DON'T EXTEND THAT RULE 59(E) DEADLINE! (OR: SOMETIMES, THINGS THAT ARE SPECIFIC ARE WORSE)

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INTRODUCTION

Did you know that federal district courts can't give parties extended time to file Rule 59(e) motions? It's true! They can't. A Rule 59(e) motion to alter or amend the judgment—a broad, commonly filed post-judgment motion, often used as a motion for reconsideration[2]—is supposed to have an ironclad 28-day deadline. You may not have known that. But you—yes, you, the person reading this—could be a law clerk about to recommend granting an extension of time, or a judge about to accept said recommendation. So please, read on.

Common sense dictates that warnings and restrictions are most effective when they arise in context. "Wash your hands before returning to work" goes in the diner's bathroom, not the little front area with the mints and ancient trivia machine. "Don't eat this" goes on the silica gel packet itself, not the mailing label. "Watch out for snakes" goes where the snakes are—places with a lot of dry heat and ochre rocks—not where the snakes *aren't*, which is hopefully everyplace else. The don't-do-this stop sign should pop up somewhere around the "this" that shall not be done, not in the preamble.

But it doesn't always. And that's what this article is about.

This article's short primal scream examines a departure from the common sense found, oddly enough, in the Federal Rules of Civil Procedure. The culprit is Rule 6, which sets how time is calculated and extended across federal civil practice with a simple background principle: courts can extend the time to file certain motions. Easy to remember, easy to internalize, and fair.

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[2] CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (3d ed. 2019).

But then, in Rule 6(b)(2), comes the exception: *except* for certain enumerated circumstances, such as the ever-popular Rules 59 and 60. For those rules, extending time is not allowed.

This would be all well and good, but for one small problem: the affected rules do not themselves clearly indicate that they are to be treated differently. As a result, litigants ask for prohibited extensions with some regularity, and courts grant them.[3] Because some of the affected rules cross paths with jurisdictional time limits, mischief is the inevitable result.

This article offers a simple solution: cross referencing! The Rules could indicate within the affected provisions that time limits are not to be extended. Eliminating 6(b)(2) isn't necessary; some redundancy is not evil. But because nobody seems in any great hurry to address this issue, I offer this short piece as an invitation to join those in the know; if but one law clerk course-corrects before doing something regrettable, we all will be better for it.

THE ENGINE OF RULE 6

It is helpful to start with a slightly deeper dive into Rule 6—"Computing and Extending Time; Time for Motion Papers," one of the seven rules that comprise Title II of the Federal Rules of Civil Procedure. Title II is home to the mechanical rules setting forth how actions are commenced, how process is served, and so forth.

Rule 6 is arguably the most nuts-and-boltsy of this mechanical subsection. It's an engine communicating important fundamentals, a handy reference for the basics of the Rules' computation of time. How are days counted?[4] What happens if the clerk's office isn't accessible?[5] Rule 6 provides the answers.

Each of the examples above is from Rule 6(a)'s "computing" subpart. Rule 6(b) is the "extending" subpart. It sets out a fairly simple, universal policy towards extensions of time, one which happens to coincide with a common-sense approach: a district court may, for good cause, extend deadlines, even after they expire.[6]

But then the Rule announces a limited exception to this general policy of time extensions. Under Rule 6(b)(2), "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and

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[3] *See infra* note 15.

[4] FED. R. CIV. P. 6(a)(1). Unless otherwise specified, citations to the Federal Rules of Civil Procedure are to the rules in effect at the time this article was drafted and published.

[5] FED. R. CIV. P. 6(a)(3).

[6] FED. R. CIV. P. 6(b)(1).

60(b)."[7] By directing the restriction at the court, rather than the parties, Rule 6(b)(2) makes clear that courts themselves are unable to extend the relevant time limit.

