

Hot Tips, Updates and Practice Pointers

DECISIONS IN RE: AND AMENDMENTS TO RULE 32 CHILD SUPPORT GUIDELINES

1) *Child Care Expenses*: Only employment or job search related child care expenses are to be used when calculating child support pursuant to Rule 32, ARJA. These expenses are limited to the maximum costs as published by the Alabama Department of Human Resources. However, recently the reasons for deviating from the Guidelines were amended and said amendment provided as follows:

Rule 32(A) Child Support Guidelines Established
(1) Reasons for Deviating from the Guidelines
(f) The actual child-care costs incurred on behalf of the children because of the employment or job search of either parent exceeds the costs allowed under subsection (B) (8) of this rule by twenty percent (20%) or more; ...

This is an important addition to the *Reasons for Deviating from the Guidelines* as the schedule developed from the Alabama Department of Human Resources is not updated that often making the maximums for daycare quite low. The latest revision was completed in October of 2015; however, the daycare rates remained at the 2009 levels.

2) *Child Care Expenses*: Recently there was a case that requested a broadening of the definition of “employment and job search related” daycare expenses to include “education-related” daycare expenses; however, the Court of Civil Appeals refused to expand the definition; therefore child care expenses that are incurred due to school attendance **may not** be used when calculating child support pursuant to the Guidelines. *C.C. v. E.W.*, [Ms. 2150007, April 22, 2016] ___ So.3d ___ (Ala. Civ. App., 2016) (*emphasis added*).

3) *Health Insurance Costs*: Previously the health insurance cost that was used to calculate child support pursuant to the Guidelines was the actual amount of the total insurance premium for family/dependent coverage, regardless of whether all children covered are in the

same family. The new amendment changed the way in which you calculate health insurance costs. Now you divide the total medical insurance premium actually paid by, or on behalf of, the parent ordered to provide the coverage by the total number of persons (adult and/or children) covered and then multiply the result by the number of children who are the subject of the support order.

| | | |
|-----|----------------------------|---------------------|
| Ex. | Health Insurance Premium: | 1200.00 |
| | Amount paid by employer: | 400.00 |
| | Amount paid by employee: | 800.00 |
| | Number of persons covered: | 1 adult, 3 children |
| | Cost per person (800/4): | 200.00 |
| | # of children (200 x 3): | 600.00 |

In this example the number that would be used for health insurance costs when calculating child support would be \$600.00.

4) *Tax deduction:* The current basic child support obligations that appear in the Appendix to Rule 32, ARJA assume that the custodial parent will have the income tax exemptions for the children. The Amendment to Rule 32 (A)(1) *Reasons for Deviating from the Guidelines* now lists the receipt of the income tax exemptions for the children by the custodial parent as a specific reason to support deviation. The thought is that the basic child support obligation amounts from the calculation chart located in the Appendix to Rule 32, ARJA were in consideration of the fact that the custodial parent would receive the economic benefit from the claiming the child dependency exemptions on his or her income taxes each year. If the custodial parent does not have this economic benefit there would be sufficient reason for an upward deviation from the Guideline calculation.

GETTING AROUND *EX PARTE CHRISTOPHER*

Ex parte Christopher prospectively abolished post-minority support for college education expenses in the State of Alabama in 2013. *Ex parte Christopher*, 145 So.3d 60 (Ala.2013). Since that date absent an agreement between the parties requiring contributions of the parents to a child's post-minority college expenses, there is no avenue of relief. However, there is no prohibition to seeking the college education expenses of a minor child. Rule 32 (A)(1)(c) specifically references such expenses as a reason to deviate from the Child Support Guidelines.

RULE 32 (A) Child Support Guidelines Established

(1) Reasons for Deviating from the Guidelines

(c) Expenses of college education incurred prior to a child's reaching the age of majority.

