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It’s 5 p.m.! Do you know where your brief is?

When notice of a proposed rule change regarding filing deadlines was issued, the Third Circuit invited comments – and comments they got.

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Prologue: The Past. Once upon a time, not such a long time ago, the filing window was actually a window. On one side of the glass was a court clerk and, on the other side, lawyers and messengers would deliver briefs and motions and pay fees, passing paper through the window. The window clerk kept business hours, of course, so woe befell any delivery that arrived after the window closed, typically at 4:30 or 5 p.m.

Living under the tyranny of the window's filing deadline, lawyers had to make sure their papers were ready in time to have tables generated and briefs printed, bound, and physically delivered. Yes, lawyers often used actual print shops. (According to appellate lore, it was a brief printer who first introduced two of the founders of the California Academy of Appellate Lawyers. This printer, who actually read the briefs she printed, told Gideon Kanner, "Your briefs have the same style as another customer, Ed Lascher. You guys should meet each other." And history was made.)

Modern Times. With the digital revolution, lawyers no longer needed printers to prepare professionally typeset briefs and no longer needed messengers to race to the courthouse window. Instead, filings could be – indeed had to be – accomplished electronically. This technological innovation changed the notion of a "filing window" from a physical place to a temporal concept. Filings could be accomplished around the clock, day or night. On a brief's deadline date, lawyers could burn the midnight oil finalizing papers and could timely file any moment before the stroke of midnight with the press of a keyboard button. The filing window had expanded. And that was good. Or was it?

Now. Once a year, on the second Sunday of March, we let out a collective groan and ask, "Wait, do we fall back, or spring forward?" And, realizing it's the latter, the next cry is, "Drat! We're losing an hour!" Now imagine how it would feel to wake up and realize that

daylight savings took away *seven* hours. That's what lawyers practicing in the Third Circuit are facing.

Last month, on May 2, the United States Court of Appeals for the Third Circuit, headquartered in Philadelphia, created a new Local Appellate Rule, rule 26.1, to change the court's filing deadline from 11:59 p.m. to 5 p.m. Eastern Time. Under Federal Rule of Appellate Procedure 26(a)(4), the "last day" for a filing ends "for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office" – "*unless a different time is set by … local rule ….*"

The genesis and rationale for this change can mostly be found in a 2019 proposal by the Third Circuit's current Chief Judge Michael Chagares, who at the time was serving as chair of the Appellate Rules Advisory Committee. Ostensibly, the change was intended to provide lawyers with a better work-life balance. Whereas lawyers used to stay up late finalizing a filing until just before the midnight deadline, an earlier deadline would ensure that lawyers make better use of their time, file before the close of business, and go home to be with their family, see friends, or enjoy other non-legal pursuits. In short, appropriately enough coming from the City of Brotherly Love, concerns of humanity drove the change.

Proponents of the 5 p.m. filing deadline also asserted that it would stop the gamesmanship of late-night filings intended to deprive opposing counsel of those few extra hours to respond to a brief; give court help desk personnel the ability to assist electronic filers during business hours, and equalize the deadlines for pro se litigants (which make up over half of the court's litigants), many of whom are unable to file electronically and so must file paper copies when the court is open.

When notice of the proposed rule change was issued in January 2023, the Third Circuit invited comments – and comments they got. Commenters included senior attorneys, junior attorneys, pro se litigants, professors, paralegals and legal assistants. In fact, the court got so many comments that the original February deadline for comments was extended into March.

Among the proposed rule's critics were the Third Circuit Bar Association, the Pennsylvania Bar Association, the ACLU of Pennsylvania, the U.S. Department of Justice, the Federal Public and Community Defender Offices, a group of 43 appellate lawyers, and large and small law firms. The thrust of the criticism was that the Third Circuit's paternalistic attempt to impose a better work-life balance on lawyers actually hinders that objective. Lawyers enjoy great flexibility in organizing their daily schedules. Now, instead of being able to pick up children from school in the afternoon, or make a midday dentist appointment, and then turn back to their filing before the midnight deadline, lawyers must work around the court's schedule.

Most filings already occur during regular business hours. Federal Judicial Center statistics show that 83% of appellate briefs filed by attorneys in 2018 were filed between 8 a.m. and 5 p.m., 1.7% were filed before 8 a.m., 15% were filed after 5 p.m., and 10% after 6 p.m. *See* Electronic Filing Times in Federal Courts, p. 5 (FJC April 25, 2022). But late-night filings are sometimes unavoidable, given other work requirements or constraints. Night work will not stop; it may just be moved to the night before the deadline rather than the night of. Critics argue that the real causes of work-life imbalance are high billable-hour requirements and a flood of work – not a midnight filing deadline that actually helps lawyers meet their high billing requirements and manage their workflow. If courts want to promote a better work-life balance – which even critics of the rule say is a noble and worthwhile goal – the focus should be on the sources of the problem, not on one of its side effects.

Another criticism is that this earlier deadline would make the Third Circuit an outlier. All other federal appellate courts follow the midnight filing rule, as do all but three federal district courts: the Eastern District of Arkansas, with a 5 p.m. deadline, and the Districts of Delaware and Massachusetts, with 6 p.m. deadlines. Thus, this rule will cause confusion among those who practice in multiple jurisdictions.

Despite the wave of criticism, the Third Circuit adopted the new 5 p.m. filing deadline rule, effective July 1, 2023.

So what? Why should California lawyers care at all about a Third Circuit local rule? All California state and federal courts have a midnight filing deadline. *See* Cal. Rule of Court 8.77(c) ("A document that is received electronically by the court after 11:59 p.m. is deemed to have been received on the next court day."); Ninth Cir. Rule 25-5(c)(2); C.D. Cal. L.R. 5-4.6.1; N.D. Cal L.R. 5-1(d)(4); E.D. L.R. 134(b); S.D. Cal. Electronic Case Filing Admin. Policies § 1(e) (noting that e-filing "is designed to provide service 24 hours a day," but parties "are encouraged to file documents … during normal business hours").

Well, work-life balance is a concern of the legal profession everywhere. And the Third Circuit's new rule is being considered by other courts and is actually even being pushed by its former critics. These critics believe that, despite the flaws in the rule itself, it is better for the time to be uniform across the federal courts to avoid confusion and missed deadlines. Howard Bashman, of How Appealing fame, wrote to the Advisory Committee on Appellate Rules arguing for this – though he noted that if the rule is not adopted nationwide, the committee should recommend that the Third Circuit reinstate the 11:59 p.m. deadline for purposes of nationwide uniformity.

Whether filing occurs at the close of business or afterward would seem to have no impact whatsoever on court operations. Thus, the rationale for the rule appears driven by a desire to return our contemporary 24-hour electronic work schedule to a more historical and analog workday. Given the tremendous outpouring of negative feedback against the new

rule, it appears that much of the bar does not want nanny courts to impose rules supposedly for the benefit of the bar itself. Will California lawyers and their assistants feel differently?