Why single out Rules 50, 52, 59, and 60 for special treatment? The prohibition on extending the time to file Rule 59 motions dates back to the original 1937 version of Rule 6(b)—then just applicable to new-trial requests, rather than altering or amending a judgment—which barred courts from enlarging "the period for taking an appeal."[8] But the real advance came nine years later, with the first major revision of Rule 6. The 1946 revision, for the first time, explicitly prohibited the court from extending the time for "taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."[9]

As the 1946 Advisory Committee note makes clear, the purpose of the change was not to establish a new restriction, but to clarify an old one: the enumerated rules were generally those that could keep judgments from becoming final and appealable. Between the original promulgation of Rule 6 and the proposed revision, courts had reached conflicting outcomes on what they could and could not do in service of extending time limits. The Advisory Committee pointed to some of this confusion and wrote:

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; *that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside*, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time.[10]

And that was that. Rule 6(b)(2) has survived mostly unchanged since then, with minor modifications and tweaks over the years.[11]

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[7] FED. R. CIV. P. 6(b)(2).

[8] FED. R. CIV. P. 6(b) (1937); *see also* FED. R. CIV. P. 59 (1937).

[9] FED. R. CIV. P. 6(b) (1948) (spacing adjusted). Rule 73 is the predecessor to Appellate Rule 4(a). *See* FED. R. APP. P. 4 advisory committee's 1967 note; *see also* Lena Husani Hughes, Note, *Time Waits for No Man-but is Tolled for Certain Post-Judgment Motions: Federal Rule of Appellate Procedure 4(a)(4) and the Fate of Withdrawn Post-Judgment Motions*, 112 COLUM. L. REV. 319, 324 (2012).

[10] FED. R. CIV. P. 6(b) advisory committee's note to 1946 amendment (emphasis added); *see also* WRIGHT & MILLER, *supra* note 2, § 1167 ("The 1948 amendment of Rule 6(b) was designed to clarify the scope of the rule and to eliminate the uncertainty as to when a judgment was final for purposes of appeal."). The restriction on enlarging the time to substitute parties under Rule 25 did not survive the next revision of Rule 6. *See* FED. R. CIV. P. 6(b) (1963) & advisory committee's 1963 note; *Lizarazo v. Miami-Dade Corr. & Rehab. Dep't*, 878 F.3d 1008, 1011 (11th Cir. 2017).

[11] *See, e.g.*, FED. R. CIV. P. 6(b) advisory committee's note to 1963 amendment (remarking upon the deletion of Rule 25, substitution of parties, from the enumerated list).

THE PROBLEM

In 2009, some 70 years after the Rules' adoption, the time limit for filing a simple Rule 59 motion to alter or amend—often styled these days as a "motion for reconsideration"[12]—was extended from 10 days to 28 days. It seems as if decades of "[e]xperience" had revealed that "in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days."[13] The Advisory Committee's "right method" had finally been heeded.

Unfortunately for the Committee, the other half of the bargain was left wanting. Both before and after the very belated 2009 revision of the Rules, courts were routinely asked to permit extensions of time to file the kinds of motions for which extensions were explicitly prohibited by Rule 6(b). And courts frequently granted these requests. In one 1963 opinion, for instance, the D.C. Circuit gently scolded the district court for "purportedly extending" an appellant's time for filing a Rule 59 motion, despite Rule 6(b)'s prohibition to the contrary.[14] Other examples are legion.[15]

Why would lawyers ask for a prohibited extension? Likely for the same reason that the District Courts granted them: they did not realize

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[12] *See* WRIGHT & MILLER, *supra* note 2, § 2810.1 (3d ed.); *see, e.g.*, *Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994); *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986).

[13] FED. R. CIV. P. 59 advisory committee's note to 2009 amendment; *see also* FED. R. APP. P. 4(a)(4)(A)(vi) advisory committee's note to 2009 amendment.

[14] Wolfsohn v. Hankin, 321 F.2d 393, 394 (D.C. Cir. 1963) (per curiam), *vacated*, 335 F.2d 281 (D.C. Cir. 1964). *Wolfsohn* would be reversed by the Supreme Court, 376 U.S. 203 (1964), although the doctrine the Supreme Court relied on in doing so—the "unique circumstances" doctrine of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (per curiam)—met its end in *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007). For a time, though, some courts relied on the "unique circumstances" doctrine to evade the jurisdictional quagmire—and flat-out unfairness to litigants—that could result from a court blessing something it was not allowed to bless. *See, e.g.*, Stauber v. Kieser, 810 F.2d 1, 1–2 (10th Cir. 1982) (per curiam) (applying doctrine to render an appeal timely when party relied on erroneously granted 59(e) motion to extend time for filing an appeal).