This rule confirms that you may seek an increase in the custodial parent's monthly child support award based upon college expenses being incurred for a minor child. Although only a narrow window as most children graduate high school at eighteen (18) years of age, the rule may be helpful in a small number of your cases with the degree of helpfulness being directly reliant on the date of the child's nineteenth (19th) birthday. If that birthday falls in the first semester of their Freshman year, then the costs of litigation may prohibit the reasonableness of filing a petition to increase child support; however, if the child's birthday falls in the Spring Semester or the summer following the Spring Semester, it may be reasonable to recommend filing the petition if you are able to streamline the litigation to keep costs down.

The important practice pointer is to evaluate the possibility of the custodial parent's use of this reason for deviation from the Guidelines at the time of divorce and make them aware of the same. Number one it protects you from a future bar complaint or lawsuit and number two it

provides information to the client so that they can then decide to use or discard depending on the economies of re-opening their case in the future.

This rule could also be used as a negotiating tool to obtain college expenses for at least the first year of college to prevent the necessity of filing a future petition to raise child support. This may be highly effective in a case with older children where the filing of a new litigation would be eminent.

There are cases that were issued pre *Ex parte Bayliss* that support this rule. See *Hopper v. Hopper*, 54 Ala.App. 144, 306 So.2d 13 (1974).

CHALLENGING EX PARTE BREWINGTON

Ex parte Brewington is the case that established post-minority support for adult children with disabilities if said disability began in the child's minority. The decision, like *Ex parte Bayliss*, was based upon an extension of the definition of "child and children as used in the Alabama Child Support Statute (§30-3-1) beyond minor children. The Court in *Ex parte Christopher* specifically overturned *Ex parte Bayliss* stating that extending the definition of child or children to adult children was error. *Ex parte Christopher*, 145 So.3d 66-67 (Ala.2013.) If you apply that same reasoning to *Ex parte Brewington* then post-minority support for disabled adult children is also due to be overturned. This reasoning has recently been pointed out in a special concurrence by Justice Donaldson, Alabama Court of Civil Appeals, in *Knepton v Knepton*, [WL 7889613, December 4, 2015], _____ So.3d _____ (Ala. Civ. App, 2015).

This raises the practical question of whether you should challenge *Ex parte Brewington* in any case that you may have where post-minority support for an adult disabled child is at issue. It would be wise to do so on the record when the opposing party is requesting post-minority

support of your client. If your client does not wish to challenge the law due to holding no objection to paying the support, I would suggest getting a waiver from your client which states that you have advised him or her that *Ex parte Brewington* should be challenged and that he or she has chosen not to do so.

If only challenging the interpretation of the child support statute pursuant to the reasoning in *Christopher*, there is no requirement to serve the Attorney General; however, if you are to add your own constitutional challenge then proof of service upon the Attorney General must be filed with the clerk. A certificate signed by the attorney of record setting forth that the Attorney General has been served is insufficient.

DECISIONS IN RE: RETIREMENT ACCOUNT VALUATION

Valuation of Retirement Accounts: Hill v. Beverly Collier Hill, [WL 7889926, December 4, 2015], ____So.3d.____ (Ala. Civ. App. 2015), recently clarified the proper method and timing of the valuation of a retirement account. Previous to this case, there was some argument as to whether you could value a retirement account at the time of the filing of the case or at the time of the divorce. *Robicheaux v. Robicheaux*, 731 so.2d 1222 (Ala. Civ. App. 1998) has been used to support the latter; however, the majority of case law held that the retirement should be valued at the time of the filing of the complaint for divorce.

In *Hill*, the court stated that an award of retirement benefits **MAY NOT** include:

- a. Benefits earned prior to the marriage nor any interest or appreciation thereon;
- b. Benefits not vested on the date the divorce is filed nor any interest or appreciation thereon; and
- c. Benefits earned after the date the divorce is filed nor any interest or appreciation thereon.

