



It's About Time

Boyce F. Martin, Jr. & Nathan H. Seltzer

IN MAY 2005, I sat on a panel that heard a case involving one of the many timing oddities that occur under the Federal Rules of Civil Procedure.¹ This one addressed the interplay between Federal Rule 54(d)(2)(B) – providing a fourteen-day time period for the filing of a motion for attorney fees following the entry of judgment at the district court level – and Federal Rule 59(e) – providing a ten-day time period for the filing of a motion for a new trial. In preparing for the oral argument I discussed the case with my clerks and we continually commented on how much easier it was, at least in this case, to be deciding the issue, as opposed to having to practice pursuant to the Federal Rules of Civil Procedure.

In any event, for the only time I can remember in twenty-six years on the bench, I started the opinion with a question. “If a ten-day period and a fourteen-day period start on the same day, which one ends first?” My

job being one of endeavoring to answer questions, I continued. “Most sane people would suggest the ten-day period.” Lawyers, however, often make things more complicated than necessary. That’s why I used the next several pages to explain that under the Federal Rules of Civil Procedure the answer is never simply the ten-day period. “But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days. And this does not even take into account inclement weather. As we sometimes say in Kentucky, there’s eight ways to Sunday.”

The case presented the following question: “Is a motion for attorney fees under Rule 54(d)(2)(B) timely if filed within fourteen days of the district court’s denial of a

Boyce F. Martin, Jr., is a Judge on the United States Court of Appeals for the Sixth Circuit and he just celebrated his 70th birthday. Pursuant to Federal Rule of Civil Procedure 6, however, excluding intermediate Saturdays, Sundays, and legal holidays, he is just over 48 years old. Nathan H. Seltzer is Judge Martin’s law clerk.

¹ See *Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 865 (6th Cir. 2005).

timely filed Rule 59(e) motion?” We answered the question “Yes.” We concluded the opinion with a bit of an open letter to the Rules Committee and to the district courts.² There is no doubt that the fourteen-day time limit for attorney fee applications and the ten-day time period for Rule 59 motions are independently reasonable. It’s when Rule 6 is thrown into the mix that it starts to stink. Rule 6 states that the computation of time periods less than eleven days *excludes* intermediate Saturdays, Sundays, and legal holidays. For time periods greater than eleven days, the computation *includes* intermediate Saturdays, Sundays, and legal holidays. This means that every ten-day time period under the Federal Rules of Civil Procedure always lasts at least *fourteen* days. Eight times per year, accounting for eight of the nine legal holidays, the ten-day period can last *fifteen* days. Once per year – if the time period covers Christmas Day and New Year’s Day – the ten-day period lasts *sixteen* days. In the Rule 59 and Rule 54 interplay, this means inefficiency, multiple fee applications, and judicial headaches. “Efficiency,” we lamented, “will rarely, if ever, be possible under this complex set of rules.”

In the weeks following our decision in *Miltimore Sales*, I received many letters and calls regarding the case. Many of them, including one from my good friend Morris Arnold, commented on the opening paragraph – Judge Arnold informed me that in Arkansas they say “six ways from Sunday” instead of eight. While this might make more sense, Judge Arnold did account for the possibility that Arkansas is just a little behind the times.³ Most of the letters agreed with the

sentiments in the opinion regarding the Federal Rules. The responses from my peers reaffirmed my belief that regardless of whether it’s six ways or eight ways to or from Sunday, the Federal Rules of Civil Procedure, at least with regard to timing, are more complex than necessary. It’s time for a change.

Fortunately, I am confident that the Rules Committee is moving in the right direction. I received an email shortly after the opinion was filed from Judge Lee Rosenthal, chair of the Rules Committee. She informed me that a subcommittee was already studying the issue and I look forward to any future proposals. Change is long overdue. I went to law school in the early sixties and it was a mess then. Many of the timing rules are relics of a past when those wise learned men writing the rules wanted to continue to appear wise and learned. Over the last eighty years or so, many of the rules have been retained, I suspect, not necessarily after debate and reflection, but more because that’s the way it was and always has been. To borrow a quote from Holmes: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁴

The Rules Committee should strongly consider grand-scale simplification of the rules. Rule 6 is a prime target for change. The time it will take lawyers and judges to learn and apply a newer and simpler set of rules will cause fewer headaches than the continued complex litigation about what’s on time and what isn’t. *JB*

- 2 Under Federal Rule 83, district courts have the authority to adopt their own time limitations for the filing of motions for attorney fees. Many district courts in the Sixth Circuit have adopted a thirty-day rule that alleviates the complications we addressed in the case.
- 3 My fellow panelists and also fellow Kentuckians, Judges Rogers and Forester, having concurred in the opinion, I do assert, at least implicitly, signed on for eight ways.
- 4 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).