FRAP](#) become effective. These amendments include: (1) eliminating language adding 3-days for eService and thus shortening deadlines that are calculated from the date a legal document has been served electronically; (2) clarifying that when a court entertains post-judgment motions that are untimely it does not restart or modify the deadlines related to filing a notice of appeal; and (3) changing the method to determine the maximum length of appellate briefs – subject to local rules – from page length to word count.

What matters do these amendments apply to? If you represent the party complying with a deadline, unless it would “not be feasible or would work an injustice”, the most conservative approach is to assume that the shorter deadlines apply. The [enabling order](#) sent by Chief Justice J. Roberts to Congress states that “the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.”

Eliminating language adding 3-days for eService. FRCP and FRAP are amended to remove service by electronic means from the modes of service that allow 3 added days to act after being served:

FRCP 6(d) **Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~ **being served** and service is made under Rule 5(b)(2)(C) **(mail)**, (D) **(leaving with the clerk)**, ~~(E)~~, or (F) **(other means consented to)**, 3 days are added after the period would otherwise expire under Rule 6(a).

FRCP 6(d), see also FRAP 26(c).

Applying FRCP 5 and FRAP 26 Amendments to Your Caseload. Unless application of amendments to FRCP 6 or FRAP 26 would be infeasible or unjust, these amendments should be applied to (1) all new cases filed after December 1, 2016, and (2) all existing cases where the deadline is triggering by electronic service AFTER December 1, 2016. The more interesting analysis is whether these amendments should be applied to (3) existing cases where the deadline is triggering by electronic service BEFORE December 1, 2016 but the deadline does not expire until AFTER December 1, 2016. Again, the most conservative analysis is to comply with the shorter time period whenever possible to eliminate unnecessary arguments with counsel and/or involving the court in procedural battles that could have been avoided. Nonetheless, we have heard anecdotally that some courts are planning to give parties the extra 3 days during this short transition phase, but before relying on this approach parties should confer with opposing counsel and file a procedural motion for clarification with the court.

LAWTOOLBOX AUTOMATES RULE CHANGE: for deadlines calculated by LawToolBox and impacted by these amendments, for a period of time during this transition to the new rules, you will see both the deadline calculated under the old rules and the new rules (the deadline under the old rules will be pre-pended with the words "OLD RULE" so you can exercise your professional judgment as to which deadline to comply with. *LawToolBox clients don't have to run any maintenance applications or rule updates, instead they just look at their deadlines charts and sync over the new deadlines they want to their calendars.*

FRCP – Examples of Shortened Deadlines. A few examples in United States District Court of the types of deadlines that will or might be **shortened** are: (1) deadlines to serve jury demand after removal, (2) deadlines to reply to an answer or respond to a counter or crossclaim, (3) deadline to object to Rule 26(a)(3) disclosures, (4) deadlines to respond to offers of judgment, and (5) deadlines related to motion practice.

FRAP – Examples of Shortened Deadlines. Similarly, a few examples in United States Court of Appeals of the types of deadlines that will or might be **shortened** are: (1) deadlines to respond to motions for summary disposition, (2) deadlines to request that additional portions of the transcript be designated, (3) deadlines related to filing briefs, and (4) deadlines related to motions practice.

Federal Courts Not Adopting or Deferring Adoption of 3-day Amendments. Some courts are not adopting, or is deferring a decision on adopting, the amendment that eliminates the 3 extra days for when a document is eServed. Here are some examples of different approaches taken by different courts:

- **Add 3-day for Electronic Service by Local Rule:** Pursuant to LR 26-2 and LR 25-5, the 9th Circuit Court of Appeals will continue to allow parties to add 3 days to deadlines calculated from the date a legal document was served electronically using the Appellate

CM/ECF system. In the Northern District for the United States District Court of California, the court has not yet removed reference in the LR 7-3 - which mirrors pre-December 2016 FRCP – and adds 3 days when a pleading is served by referencing service pursuant FRCP 5(b)(2)(C-F), and therefore continues to embrace adding 3 days for eService under its reference to FRCP 5(b)(2)(E).

- Increase the Time Frame for Deadlines in Motion Practice: The Western District for the United States District Court for Virginia has taken a different and simplified approach, and instead of modifying or confusing the rules related to eService has increased the time frame for responding in their motions practice by 3 days (for example, increasing the time to file a response brief from 11 to 14 days after service of a motion). The Eastern District for the United States District of Texas has adopted a local rule that has the same effect, but instead of just changing the time frame to respond to motions, they have adopted a rule that adds 3 days to every time frame calculated from the date a document is served. See, LR CV-6(a) (“When a party may or must act within a specified time after service, three days are added after the period would otherwise expire under Fed. R. Civ. P. 6(a), *regardless of the method of service*”) (emphasis added).

Because of the discretion of local district and appellate courts to modify the impact of these amendments, it is critical to check local rules and when in doubt call the courtroom clerk.

Conclusion. With the exception of local courts that modify and thereby confuse the centralized federal approach for calculating deadlines, these rule change will have the effect of simplifying the calculation of many deadlines, including the elimination of the last two steps from the recent federal calculation scheme of: (1) calculating a deadline, (2) rolling off a weekend or holiday, (3) adding 3 days if eServed, and (4) then rolling again if the final date lands on a weekend or holiday).

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Chart Summarizing FRCP & FRAP Amendments (effective Dec-01-2016)

Reference	BEFORE Dec-01-2016	On of AFTER Dec-01-2016
FRCP 4(m)	Potential ambiguity created by the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association.	Clarified that the 90-day time limit for serving process does not apply to service abroad on corporations, partnerships, and associations
FRCP 6(d) FRAP 26(c)	DO add 3 extra days to deadlines calculated for date a document was eServed	Do NOT add 3 extra days to deadlines calculated for date a document was eServed
FRAP 4(a)(4)	Conflict of case law from different jurisdictions as to whether untimely post-judgment motions restarted time for filing notice of appeal	clarifies that untimely post-judgment motions do not restart the time to appeal
FRAP 5(c) FRAP 21(d) FRAP 28.1(e) FRAP 29(a)(5) FRAP 29(b) FRAP 32(a) FRAP 35(b) FRAP 40(b)	Document size determined by Page length	In practice the page limits are gone bc word count went way down (e.g., principal briefs word count reduced from 14k to 13k words) so most lawyers will track the new lower word count, not page limit. Individual circuits maybe adjust these requirements (like 9th circuit did).
FRAP 29(b)		amicus supporting a petition for panel rehearing or rehearing en banc (or supporting neither party) must file its brief and any required motion within seven days after the petition is filed
FRAP 32(e)	local courts ability to modify default length limits for documents was implicit but not clearly stated	Expressly states local courts ability to modify default length limits for documents
FRAP 32(f)		Things excluded from FRAPs maximum length requirement
FRAP 32(g)		Requiring certificate of compliance for all filings that have page or word limits
FRAP form 1,5, 6 &7		modified
FRAP appendix		modified