The award of retirement benefits **MAY** include retirement benefits earned during the marriage that are vested as of the date the divorce is filed and any interest and appreciation earned thereon between the date of filing and the date of the divorce. *Id.*

In order to prove up retirement that either has premarital contributions and/or post-filing contributions, it will be necessary to hire a valuation expert to make the appropriate calculations on the divisible portion of the retirement benefit. If there were no pre-marital nor post-filing contributions, then the value of the account at the time of filing of the divorce complaint is sufficient proof.

DECISIONS IN RE: SEPARATE VS. MARITAL PROPERTY

§30-2-51. Allowance upon grant of divorce; certain property not considered: retirement benefits. Code of Alabama, 1975, *as amended*.

§30-2-51 is the statute that authorizes the court to make property divisions upon divorce regardless how property is titled; however, said statute prohibits a division of retirement assets unless the parties have been married ten (10) years as of the filing of the complaint for divorce and it prohibits the division of property acquired prior to the marriage of the parties or acquired through inheritance or gift unless said property has been used for the common benefit of the marriage. This is a basic tenet of divorce law in Alabama with which all of you are familiar. The case law that has been issued interpreting this statute is the body of law that defines the difference in separate and marital property and thus what property is divisible in a divorce action. §30-2-51, Code of Alabama, 1975, *as amended*.

Last month, April 2016, the Court of Civil Appeals handed down a pretty astounding decision that to say the least expanded the meaning of “used for the common benefit of the

marriage,” which in turn expands the definition of marital property. In *Bentley*, the husband was a partner along with his brothers and husband in a family partnership created by his father. The partnership held assets that had formerly been the sole property of husband’s father. The husband never received distributions nor made any income from the partnership during the term of the marriage and was claiming the property as his separate estate pursuant to §30-2-51(a). Previous to *Bentley*, the case law was very clear that absent receipt of distributions or income during the marriage, and absent contributions of marital property during the marriage, gifted or inherited property not jointly titled with the spouse would have been separate property and therefore non-divisible. However, the trial court rejected the husband’s claim and awarded the wife \$300,000.00 from the partnership based upon the fact that the parties’ had considered the husband’s interest in the partnership as part of their retirement plan and consequently they had not saved additional monies in other retirement investments. The Court of Civil Appeals affirmed the decision of the trial court in a 3/2 decision with Justices Thomas and Moore dissenting. *Bentley v. Bentley*, [Ms. 2140707, April 22, 2016] ____So.3d_____(Ala. Civ. App. 2016).

AMENDMENTS TO RULE 5(D) ALABAMA RULES OF CIVIL PROCEDURE

- 1) *Filing of Discovery*: Rule 5(d) now **prohibits you filing discovery material** unless said material is part of a motion and in fact states that if you use the efilings system to serve the materials the fact of service, the date of service and the nature of the documents will be preserved but the actual discovery materials will not. The person responsible for service now has the duty to maintain the original and become the custodian.
- 2) *Certificate of Service*: Additionally the amendment to 5(d) requires that you not only list the names and addresses of opposing counsel/party but also their **email addresses**.

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IN THE SUPREME COURT OF ALABAMA
February 11, 2015

ORDER

IT IS ORDERED that Rule 32(A)(1) and Rule 32(B)(7)(e), Alabama Rules of Judicial Administration, be amended to read in accordance with Appendices A and B;

IT IS FURTHER ORDERED that the Comment to Amendments Effective April 1, 2015, be adopted to read in accordance with Appendix C;

IT IS FURTHER ORDERED that Form CS-41, Child-Support-Obligation Income Statement/Affidavit, be amended to read in accordance with Appendix D;

IT IS FURTHER ORDERED that these amendments and the adoption of the Comment are effective April 1, 2015;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 32:

"Note from the reporter of decisions: The order amending Rule 32(A)(1) and Rule 32(B)(7)(e), effective April 1, 2015, and adopting the Comment to Amendments Effective April 1, 2015, is published in that volume of Alabama Reporter that contains Alabama cases from ____ So. 3d."

