

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at:

<https://courts.delaware.gov/forms/download.aspx?id=105958>. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by ‘holding’ briefs for filing until midnight themselves as a response, even when their brief was done.” Delaware Bar Report 33-34.¹

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline “will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day.” Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association’s Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline “has provided a healthier work-life balance” and that the order “has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country.”). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court’s time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court’s time zone>. Another

¹ The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing “does not promote the submission of carefully considered and edited filings,” id. at 32, and that quality “is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable,” id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk’s office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

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Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.