

Appellate Practice: COVID-19 and Other Updates

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**Donald J. Miester Jr.
Taggart Morton, LLC
1100 Poydras Street, Suite 2100
New Orleans, LA 70163
(504) 599-8500**

dmiester@taggartmorton.com

Donald J. Miester Jr. is the Chair of the Taggart Morton, LLC Appellate Practice Section. Mr. Miester is a lifelong New Orleanian, and graduated from Jesuit High School. He received a Bachelor of Science degree *magna cum laude* from Tulane University in 1987, and a Juris Doctor degree *magna cum laude* from the Tulane University School of Law in 1990 (where he was an editor of the *Tulane Law Review* and a member of both the Order of the Coif and the Order of the Barristers). Mr. Miester served as the elbow law clerk to two federal district judges: Judge F.A. Little, Jr. in the Western District of Louisiana and Judge Mary Ann Vial Lemmon in the Eastern District of Louisiana.

Mr. Miester has handled scores of appeals in both the federal and state systems throughout his 29-year career, and a significant portion of his practice involves being retained by attorneys to assist them in preparing their own writ applications and appeal briefs. Mr. Miester has been invited to speak on appellate practice at seminars sponsored by the Louisiana State Bar Association, the New Orleans Bar Association, the Jefferson Bar Association, the Slidell Bar Association, and the National Business Institute. Recently, he was selected as a top lawyer in commercial litigation and appellate practice by *New Orleans Magazine*.

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Taggart Morton, LLC

(Materials prepared on May 31, 2020 – COVID-19 Developments Change Almost Daily)

I. Federal Fifth Circuit Appellate Practice: COVID-19 Impact

A. As of May 31, 2020, The Fifth Circuit had issued four General Orders related to COVID. All are on its website (home page, left side).

The orders are not generally applicable to all cases:

- Order One (March 18, 2020): Canceled in-person oral arguments from March 30, 2020 to April 2, 2020 in New Orleans; closed the John Minor Wisdom Building to the public; suspended paper copy requirements; left all other deadlines in place. “Extensions with justification may be requested from the Clerk’s Office following normal procedures and rules.”
- Order Two (March 25, 2020): Suspended mail operations of the Clerk’s office; extended by 30 days all deadlines for incarcerated individuals and *pro se* filers not using electronic filing, EXCEPT the time to file a Notice of Appeal or Petition for Review; canceled in-person oral arguments from April 27 to 30, 2020.
- Order Three (April 20, 2020): Oral arguments authorized for video-conferencing and audio-conferencing; when feasible, real-time public access to the audio-only portion is to be provided.
- Order Four (May 5, 2020): Extended filing deadlines for incarcerated persons by an additional 30 days.

B. The Oral Argument Recordings Page contains recent oral arguments, reflecting those occurring in April (14 oral arguments) and May (7 oral arguments). On Monday, the Court updated the details for the public to access oral argument sessions scheduled for June (limited to 100 participants at a time). In-person oral arguments scheduled for June 1-4 were canceled.

II. Federal Fifth Circuit Appellate Practice: Other Updates

A. The Federal Rules of Appellate Procedure (FRAP).

1. Absent Congressional Action, here are the **proposed changes** that will take effect to FRAP in about six months, **on December 1, 2020**:
 - Rules 35 and 40 will change to restrict the length of a response to petitions for rehearing, essentially tying the length to that of the original request. Not especially significant.
2. There is also a set of **proposed FRAP amendments that could take effect on December 1, 2021**. These have only been published as a Preliminary Draft, and must be considered by the Standing Committee and the Judicial Conference, and then by the United States Supreme Court and Congress. But two changes would be significant:
 - Rule 3 governs the contents of a Notice of Appeal, which is designed to be among the simplest filings in federal practice. BUT some courts have treated a Notice of Appeal from a final judgment that mentions some interlocutory orders but not others as limiting the appeal to exclude any interlocutory order not mentioned. Some courts have also treated appeals from final orders disposing of all issues in a case as encompassing only the claims disposed in the final order. The proposed amendment would clarify that a Notice of Appeal, unless the Appellant specifically limits it to given rulings, would encompass the final judgment and all interlocutory orders merged into that judgment, and would state that “it is not necessary to designate those orders in the notice of appeal.”
 - There is a proposed change to Rule 42: currently, a clerk *may* dismiss an appeal if the parties file a stipulated dismissal and pay court costs; the proposed amendment *requires* such a dismissal. However, the rule would also make clear that if parties want any other relief beyond mere dismissal—“including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them,” then a court order is required.

