

THE 2018-2019 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE:

A Few Practical Changes That Close
Procedural Gaps and Better Align
Procedure with Practice

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In addition to holiday cheer, this past December ushered in changes to the Federal Rules of Civil Procedure. These amendments went into effect December 1, 2018, and while they are not extensive, they are meaningful.

Rule No.	Summary of Amendments
5	Updated to mandate the use of e-filing and acceptance of e-service of documents filed by the court in all cases where the parties are represented by counsel. It also establishes a national rule on digital signatures.
23(e)	Updated the class action notice, settlement, and objection requirements and procedures.
62	Updated to extend the automatic stay of enforcement following entry of judgment and to clarify that a bond is not the only form of security an appellant may post to obtain a stay pending resolution of an appeal.
65.1	Updated to recognize that forms of security, other than a bond, may be posted to obtain a stay pending resolution of an appeal.

Below is a more detailed explanation of the amendments.

FEDERAL RULE OF CIVIL PROCEDURE 5:

The amendments to Rule 5 are intended to acknowledge electronic communications as a regular and ordinary form of communication by normalizing electronic service.

Former Rule 5(b) allowed electronic service only with the written consent of the receiving party. This rule went into effect at a time when electronic communication was not as widespread or reliable as it is now. Recognizing the prevalence of electronic communications, Rule 5(b) was amended to provide that a person who registers to submit files to the court electronically using the federal court's Case Management and Electronic Case

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Files (CM/ECF) system also agrees to accept service through the CM/ECF system, unless the court orders otherwise. No additional consent is required. However, written consent still is required to serve papers by some other electronic means (other than CM/ECF). Service is complete upon filing the paper through CM/ECF or when the paper is sent to the recipient by another electronic means that the recipient has consented to in writing, unless the filing/serving party learns that the paper did not reach the recipient.² Notably, Rule 5(b) does not make the court responsible for notifying a filer of a failed CM/ECF transmission.

Former Rule 5(d)(1) provided that any paper, after the complaint, required to be served had to be filed “within a reasonable time after service.” The use of the word “within” in the rule suggested that papers must be served **before** they are filed. New Rule 5(d)(1) corrects this misconception by replacing the word “within” with the phrase “no later than,” such that the amended rule reads: “Any paper after the complaint that is required to be served – must be filed no later than a reasonable time after service.”

Rule 5(d)(1) also clarifies that a certificate of service is not required when a paper is filed through CM/ECF. When service is made by some other electronic means, however, a certificate of service must be filed with the paper or within a reasonable time after the paper is served, and the certificate should specify the date and manner of service.³

Amended Rule 5(d)(3) makes electronic filing mandatory for all parties who are represented by counsel, with limited exception. Pro se litigants, on the other hand, are **permitted** to file electronically only if allowed by local rule or court order and may be **required** to file electronically only by a court order or by a local rule that includes reasonable exceptions. The Advisory Committee Note cautions,

“[c]are should be taken to ensure that an order to file electronically does not impede access to the court[.]”

Rule 5(d)(3) also establishes a national standard on digital signatures, confirming that “[a] filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.”

FEDERAL RULE OF CIVIL PROCEDURE 23:

Overall, the changes to Rule 23 bring much needed clarification and guidance to class action litigation.

First, the 2018-2019 amendments to Rule 23 have modernized the notice requirements to potential class members. While courts have traditionally required that notice to individual class members be given by first-class mail, Rule 23(c)(2) now makes clear that “the best notice that is practicable under the circumstances” “may be by United States mail, electronic means, or other appropriate means.” The Advisory Committee Note explains that technological changes have “introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice,” such as email, but the Committee cautions that “it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.” Thus, there is no preferred method for notice. Parties, however, should be prepared to discuss with the court which method or methods of notice will be most effective.

Second, the amendments now mandate additional substantive requirements for preliminary approval under Rule 23(e).⁴ Under the new Rule, the court “must” direct notice to all class members if the

parties show that the court will likely approve the settlement proposal and will likely certify the class for purposes of judgment on the proposal. If the class has been certified, the Advisory Committee explains that the “only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted.” However, “if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class.”⁵

Further, while the Rule previously required courts to ensure a settlement was “fair, reasonable, and adequate,” it provided no guidance. The amended Rule now outlines factors that courts must consider when approving a settlement:

- Whether “the class representatives and class counsel have adequately represented the class”;
- Whether the proposal was “negotiated at arm’s length”;
- Whether “the relief provided for the class is adequate, taking into account” (the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; the terms of any proposed award of attorney’s fees, including timing of payment; and any agreement required to be identified under Rule 23(e)(3)); and
- Whether “the proposal treats class members equitably relative to each other.”⁶

Third, the 2018-2019 amendments to Rule 23 now impose new obligations and procedures to object to proposed settlements, requiring the objector to state “with specificity” the basis for any objection and whether the objection is being made

only by the objector, by a subset of the class, or by the entire class. Under the new Rule, objectors may freely withdraw their objection without court approval unless they are receiving payment or “other consideration,” which must be broadly construed, in connection with their withdrawal. This change is meant to deter objectors who “may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process.”

