

appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir. 1986); *Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates*, 780 F.2d 1043 (D.C. Cir. 1986); *In re OPM Leasing Services, Inc.*, 769 F.2d 911 (2d Cir. 1985); *Spika v. Village of Lombard, Ill.*, 763 F.2d 282 (7th Cir. 1985); *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3d Cir. 1985); *Wilson v. Atwood v. Stark*, 725 F.2d 255 (5th Cir. en banc), cert. dismissed, 105 S.Ct. 17 (1984); *Case v. BASF Wyandotte*, 727 F.2d 1034 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 386 (1984); *Hensley v. Chesapeake & Ohio R.R.Co.*, 651 F.2d 226 (4th Cir. 1981); *Buckeye Cellulose Corp. v. Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerks' offices, for the duty of that office to give notice of entry of judgment must be maintained.

COMMITTEE NOTES ON RULES—2001 AMENDMENT

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Changes Made After Publication and Comments Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note "service," not "mailing," on the docket.

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in text, are set out in this Appendix.

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See

Rule 43(e) of these rules dealing with evidence on motions. Compare *Civil Practice Rules of the Municipal Court of Chicago* (1935), Rules 269, 270, 271.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) INDICES; CALENDARS. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

U.S.C., Title 5:

§ 301 [see Title 28, § 526] (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees)

§ 318 [former] (Accounts of district attorneys)

U.S.C., Title 28:

§ 556 [former] (Clerks of district courts; books open to inspection)

§ 567 [now 751] (Same; accounts)

§ 568 [now 751] (Same; reports and accounts of moneys received; dockets)

§ 813 [former] (Indices of judgment debtors to be kept by clerks)

And see “Instructions to United States Attorneys, Marshals, Clerks and Commissioners” issued by the Attorney General of the United States.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, c. 501, §§1–7, 53 Stat. 1223, 28 U.S.C. §§ 444–450 [now 601–610].

Subdivision (b). The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography. See *Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts*, prepared by the Bureau of the Budget (1941) 38–42. See also Rule 55, Federal Rules of Criminal Procedure [following section 687 of Title 18 U.S.C.].

Subdivision (c). The words “Separate and” have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk’s force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

Subdivision (d). Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), *supra*.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The change in nomenclature conforms to the official designation in Title 28, U.S.C., § 231.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee’s Note thereto.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence

[(a) STENOGRAPHER.] (Abrogated Dec. 27, 1946, eff. Mar. 19, 1948)

[(b) OFFICIAL STENOGRAPHER.] (Abrogated Dec. 27, 1946, eff. Mar. 19, 1948)

(c) STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof

duly certified by the person who reported the testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This follows substantially [former] Equity Rule 50 (Stenographer—Appointment—Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (b). See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 A.B.A.J. 818, 819; (1937), 24 A.B.A.J. 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., c. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. § 9a [now 550, 604, 753, 1915, 1920], providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs, and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

XI. GENERAL PROVISIONS

Rule 81. Applicability in General

(a) PROCEEDINGS TO WHICH THE RULES APPLY.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651–7681. They do apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of