3. Among the more significant recent changes to FRAP that you may not know:
- Under Rule 25, **electronic filing is mandatory** for all persons represented by an attorney (pretty much like in the federal district courts). This applies to all represented parties, but not to *pro se* individuals or prison inmates. There are some other exceptions as well. Filing must be accomplished by 11:59 p.m. Central Time to be considered timely (Fifth Circuit Rule 25.2.4).
 - Any filing authorized by an attorney through a CM/ECF account, “together with that person’s name on a signature block,” will be deemed signed by the attorney. Service of a paper may be accomplished on CM/ECF filers by submitting papers through the electronic filing system, which will send a copy to all registered users.
 - The Fifth Circuit still accepts fax filings, but only for emergencies or other compelling circumstances.
 - If a “technical failure” makes your filing untimely, you “may seek appropriate relief from the court” under Fifth Circuit Rule 25.2.12.
 - Within the past few years, there were changes to the length of many filings, including briefs (which are addressed in FRAP 32). The word count for briefs was reduced, and principal briefs are limited to 13,000 words (down from 14,000 words); replies are now capped at 6,500 words (down from 7,000 words). Allowable page limits remain unchanged (30 pages for principal briefs, and 15 pages for replies). But you should still use the word-count option if you require a longer brief.

III. United States Supreme Court Practice: COVID-19 and other Updates

- A. COVID Impact: Like all of the appellate courts, the Supreme Court issued a series of COVID Press Releases, Orders, and other “Guidance” documents. In Press Releases on March 16, 2020 and April 3, 2020, the Court postponed oral argument sessions for the March and April sessions, but noted it was holding its regular conferences; the Supreme Court building was closed to the public, but remained open for official business. On April 13 and 28, 2020, the Court announced it would hear oral arguments by telephone conferencing on certain days in May. Live audio feeds were provided to some news outlets, and the arguments were posted on the Court’s website the next day.
- B. The most significant COVID documents were the Supreme Court’s March 19, 2020 and April 15, 2020 Orders.
- On March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after that date to 150 days from the date of the lower court judgment. No extension requests would be permitted from the 150 day period. Other extensions to deadlines will be ordinarily granted if the request is reasonable and based on COVID-19 difficulties.
 - On April 15, 2020, the Court ordered that: (1) a single paper copy of a document, formatted on 8.5 by 11 inch paper, can be filed “in a case prior to a ruling on a petition for a writ of certiorari or a petition for an extraordinary writ, or a decision to set an appeal for argument.” The Court noted it could “later request” that such a document be submitted in booklet format. (2) Some documents are to be filed electronically and not in paper form at all, primarily (for counsel’s purposes) motions for extension of time. (3) Parties were encouraged to agree to be served electronically, and if so, they were relieved of the obligation to serve paper copies on other parties.

C. Other recent United States Supreme Court rule changes.

- Within the last two years, the United States Supreme Court revised its rules to require (in Rule 29) that all filings submitted by parties represented by counsel must be submitted through the Supreme Court’s electronic filing system. **BUT** the Court specified that the electronic filing requirement was “[i]n addition to the filing requirements set forth in this Rule,” which mandates that “[a]ny document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk in paper form.” Rule 33 still requires that, with certain exceptions (such as motions and *in forma pauperis* filings), “every document filed with the Court shall be prepared in a 6 1/8 – by 9 1/4 inch booklet format using a standard typesetting process (e.g., hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters.”
- My preferred printer is Counsel Press (www.counselpress.com). Its director of Supreme Court filings is Gary Chyi, Esq., an attorney who was formerly with Kirkland & Ellis. His office number is (312) 431-0185. Be aware that Supreme Court printing could very well add approximately \$4,000 to \$6,000 to the price of a writ application, and almost all of this is not a recoverable cost.

IV. Louisiana Supreme Court Practice: COVID-19 Update

The Supreme Court has issued a variety of orders for the Louisiana judiciary dating from March 16, 2020 to May 15, 2020, all of which are online at the lasc.org website.

- The most recent orders are from May 15, 2020, one affecting Supreme Court filing deadlines and one addressing statewide court proceedings. The Court ordered that all filings which “were or are due to this Court between Thursday, March 12, 2020 through Friday, June 5, 2020 shall be considered timely if filed no later than Monday June 8, 2020. Parties who are unable to meet this deadline due to the COVID-19 emergency may submit motions for extensions of time, supported by appropriate documentation and argument.”
- On that same day, the Court issued an order repealing and replacing its April 6, April 22, and April 29 Orders. The May 15, 2020 order provided that (1) no civil or criminal jury trial shall commence in any state court before June 30, 2020. COVID continuances are to be excluded from speedy trial computations; and (2) courts are authorized to conduct in person proceedings, but shall take steps to minimize physical contact, practice social distancing, and generally reduce the risk of COVID transmission. Courts were also directed to follow all guidelines by the Centers for Disease Control, the President, and Governor. Finally, all matters “should continue to be conducted with the use of video and telephone conferencing whenever possible.”

