

Murphy's Law In Action — Appeal Electronically Submitted Four Days Early Was Untimely Because It Wasn't Filed By Clerk

Filing a notice of appeal on time is critically important because dismissal of an appeal can be expected if it is filed even 5 minutes late. The proliferation of electronic filing of documents in federal and state courts has increased the diligence necessary to ensure compliance with a filing deadline — because electronically submitting an appeal with proof of the date and time of its submission may not constitute filing of the appeal. Luther Franklin learned that the hard way. On October 30, 2015 the U.S. Second Circuit Court of Appeals ruled his appeal electronically submitted four days before the filing deadline was untimely because it wasn't docketed by the court clerk.

Franklin is a retired Lieutenant Colonel in the United States Army Reserve. He filed a complaint in the United States District Court for the Eastern District of New York on February 5, 2013, seeking correction of his military records, a retroactive promotion, and back pay.

On August 28, 2014, the District Court's memorandum and order was filed that granted the government's motion to dismiss Franklin's complaint for lack of subject matter jurisdiction.

Franklin had 60 days to file a notice of appeal to the U.S. Second Circuit Court of Appeals.

Kirk cont. from p. 5

¹⁶ "State fire marshal Willard Preston resigns." The News Journal. April 6, 2007 <http://www.niad.info/Willard.html>

¹⁷ http://www.niad.info/Donald_Roberts.html

¹⁸ Personal communication, Mark Kirk, Sept. 17, 2015.

¹⁹ Personal communication, Mark Kirk, March 6, 2006

²⁰ Personal communication, Ofra Bikel. Innocence Network Conference, Cincinnati. April 8, 2011

²¹ Issue 26, November 2004, online at, http://justicedenied.org/issue/issue_26/mark_kirk_jd_issue26.html

²² <https://www.change.org/p/jack-markell-captain-morgan-s-spiced-rum-is-non-flammable-please-free-mark-kirk>

²³ https://en.wikipedia.org/wiki/Safety_data_sheet

²⁴ <http://www.niad.info/FDSA.html>

Twelve years ago *Justice Denied* published an article about Mark's Kirk case in Issue 26 (Fall 2004), pgs. 8, 10, "Convicted of Starting Deadly Fire with Unburnable Substance — The Mark Kirk Story." It is online at, http://justicedenied.org/issue/issue_26/mark_kirk_jd_issue26.html



The District Court requires an attorney to electronically file all documents -- including appeals. The court's ECF ("Electronic Case Filing") [Manual states](#): "All documents must be filed electronically — Electronic Filing is Mandatory — See Administrative Order No. 2004-08."

Four days before the October 27, 2014 deadline, attorney Gary Port uploaded Franklin's notice of appeal and other necessary documents to the federal judiciary's computerized case management CM/ECF system on October 23, and he paid the required \$505 filing fee by accessing www.pay.gov, the federal government website for making payments to government agencies. Port received an email that same day from www.pay.gov transmitting a receipt for his payment.

On October 28 Port learned the Eastern District Court's docket did not reflect the notice of appeal he submitted on October 23. Port's office [contacted the court clerk's office](#), which "assured that the initial receipt of October 23, 2014 would stand as proof that we did timely file, but due to issues with the ECF system [the notice of appeal] did not get properly docketed."

Port later [related in a declaration](#) that "the [C]lerk's [O]ffice specifically instructed my office to refile the documents, and pay the fee again." Port followed the Clerk's instructions and again electronically filed the notice of appeal. The District Court docket reflected it was filed on October 28.

On January 5, 2015, the government filed a motion to dismiss Franklin's appeal as untimely. Franklin opposed the government's motion by principally arguing his notice of appeal was timely filed on October 23, 2014, when he electronically submitted it and he paid the required fee, even though it did not appear on the District Court's docket until he refilled it on October 28 and again paid the fee.

On October 30, 2015 the Second Circuit issued its ruling dismissing Franklin's "untimely" appeal. [The Court stated](#) in *Franklin v. McHugh*, No. 14-4096-cv (2nd Cir., 10-30-2015):

"The timely filing of a notice of appeal in a civil case is a prerequisite to the appellate court's jurisdiction. As the Supreme Court observed in *Bowles* in 2007, "[T]ime limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." 551 U.S. 10 at 209 n.2. Like other jurisdictional requirements, the timely

filing mandate is not subject to judicially created equitable exceptions."

...
In the Eastern District, electronic filing has been mandatory in counseled civil cases since 2004.

...
Here, although Franklin's counsel undoubtedly intended to file a notice of appeal electronically on October 23, 2014, his efforts fell short of the mark. His account of his attempt to file electronically a notice of appeal on October 23 suggests strongly that counsel simply overlooked the last step of the process: he appears to have followed the electronic filing process through the fee paying stage only, stopping upon receiving the receipt for payment. He does not represent that he proceeded past that point or that he received the critical Notice of Electronic Filing screen; and he appears to have failed at the time to notice the shortcoming.

We thus conclude that a notice of appeal is not "filed" for purposes of 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4 until counsel completes the CM/ECF filing process in compliance with the applicable local district court rules ... Because Franklin did not timely complete the filing process, the Secretary's motion to dismiss the appeal as untimely is granted, and the appeal is dismissed for want of jurisdiction."

Even though the Clerk's Office conceded there were "issues with the ECF system" on October 23 when Franklin's appeal was submitted, the Second Circuit disregarded that and placed the entire blame on his attorney for the dire consequences of the electronic problems. The Court's ruling emphasizes the importance of every attorney developing the habit to double check to make sure that an electronic submission has been properly processed.

Franklin's case was civil, but the principle underlying the Court's ruling applies to the electronic filing of a document in a criminal case.

[Click here to read](#) the ruling in *Franklin v. McHugh*, No. 14-4096-cv (2nd Cir., 10-30-2015).

Source:
[Franklin v. McHugh](#), No. 14-4096-cv (2nd Cir., 10-30-2015) (Untimely Filed Notice of Appeal Not Properly Filed Under CM/ECF System on Oct. 23, 2014) [cm/ECF User's Guide](#) (U.S. District Court Eastern District of New York)

