

TO: Judicial Council of California, Appellate Advisory Committee

FROM: Committee on Appellate Courts, Litigation Section

DATE: August 1, 2018

RE: Proposed Change to E-Filing Rule of Court 8.77 Clarifying that Documents Received Before Midnight Are Considered "Filed" the Same Day

The Committee on Appellate Courts of the California Lawyers Association, Litigation Section writes to propose a change to Rule 8.77. As written, the current rule is vague as to whether an e-filed appellate filing, if received before midnight, is considered “filed” that same day. While Rule 8.77(c) makes clear that if a document is *received* after 11:59 p.m., it is considered *received* the next day, no rule states that a document received before midnight is deemed *filed* that day, though that is the popular understanding. Particularly where the filing date is jurisdictional (e.g. a statutory writ), vagueness on this issue raises serious concern. To correct this problem, the Committee on Appellate Courts proposes a change to California Rules of Court, rule 8.77 to clear up this ambiguity and to bring the rule in line with what we believe was the original intent behind the e-filing rules.

A. Background

It is commonly thought that California’s new e-filing rules permit the *filing* of documents in the Court of Appeal up until midnight the day they are due, similar to the rules in federal appellate court. But that is not how the rules actually read. Under Rule 8.77 of the Rules of Court (copy attached), there is a distinction between documents “received” by the Court of Appeal, and documents “filed” in the Court of Appeal.

Under Rule 8.77(a)(1), an e-filed document is initially “received” by the Court, and a confirmation of receipt is generated. Then, once the court confirms that the document received complies with the filing requirements, a confirmation of “filing” is generated, pursuant to Rule 8.77(a)(2). Rule 8.77(c) makes clear that if a document is *received* after 11:59 p.m., it is considered received the next day. But no rule states that a document received before midnight is deemed *filed* that day.

As a practical matter, when the document is received after the close of business at the clerk’s office, it is not reviewed by the court clerk until the next day. If the clerk then determines

the document received the day before complies with the rules, is it deemed filed on the day received? Or on the day it is reviewed? Surprisingly, the e-filing rules do not clearly answer this question.

Rule 1.20 states that “Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk.” This would suggest that electronic receipt by the clerk’s office before midnight ought to mean the document is “filed” by the court.

A member of the Committee on Appellate Courts recently had a situation in the Fifth District, however, where a writ petition was e-filed on Day #1 at 5:30 p.m. It was reviewed on Day #2 and determined to have complied with the filing requirements, but it was docketed as “filed” on Day #2, not on Day #1 when it was received. The clerk did not change the filing date when a correction was requested. It is a real trap for the unwary.

An informal survey of all the Districts, including all three divisions of the Fourth District, indicates that the common practice is for the court clerk to “back-date” the filing date to the receipt date when a document is e-filed after hours and subsequently determined the next day to be in the correct format. But again, the rules do not actually state this.

Even the local rules governing e-filing are of little help. The e-filing rules for the First, Third, Fifth and Sixth Districts all state: “Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight.” This certainly suggests that documents “completely received...prior to midnight” shall be “timely filed on the day they are due,” but again the Rules of Court do not state this directly and the Fifth District apparently interprets this *same* local rule differently from the First, Third and Sixth Districts. (There are no local rules addressing the midnight filing issue in the Second District or Fourth District.)

Particularly where an appellate due date is jurisdictional (e.g. a statutory writ), vagueness in the e-filing rule raises serious concern. If an e-filed writ petition must be received by the clerk’s office in time for it to be reviewed and “filed” on the same day, how is a litigant to know how much time the clerk needs? And what if the hours of the clerk’s office differ between the Districts? A uniform application of Rule 8.77 is essential for fairness, and we suggest it starts with a clearly stated rule.

B. Proposed Change

A possible fix to the problem is to make the following underlined change to Rule 8.77(a):

(a) Confirmation of receipt and filing of document

(1) Confirmation of receipt

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

(2) *Confirmation of filing*

If the document received by the court under (1) complies with filing requirements, the court must arrange to promptly send the electronic filer confirmation that the document has been filed as of the date received as indicated on the confirmation of receipt in (1) above. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified.

Another option is to make a clear reference to Rule 1.20 in 8.77(a).

Attached is a redlined copy of the full text of Rule 8.77.

We appreciate your consideration of the Committee's comments and proposed change. Please do not hesitate to contact us if you have questions or would like to discuss these comments further.

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Attachment

Proposed Amendment to CRC 8.77(a)(2)

2018 California Rules of Court

Rule 8.77. Actions by court on receipt of electronic filing

(a) Confirmation of receipt and filing of document

(1) Confirmation of receipt

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

(2) Confirmation of filing

If the document received by the court under (1) complies with filing requirements, the court must arrange to promptly send the electronic filer confirmation that the document has been filed as of the date received as indicated on the confirmation of receipt in (1) above. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified. The filing confirmation must also specify:

- (A) Any transaction number associated with the filing; and
- (B) The titles of the documents as filed by the court.

(3) Transmission of confirmations

The court must arrange to send receipt and filing confirmation to the electronic filer at the electronic service address that the filer furnished to the court under rule 8.74(a)(4). The court or the electronic filing service provider must maintain a record of all receipt and filing confirmations.

(4) Filer responsible for verification

In the absence of confirmation of receipt and filing, there is no presumption that the court received and filed the document. The electronic filer is responsible for verifying that the court received and filed any document that the electronic filer submitted to the court electronically.

(Subd (a) amended effective January 1, 2017; previously amended effective January 1, 2011.)

(b) Notice of rejection of document for filing

If the clerk does not file a document because it does not comply with applicable filing requirements, the court must arrange to promptly send notice of the rejection of the document for

filing to the electronic filer. The notice must state the reasons that the document was rejected for filing.

(Subd (b) amended effective January 1, 2017.)

(c) Document received after close of business

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.

(Subd (c) amended effective January 1, 2011.)

(d) Delayed delivery

If a filer fails to meet a filing deadline imposed by court order, rule, or statute because of a failure at any point in the electronic transmission and receipt of a document, the filer may file the document on paper or electronically as soon thereafter as practicable and accompany the filing with a motion to accept the document as timely filed. For good cause shown, the court may enter an order permitting the document to be filed nunc pro tunc to the date the filer originally sought to transmit the document electronically.

(Subd (d) amended effective January 1, 2017.)

(e) Endorsement

- (1) The court's endorsement of a document electronically filed must contain the following: "Electronically filed by [Name of Court], on ____ (date)," followed by the name of the court clerk.
- (2) The endorsement required under (1) has the same force and effect as a manually affixed endorsement stamp with the signature and initials of the court clerk.
- (3) A record on appeal, brief, or petition in an appeal or original proceeding that is filed and endorsed electronically may be printed and served on the appellant or respondent in the same manner as if it had been filed in paper form.