V. Louisiana State Appellate Courts: COVID-19 Update

- **First Circuit:** On May 15, 2020, the court ordered that all deadlines were extended to June 5, 2020, so all filings due during the period of March 12, 2020 to June 5, 2020 are timely “if filed on or before **Monday, June 8, 2020**” (all boldings in these quotes are mine). If an appellant brief was filed during this period, the appellee’s brief is due 20 days after the lifting of the suspension, namely on or before June 25, 2020. The courthouse is open, but electronic filings are encouraged.
- **Second Circuit:** On May 18, 2020, the court ordered that the period of the suspension of legal deadlines would end on June 5, 2020, and pleadings otherwise due during this legal holiday period “shall be due within seven (7) days of the resumption of normal court operation (**June 12, 2020**),” except that expedited matters shall be due on or before June 8, 2020. The Court also noted that oral arguments would recommence on June 22, 2020, either in person or by videoconference. The Second Circuit, at least for now, accepts e-filings, and fax filings with prior authorization.
- **Third Circuit:** On May 15, 2020, the Court entered an order providing that all “filings otherwise due in this Court between March 12, 2020 and June 5, 2020 shall be considered timely if filed on or before **June 8, 2020**.” The Third Circuit, at least for now, accepts e-filings and fax filings.
- **Fourth Circuit:** On May 15, 2020, the Court ordered that “pleadings otherwise due in this Court during this legal holiday [extending through June 5, 2020] shall be deemed filed timely if filed on or before **June 8, 2020**.”
- **Fifth Circuit:** On May 15, 2020, the Court ordered that “filings otherwise due in this Court between March 12, 2020 and June 5, 2020 shall be deemed timely if filed on or before **June 8, 2020**.” The Fifth Circuit is conducting an oral argument docket through Zoom.

VI. Louisiana State Appellate Courts: Other Updates

- A. There have been no changes to the Uniform Rules of Appellate Practice in the last few years. Note that the current version of the Uniform Rules is available on the Supreme Court of Louisiana's website. If you ever want to check for recent amendments, however, go to the state Fifth Circuit's website, which has a handy "Latest Change to Rules" tab under the "Uniform Rules" section. That tab currently shows that the latest changes became effective in May 2014.
- B. Each Louisiana circuit has adopted Local Rules that supplement the Louisiana Uniform Rules. Here are the most recent developments (other than fee changes):

1. **First Circuit:** The most recent changes became effective on May 19, 2014, when the First Circuit adopted e-filing (Local Rule 8).
2. **Second Circuit:** Effective September 19, 2019, Rule 2-5 was amended to authorize the rejection of briefs not in compliance with local rules. All such briefs must be rejected, but there's a seven-day cure period that preserves the right to oral argument. Further, effective on May 31, 2019, Rule 15 was amended, and all briefs shall contain the following sentences:

"I hereby verify that all attachments to this brief have previously been duly filed and/or accepted or proffered into evidence in the lower court, to the best of my knowledge, information and belief. I understand that failure to comply with this local rule may result in the refusal to consider said attachments. WILLFUL FAILURE TO COMPLY WITH THIS LOCAL RULE MAY SUBJECT ME TO PUNISHMENT FOR CONTEMPT OF COURT."

The rule also specifies that no attachments "will be considered if not filed and/or accepted or proffered in the lower court unless by Order of this Court for good cause shown."

Note: the Second Circuit **does not accept e-filings**, and only accepts fax filings in the case of emergency writs.

3. **Third Circuit:** Like the Second Circuit, the Third Circuit **does not accept e-filings**, and only accepts fax filings (or filings by email) for emergencies, with prior court permission. And, like the Second Circuit, on September 25, 2019 (amended effective May 8, 2020), the Third Circuit enacted a rule (Internal Rule 32) requiring each brief and memoranda that included an attachment to include a statement nearly identical to that of the Second Circuit:

“I hereby verify that all evidence attached to this brief or memorandum, for the purpose of review and consideration as evidence by this Court, has previously been entered into evidence, or proffered as evidence in the lower court, to the best of my knowledge, information and belief. I understand that failure to comply with this local rule may result in this Court’s refusal to consider said attachments. WILLFUL FAILURE TO COMPLY WITH THIS LOCAL RULE MAY SUBJECT ME TO PUNISHMENT FOR CONTEMPT OF COURT.”

Interestingly, one recent “announcement” on the Court’s website (from April 21, 2018) reminded all counsel to be “appropriately dressed in business attire,” with men in “coat and tie.” Further, “No denim is allowed.”