Stuart, Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 11th day of February, 2015


Clerk, Supreme Court of Alabama

APPENDIX A

Rule 32(A)(1), Alabama Rules of Judicial Administration

(1) Reasons for Deviating from the Guidelines. Reasons for deviating from the guidelines may include, but are not limited to, the following:

(a) Shared physical custody or visitation rights providing for periods of physical custody or care of children by the obligor parent substantially in excess of those customarily approved or ordered by the court;

(b) Extraordinary costs of transportation for purposes of visitation borne substantially by one parent;

(c) Expenses of college education incurred prior to a child's reaching the age of majority;

(d) Assets of, or unearned income received by or on behalf of, a child or children;

(e) The assumption under the Schedule of Basic Child-Support Obligations that the custodial parent will claim the federal and state income-tax exemptions for the children in his or her custody will not be followed in the case;

(f) The actual child-case costs incurred on behalf of the children because of the employment or job search of either parent exceeds the costs allowed under subsection (B)(8) of this rule by twenty percent (20%) or more; and

(g) Other facts or circumstances that the court finds contribute to the best interest of the child or children for whom child support is being determined.

The existence of one or more of the reasons enumerated in this section does not require the court to deviate from the guidelines, but the reason or reasons may be considered in deciding whether to deviate from the guidelines. The court may deviate from the guidelines even if no reason enumerated in this section exists, if evidence of other reasons justifying deviation is presented.

APPENDIX B

Rule 32(B)(7)(e), Alabama Rules of Judicial Administration

(e) The amount to be added to the "basic child-support obligation" and inserted in Line 6 ("Health-Insurance Costs") of the Child-Support Guidelines form (Form CS-42) shall be the pro rata portion of the medical-insurance premium attributable to the child or children who are the subject of the support order, which shall be calculated by dividing the total medical-insurance premium actually paid by, or on behalf of, the parent ordered to provide the coverage by the total number of persons (adult and/or children) covered and then multiplying the result by the number of children who are the subject of the support order.

APPENDIX C

Comment to Amendments Effective April 1, 2015

Rule 32 was amended effective April 1, 2015, to add two additional specific reasons for the court to deviate from the child-support guidelines and to provide a more equitable manner of treating the inclusion of health-insurance premiums in the calculation of child support.

A new subsection (A)(1)(e) was added to specifically permit the court to deviate from the guidelines if the custodial parent is not claiming the federal and state income-tax exemptions for the child or children, as is assumed under the Schedule of Basic Child-Support Obligations.

Subsection (A)(1)(f) was added to specifically permit the court to deviate from the guidelines in the instances in which the actual child-care costs exceed the costs allowed under subsection (B)(8) of the rule by at least 20 percent (20%). This addition will allow the court to consider all the factors surrounding the child-care arrangements in each individual case, including the acceleration in child-care costs. Also, this change furthers the policy of encouraging both parents to seek and maintain employment to help support their child.

Former subsection (A)(1)(e) was redesignated as subsection (A)(1)(g) in light of the additions of the two new subsections.

Subsection (B)(7)(e) was amended to provide a more equitable determination of the actual cost of the health-insurance premiums for a child in the calculation of child support. The former rule required the inclusion of the actual amount of the total insurance premium for family/dependent coverage, regardless of which children were included under that coverage. That method of calculation was based on outdated modes of dependent health-insurance coverage and had the potential to lead to inequitable results, as demonstrated in Hein v. Fuller, 93 So. 3d 961 (Ala. Civ. App. 2012). The inclusion of the pro rata portion of the medical-insurance premium attributable to a child who is the subject of the support order will more fairly represent the true cost of medical coverage for the child. The addition of the language that allows the court to base the calculations on the premium paid "by, or on behalf of, the parent" reflects the existing

practice of stepparents' providing medical insurance for their stepchildren under their dependent-coverage policies and fosters the goal of promoting health coverage for children.