Finally, Rule 23(f) has been changed to clarify that no appeal may be taken from an order requiring notice of a proposed settlement. Therefore, as the Advisory Committee explains, “[t]his amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.”

FEDERAL RULE OF CIVIL PROCEDURE 62 AND 65.1:

Former Federal Rule of Civil Procedure 62(a) required a judgment creditor to wait a period of 14 days after entry of judgment before initiating proceedings to enforce a judgment in federal district court. This 14-day stay of enforcement is automatic and designed to provide to the judgment debtor a period of time to challenge the judgment by appealing or by filing a post-trial motion, like a motion under Rule 50 (for judgment as a matter of law), Rule 52(b) (to amend the district court’s findings), Rule 59 (for a new trial) or Rule 60 (for relief from judgment).

Before the implementation of the 2009 Federal Time Computation Project (the “FTCP”),⁷ the deadline to file a Rule 50, 52 or 59 motion was 10 days after entry of judgment, and the automatic stay also expired 10 days after entry of judgment. As a result of the FTCP, however, the deadlines for

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filing a Rule 50, 52, or 59 motion was extended to 28 days after entry of judgment; but oddly, the FTCP set the expiration of the automatic stay at 14 days after entry of judgment. The unintended consequence of these changes was that the automatic stay of enforcement provided in Rule 62(a) expired half-way through the time allowed to challenge the judgment through a Rule 50, 52, or 59 post-trial motion.

The 2018-2019 amendments to Rule 62 make three changes. **First**, the automatic-stay is extended from 14 days after entry of judgment to 30 days after entry of judgment. This change eliminates the gap in the former rule between the expiration of automatic stay and the deadline to file one of the permissible post-trial motions.⁸ The rule further provides that the automatic stay takes effect “unless the court orders otherwise,” expressly recognizing the authority of the district court to dissolve the automatic stay or to supersede it with a court-ordered stay.⁹

Second, the amendments continue Rule 62’s supersedeas bond provisions, albeit with modifications. The former Rule 62 permitted a judgment debtor who had appealed the judgment to stay enforcement of the judgment pending a resolution of an appeal by filing a supersedeas bond, generally in the amount of the judgment. The stay becomes effective when the supersedeas bond is approved by the district court.

Amended Rule 62 makes explicit the ability to post security in a form other than a bond,¹⁰ expands to all parties (not just an appellant) the right to obtain a stay by posting security,¹¹ and allows the security to be provided at any time after the judgment is entered (even before an appeal is taken, before the automatic stay expires, or after the automatic stay has been lifted by the court). The stay takes effect

when the court approves the security and remains in effect for the time specified in the security.

Third, the amendments carry forward with only minor, stylistic changes the provisions for staying judgments in actions for injunctions, receiverships or directing an accounting in an action for patent infringement. While the provisions for staying these types of actions are reorganized by consolidating them in new subdivisions (c) and (d), there is no change in meaning.

CONCLUSION:

The 2018-2019 amendments to the Federal Rules of Civil Procedure modernize certain outmoded rules, close unintended gaps in procedure, and better align federal procedure with the realities of daily life and practice.



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- 1 This article is intended to provide a high-level discussion of the 2018-2019 amendments to the Federal Rules of Civil Procedure. For a more detailed understanding of these amendments, readers are encouraged to personally review the amendment at <https://www.federalrulesofcivilprocedure.org/2018-2019-amendments-to-the-federal-rules-of-civil-procedure-approved/>.
 - 2 A filer who learns that the transmission failed is responsible for making effective service.
 - 3 For papers that must be served, but are not required to be filed until used in the litigation or the court requires filing, the certificate of service need not be filed until the papers is filed, unless filing is required by local rule or court order.
 - 4 Another subtle change is the extension of Rule 23(e)'s procedural safeguards to a "class proposed to be certified for purposes of settlement." Therefore, the notice required under the new Rule 23(e)(1), according to the Advisory Committee, "should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion."
 - 5 The Committee recognizes that although "the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record."
 - 6 The Advisory Committee also suggests that parties "supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate."
 - 7 The FTCP was an effort by the Appellate, Civil and Criminal Rules Advisory Committees to make the method of computing time consistent, simpler and clearer across all Federal Rules. The FTCP was launched in 2007 in response to frequent complaints about the time, energy and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the then-current computation provisions. The time computation amendments went into effect on December 1, 2009.
 - 8 While the 30-day automatic stay coincides with the timing for appealing most civil actions, the Advisory Committee concluded that a 30-day automatic stay also suffices in cases governed by a 60-day appeal period.
 - 9 As the Advisory Committee Note explains, "[o]ne reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor." The Advisory Committee also notes that "[r]ather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security."
 - 10 The amendments to Rule 65.1 are intended to reflect the expansion of Rule 62 to include forms of security other than a bond.
 - 11 "For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal." Fed. R. Civ. P 62, Advisory Committee Notes.

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