

AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE
THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSU-
ANT TO 28 U.S.C. 2074(a); ADDED BY PUBLIC LAW 100-702, SEC.
401(a); (102 STAT. 4649) AND 28 U.S.C. 331; JUNE 25, 1948, CH.
646 (AS AMENDED BY PUBLIC LAW 110-177, SEC. 101(b)); (121
STAT. 2534)



APRIL 29, 2016.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 28, 2016.

Hon. PAUL D. RYAN,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2, 2015 Report of the Advisory Committee on Civil Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 4, 6, and 82.

[*See infra* pp. ____ — ____.]

2. 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.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 4. Summons

* * * * *

- (m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

2 FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

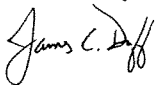
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 6, and 82 of the Federal Rules of Civil Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Attachments

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

1 **Rule 4. Summons**

2 * * * * *

3 **(m) Time Limit for Service.** If a defendant is not served
4 within 90 days after the complaint is filed, the
5 court—on motion or on its own after notice to the
6 plaintiff—must dismiss the action without prejudice
7 against that defendant or order that service be made
8 within a specified time. But if the plaintiff shows
9 good cause for the failure, the court must extend the
10 time for service for an appropriate period. This
11 subdivision (m) does not apply to service in a foreign
12 country under Rule 4(f), 4(h)(2), or 4(j)(1).

13 * * * * *

Committee Note

* New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Invoking service “in the manner prescribed by Rule 4(f)” could easily be read to mean that service under Rule 4(h)(2) is also service “under” Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

1 **Rule 6. Computing and Extending Time; Time for**
2 **Motion Papers**

3 * * * * *

4 **(d) Additional Time After Certain Kinds of Service.**

5 When a party may or must act within a specified time
6 after ~~service~~being served and service is made under
7 Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk),
8 ~~(E)~~, or (F) (other means consented to), 3 days are
9 added after the period would otherwise expire under
10 Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems

4 FEDERAL RULES OF CIVIL PROCEDURE

might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not

count as consent to service “by any other means” of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 “to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served.” A potential ambiguity was created by substituting “after service” for the earlier references to acting after service “upon the party” if a paper or notice “is served upon the party” by the specified means. “[A]fter service” could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). “[A]fter being served” is substituted for “after service” to dispel any possible misreading.

1 **Rule 82. Jurisdiction and Venue Unaffected**

2 These rules do not extend or limit the jurisdiction of the
3 district courts or the venue of actions in those courts. An
4 admiralty or maritime claim under Rule 9(h) is governed by
5 28 U.S.C. § 1390~~not a civil action for purposes of 28 U.S.C.~~
6 ~~§§ 1391-1392.~~

Committee Note

Rule 82 is amended to reflect the enactment of
28 U.S.C. § 1390 and the repeal of § 1392.

**EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 4, 6, and 82, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and are proposed for approval as published with the minor exceptions noted below.

Rule 4(m)

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Comments received on the amendment to Rule 4(m) that was published in 2013 as part of the Duke Conference Package¹ revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a “manner prescribed by Rule 4(f).” It is not clear whether this is service

¹That amendment, which was approved by the Supreme Court and transmitted to Congress on April 29, 2015, shortens the time for service from 120 days to 90 days.

“under” Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). Four comments were submitted, all of which supported the proposed amendment.

3-Day Rule

Rule 6(d). The proposed amendment to Rule 6(d) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c), which are part of the 3-day rule package discussed *supra*. The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.

Some commentators expressed concern that the time periods in the Civil Rules are too short and, therefore, any provision that provides some relief should be retained. The Advisory Committee carefully considered this concern as well as others, but approved the text of the rule as published. The Advisory Committee approved adding language to the Committee Note as a result of the concerns expressed by the Department of Justice (*see supra*, pp. 7-8); the Standing Committee concurred with minor modifications.

Another proposed amendment to Rule 6(d) is to substitute “after being served” for “after service.” The purpose of the amendment is to correct a potential ambiguity that was created when the “after service” language was included in the rule when it was amended in 2005. “[A]fter service” could be read to refer not only to a party that has been served but also to a party that has made service. The purpose of the proposed amendment is to dispel any misreading. The proposed amendment was published in August 2013, and approved by the Committee in May 2014. It was held in abeyance for one year in order for it to be submitted to the Judicial Conference simultaneously with the proposed amendment to the 3-day rule.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h)² with the venue statutes through Rule 82.

The Standing Committee concurred with the Advisory Committee's recommendations above.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 4, 6, and 82, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Sally Yates
Susan P. Graber	Jack Zouhary
David F. Levi	

²Rule 82 invokes Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR
REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

* * * * *

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

- (m) **Time Limit for Service.** If a defendant is not served within 90¹ days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Invoking service “in the manner prescribed by Rule 4(f)” could easily be read to mean that service under Rule 4(h)(2) is also service “under” Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service “made under Rule 5(b)(2)(C), (D), (E), or (F).” The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: “(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to).” Parallel proposals to delete electronic service from the 3-added days

¹ This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. “No one goes home until after midnight.” Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an “other means consented to” under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading, moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court’s transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department’s extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee’s position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

- (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service being served~~² 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).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means” of delivery under subparagraph (F).

² This wording reflects the proposed amendment approved by the Standing Committee in May 2014, but held in abeyance.

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392.~~

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

* * * * *

