

M E M O R A N D U M

TO: Professor Edward Hartnett
Reporter, Advisory Committee on Appellate Rules

FROM: Howard J. Bashman

RE: Whether the U.S. Courts of Appeals should adopt a uniform 5 p.m.
nationwide filing deadline

DATE: May 8, 2023

On May 2, 2023, the U.S. Court of Appeals for the Third Circuit announced that it had approved a change to its local rules to require that documents electronically filed, with the exception of case-initiating filings, must be submitted by 5 p.m. eastern time on their due date to be considered timely filed. *See Exhibits A & B hereto.*

This rule change injects disuniformity into the federal appellate CM/ECF system, since in every other federal court of appeals an electronic filing is deemed timely filed so long as it is received by 11:59:59 p.m. on its due date, as had also been the case in the Third Circuit before its recently announced rule change.

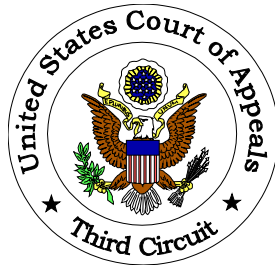
I am writing to suggest that the Advisory Committee on Appellate Rules consider whether to adopt a nationwide 5 p.m. electronic filing deadline throughout the federal appellate system, to reinstate the uniformity that had previously existed. I make this suggestion even though I strongly opposed the Third Circuit's e-filing deadline rule change, and I continue to think that the change was not well-advised.

If the Committee is not willing to propose the enactment of a nationwide 5 p.m. e-filing deadline for the federal appellate system, then I suggest that the Committee

examine whether the Third Circuit acted within the authority conferred under Fed. R. App. P. 26(a)(4) in adopting an across-the-board 5 p.m. electronic filing deadline other than for case-initiating filings. Lastly, if enactment of a nationwide 5 p.m. e-filing deadline will not be pursued, then I suggest that the Committee recommend to the Third Circuit that it reinstate the same 11:59:59 p.m. filing deadline that exists throughout the rest of the federal appellate system.

Thank you for considering these proposals. If I can be of any further assistance in this regard, please let me know.

EXHIBIT A



**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**ORDER ADOPTING AND AMENDING
LOCAL APPELLATE RULES**

PRESENT: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR., SCHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

IT IS HEREBY ORDERED that Local Appellate Rule 26.1 and an amendment to L.A.R. Misc. 113.3(c) are adopted by the United States Court of Appeals for the Third Circuit as supplementary to the Federal Rules of Appellate Procedure. These rules are effective July 1, 2023 and supersede all prior editions and all prior orders amending the Local Appellate Rules.

s/ Michael A. Chagares

Chief Judge

DATED: May 2, 2023

A true copy:
s/Patricia S. Dodszeit
Clerk

L.A.R. 26.0

COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

- (a) Unless a different time is set by a statute, local rule, or court order:
 - (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
 - (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
 - (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.
- (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
- (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
 - (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
 - (2) a party is providing paper copies of previously filed electronic briefs and appendices.
- (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as “midnight in the time zone of the circuit clerk’s principal office” for electronic filing and “when the Clerk’s office is scheduled to close” for other means of transmission of documents to the clerk’s office. This rule applies “[u]nless a different time is set by statute, local rule, or court order.” L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

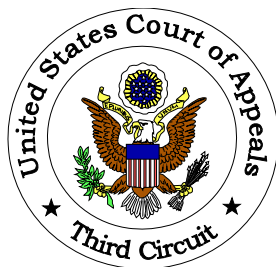
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(c) ~~Except as stated in L.A.R. 26.1, Filing must be completed by midnight on the last day Eastern Time 5:00 p.m. Eastern Time on the last day~~ to be considered timely filed that day.

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Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

EXHIBIT B



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk’s Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk’s Office closes. The hours of the Clerk’s Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. “The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review,” stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court’s adoption of the amendments include, in no particular order:

- permitting the Court’s Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk’s Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party’s motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.
- insofar as over half of the Court’s litigants are pro se, many of whom cannot or will not use the Court’s CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.
- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court’s filings are currently received after business hours.
- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, “the virtual courthouse remains open twenty-four hours a day for electronic filing.”

The Clerk’s Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0

COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

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