CHILD-SUPPORT-OBLIGATION
INCOME STATEMENT/AFFIDAVIT

Case Number

IN THE _____ COURT OF _____ COUNTY, ALABAMA
(Circuit or District) (Name of County)

Plaintiff _____ v. Defendant _____

AFFIDAVIT

I, _____, being duly sworn upon my oath, state as follows :
(Name of Affiant)

1. I am the ☐ Plaintiff ☐ Defendant ☐ Other (please specify): _____ in the above matter.
My Social Security number is: _____

2. I am ☐ currently employed. My employer's name and address are:

☐ not currently employed.

My last employer's name and address are: _____

Last position title: _____

Average monthly salary in the last year of employment: \$ _____

3. My monthly gross income includes:

(For example of income that must be included, see back of this form. If income varies by month, enter the estimated average monthly gross income.)

Employment income \$ _____

Self-employment income \$ _____

Other employment-related income \$ _____

Other non-employment-related income \$ _____

Total \$ _____

4. I incur the following amount monthly for work-related child-care:

\$ _____
(if none, write "None")

5. The child(ren) of the parties is/are

☐ not covered by health insurance from me and/or my employer.

☐ covered by health insurance, and (1) I pay \$_____ each month, or that amount is paid on my behalf each month by my_____, for the family policy coverage under which the child(ren) is/are covered; and (2) the total number of persons covered under that policy is _____.

The pro rata portion of the medical insurance premium attributable to the child or children who are the subject of the support order (which shall be calculated by dividing the total medical insurance premium actually paid by, or on behalf of, the parent ordered to provide the coverage by the total number of persons (adult and/or children) covered and then multiplying the result by the number of children who are the subject of the support order) is the sum of \$ _____.

6. I pay the following total amount for ☐ child support ☐ alimony in [a] prior case(s) as follows:

[List case number(s) and county(ies) and state(s) here]:

\$ _____
(if none, write "None")

I understand that I will be required to maintain all income documentation used in preparing this Income Statement/Affidavit (including my most recent income-tax return) and that such documentation shall be made available as directed by the court. I also understand that any intentional falsification of the information presented in this Income Statement/Affidavit may subject me to the penalties of perjury.

Affiant

Sworn to and subscribed before me this _____
day of _____, _____

Notary/Clerk

EXAMPLES OF INCOME THAT MUST BE INCLUDED IN YOUR GROSS MONTHLY INCOME

1. Employment Income – shall include, but not be limited to, salary, wages, bonuses, commissions, severance pay, worker's compensation, pension income, unemployment insurance, disability insurance, and Social Security benefits.
2. Self-Employment Income – shall include, but not be limited to, income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation. "Gross income" means gross receipts minus ordinary and necessary expenses required to produce this income.
3. Other Employment-Related Income – shall include, but not be limited to, the average monthly value of any expense reimbursements or in-kind payments received in the course of employment that are significant and reduce personal living expenses, such as a furnished automobile, a clothing allowance, and a housing allowance.
4. Other Non-Employment-Related Income – shall include, but not be limited to, dividends, interest, annuities, capital gains, gifts, prizes, and pre-existing periodic alimony.

RULE 32, ALABAMA RULES OF JUDICIAL ADMINISTRATION, PROVIDES THE FOLLOWING DEFINITIONS:

Income. For purposes of the guidelines specified in this Rule, "income" means the actual gross income of a parent, if the parent is employed to full capacity, or if the parent is unemployed or underemployed, then it means the actual gross income the parent has the ability to earn.

Gross Income.

"Gross income" includes income from any source, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment-insurance benefits, disability-insurance benefits, gifts, prizes, and preexisting periodic alimony.

"Gross income" does not include child support received for other children or benefits received from means-tested public-assistance programs, including, but not limited to, Temporary Assistance for Needy Families, Supplemental Security Income, food stamps, and general assistance.

