



IN THE ALABAMA COURT OF THE JUDICIARY

In the Matter of:)
)
ROY S. MOORE,)
Chief Justice)
Supreme Court of Alabama)

Court of the Judiciary
Case No. 46

THE JUDICIAL INQUIRY COMMISSION'S
MOTION FOR PRODUCTION OF SUMMARY JUDGMENT DOCUMENTS UNDER
ALA. R. CIV. P. 56(E) AND ALA. R. EVID. 106

The Chief Justice's July 26, 2016 Response to the JIC's Motion for Summary Judgment included an attached "Affidavit of Chief Justice Roy. S. Moore," which affidavit referenced excerpts of two memoranda issued by the Chief Justice on September 2, 2015 and October 7, 2015 respectively.

Under Ala. R. Civ. P. 56(e), "sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be attached [to the summary judgment motion] or served therewith.*" See Ala R. Civ. P. 56(e) (emphasis added). Moreover, Ala R. Evid. 106—known as the Rule of Completeness—entitles the JIC to seek the introduction of the *entire* memoranda into evidence, and not just the excerpted portions relied upon by the Chief Justice in his affidavit. See Ala. R. Evid. 106.

The Chief Justice did not attach the memoranda to his summary judgment affidavit, nor did he originally serve a complete copy upon the JIC. In order to avoid the need for the present motion, Wednesday morning, July 27, 2016, the JIC wrote to counsel for the Chief Justice seeking production of complete, un-excerpted memoranda in accordance with the above-cited rules. The Chief Justice provided the two memoranda pursuant to the JIC's request; however, the memoranda still contained substantial redactions. As grounds for these redactions, counsel for

the Chief Justice indicated that “a small portion of each memorandum has been redacted because it includes confidential court matters not relevant to the dispute in this case.” Upon receipt of the redacted memoranda, the JIC responded to counsel for the Chief Justice and once again asked for complete, un-redacted memoranda, but the Chief Justice has refused this request, citing confidentiality concerns. To be fair, counsel for the Chief Justice then suggested that, if the JIC intends to press this issue, it would be willing to provide the un-redacted memoranda to the Court for *in camera* inspection, and will promptly respond to the JIC’s present motion.

The fact is, there is simply no way to know if the portions of the two memoranda that the Chief Justice unilaterally redacted are—or at least may be—relevant to the issues in this case without the opportunity to fairly review them. Rule of Civil Procedure 56(e) requires that the Chief Justice serve and attach these memoranda to his summary judgment affidavit, which he originally failed to do. And Rule of Evidence 106 entitles the JIC to seek introduction of each *entire* document into the record. The JIC submits that the production of these redacted documents do not satisfy these rules.

The JIC further submits that if the Chief Justice is asserting some manner of privilege to produce redacted memoranda to the Court, under the Alabama Rules of Evidence, he must identify the constitutional provision, statute, or rule of the Alabama Supreme Court under which this privilege is being asserted and why the Chief Justice himself—as opposed to the whole Alabama Supreme Court—is the holder of this privilege. *See* Ala. Rule of Evid. 501 (“except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to: (1) refuse to be a witness; **(2) refuse to disclose any matter; (3) refuse to produce any object or writing;** or (4) prevent another from being a witness or disclosing any matter or producing any object or writing.”)

Moreover, if such a privilege actually exists, the Chief Justice bears an even higher burden of showing the he did not plainly waive this privilege under Alabama Rule of Evidence 510(a) when he voluntarily disclosed substantial portions of the memoranda in his affidavit. *See* Ala. R. Evid. 510(a) (“a person upon whom these rules confer a privilege against disclosure waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the privileged matter.”).

The JIC hereby respectfully requests that this Court order the Chief Justice to supplement his motion for summary judgment with these memoranda and to produce these two memoranda, in their un-excerpted and un-redacted entirety, to the JIC under Ala R. Civ. P. 56(e) and Ala. R. Evid. 106. In the alternative, the JIC asks that this Court order *in camera* inspection of the memoranda, as suggested by the Chief Justice, so that this Court may determine the relevancy and the asserted confidentiality of the redacted memoranda.

Respectfully submitted,

/s/ John L. Carroll

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Judicial Inquiry Commission of Alabama

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CERTIFICATE OF SERVICE

I certify that I have this 29th day of July, 2016, served a copy of this notice on attorneys

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