

Alabama Rules of Civil Procedure

X. CIRCUIT COURTS AND CLERKS

Rule 77.

Circuit courts and clerks.

(a) *Circuit courts always open.* The circuit courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) *Trials and hearings; orders in chambers.* All trials upon the merits shall be conducted in open court, except as otherwise provided by statute, and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state either within or without the circuit; but no hearing, other than one ex parte, shall be conducted outside the circuit without the consent of all parties affected thereby.

(c) *Clerk's office and orders by clerk.* The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays but a circuit court may provide by order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.

(d) *Notice of orders or judgments.* Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail or by electronic transmittal in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing or electronic transmittal. Such mailing or electronic transmittal is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit

court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions. The circuit court may also extend the time for cross-appeal, pursuant to Rule 4(a)(2), Alabama Rules of Appellate Procedure, not exceeding thirty (30) days from the expiration of the original time now provided for cross-appeals, upon a showing of excusable neglect based on a failure of a party to learn of the filing of a notice of appeal by another party.

(dc) *District court rule.* Rule 77 applies in the district courts and its references to “circuit” shall be treated as references to “district.”

[Amended 5-13-73; Amended 4-15-74; Amended eff. 6-20-89; Amended eff. 10-1-95; Amended eff. 10-24-2008.]

Committee Comments on 1973 Adoption

The rule differs from Federal Rule 77 only in minor respects. The words “district courts” and “district” are changed to “circuit courts” and “circuit” to conform to the local court structure, and the words “within the state” added in subdivision (b) to make the rule applicable to state courts. The qualification on trials in open court “except as otherwise provided by statute,” which appears in subdivision (b), leaves the statutory power in the judge to exclude the public pursuant to Code of Ala., § 12-21-9. The treatment of the opening of the clerk’s office differs somewhat. Whereas Rule 6 includes federal and state holidays within the definition of legal holidays so as to eliminate confusion, this Rule permits the clerk’s office to be opened on Federal, but not state holidays such as Memorial Day or Columbus Day, just as the Federal Court Clerk’s office may remain open on Mardi Gras Day or Robert E. Lee’s birthday even though these two state holidays are legal holidays for purposes of computation of time under Rule 6, F.R.C.P.

Rule 77(d) also modifies the federal requirement of notification of the entry of order by the clerk so as not to require notification to those who were actually present when the order was entered or not otherwise notified.

Also, the last sentence of Rule 77(d) has been modified to retain the effect of the abrogated Rule 73(a), F.R.C.P. The matters covered in Rules 72-76 are generally beyond the scope of this Committee’s assignment.

Subdivision (a) has the same meaning and effect as Code of Ala., § 12-11-4, and Equity Rule 3, which are superseded by it. Rule 77(a) recognizes that, theoretically, the court is always open for filing papers, etc. Filing with a deputy clerk at her residence was approved in *Greeson v. Sherman*, 265 F.Supp. 340 (W.D.Va.1967) and slipping a paper under the door of a closed clerk's office was upheld as adequate filing in *Freeman v. Andrea*, 282 F.Supp. 525 (E.D.Pa.1968). This is not inconsistent with the cooperative spirit of accommodation in emergencies shown by court personnel in present Alabama practice.

Subdivision (b) is in accord with present Alabama law and practice. The requirement that courts be open is of constitutional origin, Const.1901, § 13. The statute requiring testimony to be given in open court, Code of Ala., § 12-21-125, is superseded by the rule, but Code of Ala., § 12-21-9, giving the judge discretion to clear the courtroom in civil cases involving certain reprehensible sexual conduct or obscene evidence is retained. The rule is not inconsistent with the statutes regulating where court is to be held, Code of Ala., §§ 11-14-12, 12-2-36 and 12-11-3. and they also are retained. The final sentence of the subdivision is similar to, and supersedes, Code of Ala., § 12-17-27.

Subdivision (c) will not alter present state practice, since it merely sets out the authority which the clerks and registers already exercise. Equity Rule 89 is superseded, as covered by the rule. Note that the reference to "clerk" throughout these rules, includes a register of chancery. Rule 81(d).

Subdivision (d) is new to Alabama law. The duty which it imposes on the clerks and registers is intended for the convenience of litigants. 7 Moore's *Federal Practice*, ¶ 77.05 (2d ed.1971). As noted earlier, the clerk need not notify those who received actual notice by being present or were otherwise notified when the order or judgment was entered.

Committee Comments to June 20, 1989, Amendment to Rule 77(dc)

As Rule 77(dc) was initially promulgated, an uncertainty existed as to which court could extend the time for appeal in the event of an appeal from the district court, when a party had failed to learn of the entry of the district court's judgment. The amendment will make it clear that in such a case it is the district court, not the circuit court, that can extend the time. In *Bowman v. Pat's Auto Parts*, 504 So.2d 736 (Ala.Civ.App.1987), there was language suggesting that the circuit court could have extended the time for appeal from the district court to the circuit court. This amendment is intended to make it clear that an extension of time for appeal based on a failure to learn of the district court's judgment is available only from the district court.

**Committee Comments to October 1, 1995,
Amendment to Rule 77**

In addition to technical changes, subdivision (d) is amended to permit the clerk to extend the time for cross-appeal. Injustice can occur if the party failing to cross-appeal does not do so because of ignorance of the filing of the notice of appeal.

**Committee Comments to Amendments to Rule 77(d)
Effective October 24, 2008**

The intent of the amendments to Rule 77(d) is to include the use of the electronic-filing system as an additional means of notice available to the clerk.

Note from the reporter of decisions: The order amending effective October 24, 2008, Rule 3, Rule 4, Rule 5, Rule 6, Rule 11, Rule 55, Rule 58, Rule 59.1, Rule 77, and Rule 79, and adopting effective October 24, 2008, the Committee Comments to Amendment to Rule 3(b) Effective October 24, 2008; Committee Comments to Amendments to Rule 4 Effective October 24, 2008; Committee Comments to Amendments to Rule 5 Effective October 24, 2008; Committee Comments to Amendments to Rule 6 Effective October 24, 2008; Committee Comments to Amendment to Rule 11 Effective October 24, 2008; Committee Comments to Amendment to Rule 55(a) Effective October 24, 2008; Committee Comments to Amendments to Rule 58 Effective October 24, 2008; Committee Comments to Amendment to Rule 59.1 Effective October 24, 2008; Committee Comments to Amendments to Rule 77(d) Effective October 24, 2008; and the Committee Comments to Addition of Rule 79(e) Effective October 24, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from 994 So. 2d.