Self-employment Income.

For income from self-employment, rent, royalties, proprietorship of business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required to produce such income, as allowed by the Internal Revenue Service, with the exceptions noted in Rule 32 (B)(3)(b).

Under those exceptions, "ordinary and necessary expenses" does not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support.

Other Income. Expense reimbursements or in-kind payments received by a parent in the course of employment of self-employment or operation of a business shall be counted as income if they are significant and reduce personal living expenses.

State of Alabama Provider Rate Chart
*Maximum Weekly Full-time Rates
for Child Care Subsidy Program Services
10/1/2015 -- 9/30/2016*

| Regions | Child Care Provider Type and Care Level | | | | | | | | |
|------------|---|----------------------|------------------|------------------------|--------------------|----------------|-----------------------|-------------------|---------------|
| | Center Infant/Toddler | Center Pre-School | Center School | GFDC Infant/Toddler | GFDC Pre-School | GFDC School | FDC Infant/Toddler | FDC Pre-School | FDC School |
| Huntsville | \$101.00 | \$92.00 | \$87.00 | \$93.00 | \$86.00 | \$75.00 | \$91.00 | \$86.00 | \$79.00 |
| Mobile | \$101.00 | \$91.00 | \$85.00 | \$82.00 | \$78.00 | \$74.00 | \$88.00 | \$84.00 | \$84.00 |
| Birmingham | \$111.00 | \$102.00 | \$94.00 | \$94.00 | \$90.00 | \$86.00 | \$89.00 | \$83.00 | \$84.00 |
| Montgomery | \$95.00 | \$83.00 | \$79.00 | \$77.00 | \$74.00 | \$66.00 | \$81.00 | \$79.00 | \$78.00 |
| Opelika | \$91.00 | \$87.00 | \$80.00 | \$68.00 | \$67.00 | \$65.00 | \$81.00 | \$80.00 | \$80.00 |
| Tuscaloosa | \$86.00 | \$82.00 | \$79.00 | \$64.00 | \$63.00 | \$63.00 | \$69.00 | \$67.00 | \$67.00 |
| Ft. Payne | \$74.00 | \$70.00 | \$68.00 | \$67.00 | \$65.00 | \$64.00 | \$63.00 | \$60.00 | \$60.00 |
| Talladega | \$73.00 | \$70.00 | \$70.00 | \$81.00 | \$66.00 | \$66.00 | \$64.00 | \$62.00 | \$60.00 |
| Dothan | \$75.00 | \$73.00 | \$69.00 | \$64.00 | \$64.00 | \$65.00 | \$66.00 | \$64.00 | \$63.00 |

Full-time Rates -The above rates reflect the maximum full-time rates for child care services averaging more than 25 hours per week. The maximum full-time rate applicable to informal care providers shall not exceed \$35 per week.

Part-time Rates - The maximum rate for child care services averaging 25 hours per week or less shall not exceed one-half of the applicable full-time rate.

Key To Provider Type

Center - a child care facility licensed by the Department or otherwise legally authorized, which receives more than 12 children during the day or night, as applicable.

GFDC - Group Family Day Care, an individual licensed by the County Department to provide care in a private residence, other than the eligible child's residence, for at least seven (7), but not more than twelve (12), children during the day or night, as applicable.

FDC - Family Day Care, an individual licensed by the County Department to provide care as the sole caregiver in a private residence, other than the eligible child's residence, for no more than six (6) children during the day or night, as applicable.

