

Alabama Rules of Civil Procedure

II. Commencement of action; service of process, pleadings, motions, and orders.

Rule 5.

Service and filing of pleadings and other papers.

(a) *Service: When required.* Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) *Same: How made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or the party or by mailing it to the attorney or the party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

If the attorney for the party to be served or the party to be served is a registered user of the electronic-filing system as provided for by order or rules of the Supreme Court of Alabama, service may be made by electronic transmittal in accordance therewith. Service by electronic means in compliance with those orders and rules shall be complete on transmission of the electronic document.

(c) *Same: Numerous defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(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.

(e) *Filing with the court defined.* The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event, the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A pleading, motion, order, or other document filed by electronic means in accordance with an order or rules of the Supreme Court of Alabama constitutes filing with the court for the purpose of applying these rules. The clerk shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules.

(dc) *District court rule.* Rule 5 applies in the district court.

[Amended eff. 2-1-88; Amended eff. 8-1-92; Amended eff. 10-1-95; Amended eff. 10-24-2008; Amended eff. 4-16-2010.]

Committee Comments on 1973 Adoption

Except for a sentence added to paragraph (d), this rule is identical with Federal Rule 5. It is in substantial accord with the general practice of Alabama courts. See Tit. 7, §§ 349(1)-349(5), Code of Ala.

Rule 5(a) thus requires all papers to be served on all parties to the action with the following exceptions: (1) orders and judgments not required by their terms to be served; (2) *ex parte* motions; (3) any pleadings, motions, notices, or other papers when the opposing party is in default for failure to appear, and no new or additional claim for relief is asserted; (4) certain pleadings when the court, pursuant to Rule 5(c), orders otherwise because of numerous defendants; and (5) such notices as are required to be filed rather than served, such as the transcript of a deposition, Rule 30(f), a notice of dismissal, Rule 41(a)(1).

Rule 5(b) has no application to service of the summons. That subject is completely covered by Rule 4.

Proof of service of a summons is required by Rule 4. There is no similar provision in the Federal Rules of Civil Procedure. Tit. 7, §§ 349(1)-349(5), Code of Ala., very closely follow Rule 5 of the Federal Rules of Civil Procedure but do contain additional treatment of proof of service at Tit. 7, § 349(4), Code of Ala., last sentence. This Rule has carried that language forward as the second sentence of Rule 5(d). The requirement of proof of service is not imposed upon written requested instructions which are required to be served by Rule 51. This dispensation is necessitated by practical considerations. Better practice, however, would call for counsel making a statement on the record in open court to the effect that he is now serving requested charges numbered 1-5 or 10, as the case may be, on opposing counsel. Note that these rules generally refer to service rather than filing. For example, see Rule 12(a) wherein a defendant is required to “serve” his answer within thirty (30) days. The requirement of service used in these rules must be read in conjunction with Rule 5(d), first sentence, wherein the Rule provides that all papers that are required to be served, shall be filed either before service or within a reasonable time thereafter.

The term “clerk” is used throughout these rules as referring both to the clerk of court and to the register in chancery. Rule 81(d). For administrative purposes only, suits are to be filed with the register or with the clerk as would have been proper prior to adoption of these rules. If the papers are filed in the wrong office, or, for other reasons, provision is made for their transfer. Rule 79(f).

**Committee Comments to February 1, 1988,
Amendment to Rule 5(d)**

This amendment to subdivision (d) is intended to permit courts in appropriate circumstances to dispense with the requirement for filing discovery material. Many courts are presently encountering severe constraints in storing litigation papers. These storage constraints and the expenses incurred by the courts in connection with the retention of discovery materials may make it appropriate for certain courts to utilize the option permitted under the amended subdivision and eliminate the necessity for filing all discovery material. If this option is exercised, the court should be careful to provide certain safeguards necessary to assure access to these discovery materials. Local Rule 17(A-E) of the United States District Court for the Southern District of Alabama is an example of such safeguards.

