MEMORANDUM

DATE: January 30, 2023

TO: Patricia S. Dodszuweit, Clerk of Court

FROM: See List Beginning on P. 8

SUBJECT: Proposed Amendments to 3d Cir. L.A.R. 26.1 & 3d Cir. L.A.R. Misc. 113.3

The 43 appellate lawyers joining in this memorandum oppose the proposed amendments. We are a cross-section of lawyers, including lawyers in large firms, small firms, solo practice and government practice.

Although the proposed amendments were not accompanied by a statement of purpose, we assume that the rationale is based at least in part on the "quality-of-life" concern that Chief Judge Chagares expressed in the June 3, 2019 memorandum to the Committee on Rules of Practice and Procedure, proposing similar amendments to the Federal Appellate, Bankruptcy, Criminal, and Civil Rules. https://tinyurl.com/2e9424na. We also understand that the proposed amendments may have been motivated by a desire to avoid inequitable treatment of *pro se* litigants.

All of us agree the proposal is well intentioned. But we believe, for the reasons noted, that the proposed change would be undesirable and counterproductive to the apparent purposes of the proposal.

I. Quality-of-Life Issues

The electronic filing system created a beneficial flexibility in the filing and service of briefs, appendices and other papers. By recognizing midnight as the "end of day" for purposes of electronic filing, the system and the implementing provisions of Fed. R. App. P. 26(a)(4)(A) & (B) have eased the stress of filing on a due date and have enabled lawyers and staff to

work, on flexible hours, from the comfort of home and other places outside their offices.

One of the "benefits" of the COVID-19 experience is the realization that quality of life is enhanced by flexibility in both working location and working hours. Many of those involved in filings – lawyers, staff, clients – do not work traditional office hours of 9:00 a.m. to 5:00 p.m.; their work is not confined to offices; and remote work can be from different time zones. Even before the pandemic, lawyers and staff, because of family or other personal reasons, often leave the office late afternoon, spend time with family or children, and resume work after 5:00 p.m. By way of example, we have heard that younger lawyers have expressed concern that the proposed amendments could deprive them of their ability to take late afternoon and evening hours away from work to get children settled with dinner and homework, before returning to work later in the evening at a "home office."

The current system under Fed. R. App. P. 26(a)(4)(A) & (B) promotes personal and professional autonomy. By eliminating flexibility, while increasing stress on due dates, the proposed amendments would diminish, rather than enhance, quality of life.

The ability to make timely filings after the clerk's office closed on a due date existed for many years before there was electronic filing. The Federal Rules of Appellate Procedure authorized briefs and appendices to be filed timely if mailed and postmarked by the United States Postal Service on the due date. *See* Fed. R. App. P. 25, Advisory Committee Notes (1967 Adoption). The Rules subsequently were amended to enable timely filing by delivery to a commercial delivery service on the due date. *See* Fed. R. App. P. 25, Advisory Committee Notes, Subdivision (a) (1996 Amendments). For many years, this Court maintained an after-hours filing drop box in the lobby of the United States Courthouse.

So, the concept of filing after the 5:00 p.m. closure of the Clerk's Office did not originate with electronic filing. Electronic filing simply made that process a lot easier.

In our experience, there is no basis to assume that late night electronic filing of briefs and other papers is the norm. In our collective experience, while electronic filings often happen after 5:00 p.m. on a due date, filings approaching midnight are rare.