4. **Fourth Circuit:** Effective March 14, 2018, the Fourth Circuit adopted an e-filing rule (Local Rule 25). The only other recent changes are to fees.

5. **Fifth Circuit:** The Fifth Circuit had the earliest local rule addressing e-filing (Local Rule 7, effective April 24, 2014). The only other recent rule change is to Rule 11, which is not about sanctions, but about electronic and video evidence. All such evidence shall be in Windows Media Audio or Video format.

To quickly summarize: The Louisiana First, Fourth, and Fifth Circuits accept e-filings, and the Second and Third do not; but the Second and Third Circuits are accepting e-filings for now due to the COVID-19 crisis.

VII. Louisiana State Courts: Selected Cases over the Past Month, Highlighting and Updating Recurring Appellate Issues

A. Supreme Court of Louisiana

Everett v. Air Products and Chemicals, Inc., No. 2019-1975 (La. 5/26/20) (per curiam addressing *Daubert* and *Foret*)

Bardeau-Marse v. Delatorre, No. 2020-403 (La. 5/7/20) and *Seven Arts Pictures v. LDED*, No. 2020-427 (La. 5/14/20) (timeliness of writ application following rehearing) (VERY IMPORTANT RECURRING ISSUE)

B. First Circuit Court of Appeal

Doctors for Women Medical Center, LLC v. Breen, No. 2019-584 (La. App. 1 Cir. 6/01/20) and *Markiewicz v. Sun Construction, LLC*, No. 2019-869 (La. App. 1 Cir. 5/28/20) (decretal language) (VERY IMPORTANT RECURRING ISSUE)

In re Succession of Johnson, No. 2019-786 (La. App. 1 Cir. 5/28/20) (conversion of appeal to writ)

Jackson v. Atlantic Specialty Automotive Ins., No. 2020-166 (La. App. 1 Cir. 5/26/20), *Friendly v. Pulido*, No. 2020-327 (La. App. 1 Cir. 5/26/20), and *Aguirre v. Safeco Ins. Co.*, No. 2020-164 (La. App. 1 Cir. 5/12/20) (writs not considered; recurring issue: failure to provide proper documents to appellate court—many others issued in past 30 days)

Gros v. Baton Rouge Rehabilitation Hospital, No. 2020-279 (La. App. 1 Cir. 5/12/20) (writ granted with order: seeking improper *ex parte* relief)

Gaudin v. Asplundh Tree Expert Co., No. 2020-29 (La. App. 1 Cir. 5/12/20) (3-2 writ grant; unstated *Herlitz* issue in damages context)

Rainer v. Thornhill, No. 2019-974 (La. App. 1 Cir. 5/11/20) (unpublished; what rulings form part of an appeal)

Didier v. Simmons, No. 2019-1100 (La. App. 1 Cir. 5/11/20) (relief when peremptory exception of no cause of action is granted).

Tassin v. State Farm, 2019-1162 (La. App. 1 Cir. 5/11/20) (proper use of proffer to obtain a reversal).

C. Second Circuit Court of Appeal

Redstone v. Sipes, No. 53,416 (La. App. 2 Cir. 4/22/20) (contract ambiguity)

D. Third Circuit Court of Appeal

Trahan v. Martin, No. 2019-430 (La. App. 3 Cir. 5/20/20) (summary judgment evidence)

Arsement v. Bruchhaus, No. 2019-546 (La. App. 3 Cir. 5/6/20) (attorney fees on SLAAP motion)

Colligan v. Maison de Lafayette Nursing Home, No. 2019-857 (La. App. 3 Cir. 5/6/20) (medical malpractice—burden of proof)

E. Fourth Circuit Court of Appeal

Matusoff v. Department of Fire, No. 2019-932 (La. App. 4 Cir. 5/20/20) (reversal using abuse of discretion standard)

ERG Enterprises, LLC v. Green Coast Enterprises, No. 2019-1104 (La. App. 4 Cir. 5/13/20) (arbitration agreement binding on non-signatories)

Laborde v. Laborde, No. 2019-634 (La. App. 4 Cir. 5/6/20) (attorney's fees for contempt).

F. Fifth Circuit Court of Appeal

Ehlingberger v. Guardian Medical Group, LLC, No. 2019-446 (La. App. 5 Cir. 5/39/20) (conversion of appeal to writ, and declaratory judgment issues).

Burke v. Cohen, No. 2019-544 (La. App. 5 Cir. 5/28/20) (evidence submitted allegedly untimely in connection with exception)

Succession of Carter, No. 2019-545 (La. App. 5 Cir. 5/28/20) (olographic will requirements)

Mautner v. Ware, No. 2019-611 (La. App. 5 Cir. 5/27/20) (default judgment standards)