[15] *See, e.g.*, Clark v. Time Inc., 727 F. App'x 975, 976–77 (10th Cir. 2018) (nonprecedential); Colter v. Omni Ins. Co., 718 F. App'x 189, 191 (4th Cir. 2018) (nonprecedential per curiam); Legg v. Ulster Cty., 820 F.3d 67, 71–72, 79 (2d Cir. 2016); *In re* Sanai, 653 F. App'x 560, 560–61 (9th Cir. 2016) (nonprecedential); Roistacher v. Bondi, 624 F. App'x 20, 21–22 (2d Cir. 2015) (nonprecedential summary order); Heath v. Superintendent Frackville SCI, 582 F. App'x 82, 85 n.3 (3d Cir. 2014) (nonprecedential per curiam); Obaydullah v. Obama, 688 F.3d 784, 787–88 (D.C. Cir. 2012); Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 615 F.3d 1352, 1359 n.15 (11th Cir. 2010); Green v. DEA, 606 F.3d 1296, 1299–1303 (11th Cir. 2010); Weitz v. Lovelace Health Sys., Inc., 214 F.3d 1175, 1178 (10th Cir. 2000); Alston v. MCI Commc. Corp., 84 F.3d 705, 706 (4th Cir. 1996).

extensions were prohibited. Here, in particular, "gamesmanship" is an extraordinarily unlikely possibility; an attorney would be taking a huge risk by banking on a court or opposing counsel not noticing that extensions are prohibited, given the dire consequences (discussed below) that can cascade out of filing beyond the deadline.

The affected rules bear only the tiniest hint of their exalted status. As of the post-2009 revisions, and with the exception of Rule 60, each of the affected rules states that the respective motions must be filed "no later than" the enumerated number of days.[16] But that's hardly a klaxon. "No later than" could be, and is, sensibly read to allow for a caveat: "unless someone says something different." In fact, the phrase "no later than" is often deployed in litigation contexts that practically invite requests for extensions of time—tight briefing deadlines, for instance,[17] or the narrow window to object to a Magistrate Judge's Report and Recommendation.[18] Its few appearances elsewhere in the Federal Rules do not change this impression.[19]

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[16] *See* FED. R. CIV. P. 50(b), (d); FED. R. CIV. P. 52(b); FED. R. CIV. P. 59(b), (d), (e). Rule 60 has a more amorphous deadline to begin with: "within a reasonable time" for subsections 4 through 6, and "no more than a year" for subsections 1 through 3. FED. R. CIV. P. 60(c)(1).

[17] *See, e.g.*, Min. Order, United States v. Flynn, No. 1:17-cr-00232, 2019 U.S. Dist. LEXIS 216874 (D.D.C. Dec. 16, 2019) (directing the United States to file its "supplemental memorandum of law in aid of sentencing by no later than December 30, 2019"); Unopposed Mot. to Continue Briefing Deadlines by the United States, United States v. Flynn, No. 1:17-cr-00232, 2019 U.S. Dist. LEXIS 216874 (D.D.C. Dec. 26, 2019) ECF No. 148 (seeking an extension of time); Min. Order as to Michael T. Flynn Granting 148 Unopposed Motion to Continue Briefing Deadlines, United States v. Flynn, No. 1:17-cr-00232, 2019 U.S. Dist. LEXIS 216874, 1 (D.D.C. Dec. 27, 2019), ECF No. 148-1 (granting the extension).