Key to Care Level

Infant/Toddler - Birth to age 30 months

Pre-School - 30 months to 5 years

School Age - 5 years through age 12 (or through age 18 if the child has a physical or mental disability documented by a licensed physician,

| Regions and Counties Served | |
|-----------------------------|-------------------|
| Huntsville | Tuscaloosa |
| 17 Colbert | 04 Bibb |
| 22 Cullman | 12 Choctaw |
| 30 Franklin | 29 Fayette |
| 39 Lauderdale | 32 Greene |
| 40 Lawrence | 33Hale |
| 42 Limestone | 38 Lamar |
| 45 Madison | 46 Marengo |
| 52 Morgan | 47 Marion |
| 67 Winston | 53 Perry |
| | 54 Pickens |
| Mobile | 60 Sumter |
| 02 Baldwin | 63 Tuscaloosa |
| 13 Clarke | |
| 18 Conecuh | Ft. Payne |
| 27 Escambia | 10 Cherokee |
| 49 Mobile | 25 DeKalb |
| 50 Monroe | 28 Etowah |
| 65 Washington | 36 Jackson |
| | 48 Marshall |
| Birmingham | |
| 05 Blount | Talladega |
| 37 Jefferson | 08 Calhoun |
| 58 St Clair | 14 Clay |
| 59 Shelby | 15 Cleburne |
| 64 Walker | 19 Coosa |
| | 56 Randolph |
| Montgomery | 61 Talladega |
| 06 Bullock | |
| 07 Butler | Dothan |
| 11 Chilton | 03 Barbour |
| 20 Covington | 16 Coffee |
| 24 Dallas | 21 Crenshaw |
| 26 Elmore | 23 Dale |
| 43 Lowndes | 31 Geneva |
| 51 Montgomery | 34 Henry |
| 66 Wilcox | 35 Houston |
| | 55 Pike |
| Opelika | |
| 09 Chambers | |
| 41 Lee | |
| 44 Macon | |
| 57 Russell | |
| 62 Tallapoosa | |

psychologist or psychiatrist)

IN THE SUPREME COURT OF ALABAMA
April 16, 2010

ORDER

IT IS ORDERED that Rule 5(d), Alabama Rules of Civil Procedure, be amended to read in accordance with Appendix A attached to this order;

IT IS FURTHER ORDERED that committee comments to that amendment are adopted to read in accordance with Appendix B attached to this order;

IT IS FURTHER ORDERED that this amendment shall be effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 5:

"Note from the reporter of decisions: The order amending Rule 5(d), Alabama Rules of Civil Procedure, effective April 16, 2010, is published in that volume of Alabama Reporter that contains Alabama cases from ____ So. 3d."

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

APPENDIX A

Rule 5(d), Alabama Rules of Civil Procedure.

(d) Filing; certificate of service. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court either before service or within a reasonable time thereafter, except that discovery material shall not be filed other than upon order of the court, for use at trial, or in connection with motions. For purposes of this rule, "discovery material" shall include depositions upon oral examination or written questions, notices of deposition, interrogatories, requests for production of documents, requests for admission, and answers, responses, and objections thereto. The person responsible for service of the discovery material shall retain the original and become custodian.

A certificate of service shall list the names and addresses, including the e-mail addresses of registered electronic-filing-system users, if known, of all attorneys or pro se parties upon whom the paper has been served.

All discovery material may be served electronically using the court's electronic filing system. Such service will generate an entry in the case-action summary documenting the fact of service, the date of service, and the nature of the document or documents served, but the discovery will not be filed, entered, or retained in electronic form in the court file.

During the pendency of any case, the custodian of any discovery material shall provide to counsel for all other parties reasonable access to the material and an opportunity to duplicate the material at the expense of the copying party.

APPENDIX B

Committee Comments to Amendment to Rule 5(d) Effective April 16, 2010.

Before this amendment, Rule 5(d) included a model standing order under which the parties could serve and retain discovery material and not file it. Virtually all circuits adopted the model standing order. This amendment embraces the current practice by specifying that discovery material may be served electronically but is not kept in the court file. In the absence of a protective order, a party retains the discretion to allow or to deny a nonparty access to discovery material. Whether discovery material is a matter of public record is an issue for the courts and is beyond the scope of this amended rule.