Our experience is consistent with the conclusions of a recent study by the Federal Judicial Center, *Electronic Filing Times in Federal Courts* (2022), https://tinyurl.com/37k93zn4. That study, which was based upon filings in 2018, found that 89% of electronic filings of briefs and other papers in the Courts of Appeals occurred between 8:00 a.m. and 5:00 p.m. *Id.* at Appendix I.1 (PDF p. 13). Only 8.9% of the filings were after 5:00 p.m., and only 4.9% were after 6:00 p.m. *Id.*

The Third Circuit data are consistent with the aggregate data of all Courts of Appeals. In the Third Circuit, only 10% of electronic filings occurred after 5:00 p.m., and only 5.1% were after 6:00 p.m. *Id.* at Appendix I.4 (PDF p. 16). With respect to briefs filed by lawyers in the Third Circuit, as distinct from all filings, only 24% of briefs were filed after 5:00 p.m., and only 16% were filed after 6:00 p.m. *Id.* at Appendix I.4 & I.15 (PDF pp. 16, 27).

Apart from the data and our experience not supporting the apparent assumptions underlying the proposal, the proposed amendments would make this Circuit an outlier and would be a throwback to the pre-electronic filing era without the safeguards that permitted timely filing by postmark, delivery to commercial carrier or drop box. The proposed amendments would not eliminate late nights working on briefs or other filings, but instead would make it more likely that there would be late working nights in the days immediately preceding the due date as well as increase the stress on lawyers and staff on the due date, because of the 5:00 p.m. cutoff. That would not further any quality-of-life goals.

We believe this would be a particular hardship on solo practitioners and lawyers in smaller firms, because they often do not have associate, paralegal or other staff to assist, but instead must do the work individually and often at night after balancing other demands of the day.

There also would be a hardship on lawyers, staff and clients located in time zones to the west. It is not uncommon for lawyers in the Eastern time zone to represent in the Third Circuit clients located in California, Alaska or Hawaii. Those clients often need to review and have input on briefs and other papers before filing. Similarly, lawyers and staff located either permanently or temporarily in Western time zones often are involved in filings in the Third Circuit.

The considerations might be different if the after-hours filings somehow impeded the Court's operations or required court staff to work longer hours. We cannot conceive of how that could be the case, particularly because the proposed amendments would not prohibit after-hours filings (or pre-opening filings), but instead treat them as filed on the next business day, contrary to the national rule established in Fed. R. App. P. 26(a)(4)(A) & (B). In emergency situations where judges and court staff need to receive a particular filing during the Clerk's office hours, the Court may require electronic filings to be completed by a set time. The proposed amendments, therefore, are not for the benefit of the Court, but instead would affect only lawyers, their staff, and clients.

There are better ways to promote quality of life through local rule amendments related to electronic filing. For example:

1. To the extent the Court is concerned that late night filings unfairly shorten a party's response time, the Court could provide that where an electronic filing is made after a certain hour, the time for response automatically is enlarged by one business day.

2. Another idea would be to adopt provisions that prevent filing deadlines from occurring on the first business day of a week, in the absence of expedited or emergency proceedings.

The Court might want to consult with the Lawyers Advisory Committee and other representative groups to consider these and other proposals that would promote quality of life without impeding the Court's operations.

II. Equitable Treatment of *Pro Se* Litigants

There has been some suggestion that the proposed amendments are motivated by a concern that *pro se* litigants who are not filing users are treated unfairly by not receiving the same ability to make filings until midnight on a due date, but instead are limited to the hours that the Clerk's Office, post office, or other commercial carrier is open. We understand this to be a concern, even though the Court allows *pro se* litigants in civil cases to become filing users and obtain all the benefits of the electronic filing system. *See* 3d Cir. L.A.R. Misc. 113.2(b). We suggest that to the extent this is a concern, there are better potential remedies, including:

1. Allowing *pro se* litigants an automatic one-day enlargement of the time for making any non-jurisdictional filing.

2. Allowing *pro se* litigants to file by email.

3. Extending to all filings by *pro se* litigants the ability to make timely filings by mail or delivery to a commercial carrier that currently exists for briefs and appendices under Fed. R. App. P. 25(a)(2)(A)(ii). This now is the case for non-electronic filings by inmates under Fed. R. App. P. 25 (a)(2)(A)(iii).