[18] Magistrate Judges sometimes direct that objections to a Report and Recommendation are to be filed "no later than" the 14 days set out in FED. R. CIV. P. 72(b). *See, e.g.*, Prado v. Nielsen, 379 F. Supp. 3d 1161, 1170 (W.D. Wash. 2019); Louis v. Wright, 333 F.R.D. 19, 24 (E.D.N.Y. 2017); Gabriel v. Giant Eagle, Inc., 124 F. Supp. 3d 550, 574 (W.D. Pa. 2015). But Rule 72(b)'s deadline, like other regular deadlines, can be extended. *See* Suarez v. Anthem, Inc., 697 F. App'x 607, 608 (10th Cir. 2017); Mathis v. Adams, 577 F. App'x 966, 967 (11th Cir. 2014); Davis v. Mitchel, 553 F. App'x 356, 357 (4th Cir. 2014) (per curiam); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 997 (11th Cir. 1997). So in this context, "no later than" does not establish a hard deadline. *See also* Colon v. DiGuglielmo, No. 05-4343, 2007 WL 4248495, at *1 n.1 (E.D. Pa. Dec. 3, 2007) (noting that an extension of time rendered timely the "late" filing of objections).

[19] The phrase shows up elsewhere in the federal rules, often in constructions that make it sound something other than an unyielding command. Rule 5(e) contains the delightful variation "must be filed no later than a reasonable time after service"—how stern!—and Rule 54(d)(2)(B) instructs lawyers that their fee applications must be filed "no later than 14 days after entry of judgment" unless "a statute or a court order provides otherwise."

Instead, the restriction is confined to Rule 6(b). As Judge Posner observed in the context of a *pro se* appeal, this oversight makes discovery of the restrictive nature of the affected timelines "unlikely."[20] It is simply not obvious that an unpleasant surprise lurks in Rule 6(b).[21] Even government lawyers have failed to realize that the relevant deadlines cannot be extended.[22]

Rampant violation of this restriction would not be as much of a problem if not for the fact that, as the Advisory Committee recognized all of those years ago, the affected rules tend to affect "jurisdictional" time limits that ordinarily cannot be equitably extended.[23] For instance, blowing the 30-day period for filing a civil notice of appeal creates a "jurisdictional" defect, meaning your appeal is dismissed.[24] Ordinarily, a timely filed Rule 59(e) motion stops the 30-day period from running until the district court grants or denies the motion.[25] But what about a Rule 59(e) motion that is "timely" only because the district court violated Rule 6(b)(2) and granted an extension? Does that toll the 30-day clock? Answering that question is beyond the scope of this piece, but at least two courts have answered, "No."[26] Others have answered "Yes,"[27] and still others have come down on "Maybe."[28] But still: no party wants to lose an appeal because he or she sought, and the district court purported to grant, an extension of time that the rules do not allow.

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[20] Robinson v. Sweeny, 794 F.3d 782, 783–84 (7th Cir. 2015).

[21] Some courts have ruled that the "mistake" of asking for these extensions can be avoided by simply reading Rule 6(b), but again, there is simply no indication that there is any reason to do so. *See, e.g.,* Weitz, 214 F.3d at 1179.

[22] *See* United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737, 743 (8th Cir. 2014) (observing that district court had erroneously granted government's request for Rule 59(e) extension); Nat'l Ecological Found. v. Alexander, 496 F.3d 466, 473–74 (6th Cir. 2007) (observing lawyers for Tennessee made the same mistake).

[23] *See* Bowles v. Russell, 551 U.S. 205, 214 (2007).

[24] *See, e.g.*, Spears v. Carnegie Mellon Univ. Police, No. 18-3529, 2019 WL 2152813, at *1 (3d Cir. Feb. 8, 2019) (order).

[25] FED. R. APP. P. 4(a)(4)(A)(iv).

[26] *See, e.g.*, Blue v. Int'l Bhd. of Elec. Workers Local Union 159, 676 F.3d 579, 582–84 (7th Cir. 2012); Weitz, 214 F.3d at 1179.

[27] *See, e.g.*, Alexander, 496 F.3d at 475–76 (holding that relevant time limits are nonjurisdictional claims-processing rules, and that timeliness objections not raised in district court allow otherwise "untimely" post-judgment motions to toll under FED. R. APP. P. 4).

[28] *See, e.g.*, Lizardo v. United States, 619 F.3d 273, 274, 278–80 & 280 n.9 (3d Cir. 2010) (suggesting that, if Rule 59(e) motion is untimely filed, it may still toll *if* its timeliness is not correctly challenged on appeal, so long as FED. R. APP. P. 4(a)(4)(A) is not itself jurisdictional); *see also* Weitzner v. Cynosure, Inc., 802 F.3d 307, 312 (2d Cir. 2015) (holding that FED. R. APP. P. 4(a)(4)(A)(iv) is not jurisdictional).

THE SOLUTION

The simplest solution to this problem would be to *include warnings in the relevant rules*. This would create redundancy, to be sure, but 1) lawyers love redundancy,[29] and 2) there is nothing wrong with helpful redundancy.[30] The warnings could even include a reference to Rule 6(b)(2), thereby alerting lawyers, clients, clerks, and courts to the blanket prohibition contained in that Rule.

So, for instance, Rule 59(e) could read as follows:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment. As set forth in Rule 6(b)(2), this deadline cannot be extended by the court.

The Rules themselves already contain similar redundancy along these lines, most of which is helpful. For instance, in setting forth when orders disposing of certain motions do not require the entry of a separate document, Rule 58(a) does not just *list* the affected rules, but even describes them.[31]

To be clear, this fix would not actually solve the problem of what happens in the case of a violation; the old "Is this jurisdictional?" question would still linger.[32] What it would do, however, is make violations less likely, because the relevant prohibition would be smack dab in the center of the relevant rule, instead of hidden somewhere else.

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[29] *See, e.g.*, PETER M. TIERSMA, LEGAL LANGUAGE 63 (1999) ("Apparently, the lawyer's most important drafting tool is an extensive thesaurus."); Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 31 (2019) ("Contracts are frequently drafted in a way that includes deliberate redundancy . . . ."); Gary Lawson, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 250 (2005) ("Lawyers love redundancy (as anyone who has ever read a contract or deed provision along the lines of 'give, grant, bargain, sell, and convey' can attest) . . . .") (citing Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting). Consider also the meta-implications of using three citations to demonstrate this principle.

[30] *See* Solum, *supra* note 29, at 31 ("But in the law as in human communication generally, redundancy may serve important functions."); John M. Golden, *Redundancy: When Law Repeats Itself*, 94 Tex. L. Rev. 629, 633 (2016) (exploring the need to balance helpful elements of redundancy against negative trade-offs).

[31] *See* FED. R. CIV. P. 58(a)(3) (stating "for attorney's fees under Rule 54" instead of merely saying "Rule 54(d)").

[32] There is also the problem of post-judgment "motions for reconsideration," which do not actually exist under the Federal Rules of Civil Procedure, but are nonetheless commonly—although not always—treated as Rule 59(e) motions if timely filed under that rule. *But see In re* Greektown Holdings, LLC, 728 F.3d 567, 573–74 (6th Cir. 2013) (reasoning that it is improper to construe reconsideration motion as falling under Rule 59(e) when they are instead governed by local rules). Amending the relevant rules would thus not be a *perfect* solution, but merely a very good one.

Clerks, I think, would find it to be especially useful. Many law clerks, especially those right out of law school, will be encountering some of these procedural mechanisms for the first time, and will be inclined to at least read Rules 59 and 60 the first time they come up. Putting the no-extension warnings *in the actual rules* would vastly increase the likelihood that the court, as the final line of defense, would put a halt to the problem before it starts.

CONCLUSION

Small oversights can lead to big problems. Such is the case here; a firm thou-shalt-not has the misfortune of being buried in the instruction-manual preamble for federal litigation, rather than in the substantive portion that follows. Courts are prohibited from extending the deadlines of certain common motions, but the rules governing those motions do not clearly warn litigants that they are to be treated differently. As a result, the prohibition is frequently overlooked, creating problems for litigants, attorneys, and both trial and appellate courts. At the extreme end, the simple error of extending a deadline can, even if the party's reliance would otherwise be reasonable, lead to the abrupt end of litigation, in the form of an untimely appeal or other inability to disturb a now-final judgment.

Happily, there's an easy fix: an amendment that creates additional warnings *in the affected rules*. With minimal fuss, the Federal Rules of Civil Procedure could be tweaked to increase the likelihood of compliance with Rule 6(b)(2)'s prohibition on extending the time to file certain motions.

Make it so, Advisory Committee. And, in the meantime: if this piece helps to avoid at least one post-judgment tragedy, it will have served its purpose.