4. A drop box in the courthouse lobby.

The proposed amendments would have the anomalous effect of affording preferential treatment to *pro se* litigants who are not filing users of the electronic filing system. That is because non-filing users may file timely briefs and appendices by delivery to post office or a commercial carrier on the due date under Fed. R. App. P. 25(a)(2)(A)(ii), and that could occur until well after 5:00 p.m. Eastern, particularly if the *pro se* litigant is located in a Western time zone. Lawyers do not have the same option of filing through mail or commercial delivery, which would allow for timely filing after 5:00 p.m. Eastern. *See* Fed. R. App. P. 25; 3d Cir. L.A.R. 25.1; 3d Cir. L.A.R. Misc. 113.2(a). The proposed amendments would require that lawyers file electronically no later than 5:00 p.m. Eastern on the due date,

even though *pro se* litigants (and only *pro se* litigants) may take advantage of methods of filing that can be accomplished after 5:00 p.m. That is anomalous because the filing of briefs by mail or commercial delivery service causes them to be delivered to the Clerk and opposing parties as much as several days after the due date, thus potentially affecting court efficiency, while electronic filing and service is instantaneous.

III. Other Concerns

These proposed amendments would make the Third Circuit an outlier among the courts of appeals (with no appreciable benefit to the Court's operations, as noted above). That is contrary to the stated purpose of the Federal Rules of Appellate Procedure: to adopt "an integrated set of rules" to promote national uniformity in appellate practice. Fed. R. App. P. 1 Advisory Committee Notes (1979 amendment).

In providing for midnight as the end of day for electronic filing purposes in Fed. R. App. P. 26(a)(4)(A) & (B), the intent was to implement a pre-existing reading of 28 U.S.C. § 452, which requires that all federal courts "be deemed always open" for the purpose of filings. *See, e.g.*, Civil Rules Advisory Committee, Minutes of Sept. 7–8, 2006 Meeting, 3–4, https://tinyurl.com/5erp5hma (PDF pp. 311-12); Memorandum from C. Struve to Appellate Rules Advisory Committee (Oct. 16, 2006) (suggesting that Appellate Rules Advisory Committee would follow approach of Civil Rules), https://tinyurl.com/ymsev6yj (PDF pp. 123-24). For electronic filings, the midnight deadline was uncontroversial, generating very little discussion during the rule-amendment process. The proposed amendments to this Court's local rules seemingly are inconsistent with that statutory requirement as applied to the "electronic age."

Fed. R. App. P. 26(a)(4) does authorize an exception where "a different time is set by a statute, local rule, or court order," as noted in the comment to the proposed amendment to 3d Cir. L.A.R. 26.1. But the exemplar

scenarios in the committee note contemplate local rules that deal with site-specific administrative problems, such as "clerk's offices in different time zones" or the presence of a drop box. Fed. R. App. P. 26(a)(4) Advisory Committee Notes (2009 amendments). By contrast, the proposed amendment's broad reading of this exception would swallow what is supposed to be a general rule of national application. It would also set a trap for the unwary, if practitioners who do not often appear before this Court assume that it abides by the same midnight deadline set by the Federal Rules and every other federal court of appeals. The consequences for such an error could be catastrophic.

In authorizing local rules by a court of appeals in Fed. R. App. P. 47, the Advisory Committee Notes state, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." Consistent with that principle, we suggest that by authorizing exceptions by local rule or order, Fed. R. App. P. 26(a)(4) contemplates that such an order or local rule relate to site-specific problems, as suggested in the Advisory Committee Note, or to specific types of cases or situations, such as emergency proceedings or expedited appeals. We do not believe it reasonable to interpret Fed. R. App. P. 26(a)(4), consistent with Fed. R. App. P. 47, as authorizing a court of appeals to adopt a local rule that shortens the filing day for all purposes in all cases where papers are filed electronically.

IV. Conclusion

For the above reasons, we request the Court to withdraw or to decline the proposed amendments.

Respectfully*,

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