**Court Comments to February 1, 1988,
Amendment to Rule 5(d)**

If this option is exercised, the court’s order must, at a minimum, contain the safeguards set out in Local Rule 17 of the United States District Court for the Southern District of Alabama. The court’s order—in addition to other provisions—must substantially track the language of Rule 17(A-E), adapting that language for application in the state court. Rule 17(A-E), as it existed at the time of the adoption of this amendment to Rule 5(d), provided, as follows:

“RULE 17. CIVIL DISCOVERY MATERIALS AND EXHIBITS

“Unless the Court directs otherwise, in all civil actions other than inmate complaints challenging the conditions of confinement:

“A. Interrogatories, requests for production, requests for admissions and responses thereto, and notices of depositions shall be served in accordance with Rule 5(b), FED.R.CIV.P., but shall not be filed with the Clerk except upon order of the Court or for use at trial or in connection with motions. The party responsible for service of the discovery material shall retain the original and become custodian.

“B. No depositions shall be filed with the Clerk unless the Court directs otherwise, or unless in support of or in opposition to a motion. Counsel who notices a deposition shall be the custodian of the deposition and shall maintain the original for filing if the Court so directs.

“C. If discovery materials are germane to any motion or response, only the relevant material shall be filed with the motion or response.

“D. Whenever any discovery material (request, response, notice) is served, counsel shall contemporaneously deliver to the Clerk a notice identifying the date of service and the nature of the material served or the first and last page of the document served, including the certificate of service. These notices shall be maintained by the clerk with the civil action file but will not be docketed.

“E. 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, and any other person may, with leave of Court, obtain a copy of any discovery material from its custodian upon payment of the expense of the copy.”

Committee Comments to August 1, 1992, Amendment to Rule 5(d)

The February 1, 1988, amendment to Rule 5(d) gave courts the option to order that discovery materials no longer be filed with the clerk of the court. This dispensation from the filing requirement was felt necessary to deal with the severe problems many courts faced in storing litigation papers. The comments to the 1988 amendment suggested that any court following this option should be careful to provide safeguards necessary to assure access to these discovery materials. Local Rule 17 of the United States District Court for the Southern District of Alabama was suggested as an example of such safeguards. Following the 1988 amendment, many courts have adopted the option permitted by this rule and have dispensed with the necessity for filing all discovery materials. Unfortunately, these courts adopted a variety of local rules to guide litigants with respect to nonfiled discovery materials. The August 1, 1992, amendment to Rule 5(d) is intended to provide a uniform procedure for the nonfiling of discovery materials in those circuits that choose to dispense with the filing of discovery materials. This amendment generally follows the guidelines incorporated in Local Rule 17 of the United States District Court for the Southern District of Alabama. In view of this amendment, there is no longer any need for any local rule on this

subject. The Committee notes that by order effective April 14, 1992, the Supreme Court amended Rule 83 to provide that there will be no local rules.

Important Notice From the Clerk of the Supreme Court of Alabama

The Supreme Court issued an opinion in *Ex parte Tuck*, 622 So.2d 929 (Ala.1993), affirming an opinion by the Alabama Court of Civil Appeals in *McKay v. Tuck*, 622 So.2d 926 (Ala.Civ.App.1992). These opinions addressed the propriety of facsimile filings under the Alabama Rules of Civil Procedure. The Alabama Supreme Court held that “other filings attempted by facsimile transmissions as filings in reliance on the opinion of the Court of Civil Appeals will be taken as proper on the same basis through the period ending July 31, 1993. After that date we will not recognize facsimile transmissions as filings, within the meaning of our rules of court or the statutes of this state, except as statutes or rules may authorize ‘filing’ by facsimile transmission.” *Ex parte Tuck*, 622 So.2d at 930. After due consideration the Supreme Court Standing Committee on the Rules of Civil Procedure has recommended to the Supreme Court that the Rules of Civil Procedure not be amended to provide for filing by facsimile transmission after July 31, 1993.

Committee Comments to October 1, 1995, Amendment to Rule 5

The amendments to subdivisions (b) and (d) are technical; no substantive change is intended. The amendment to subdivision (e) incorporates most of the language of F.R.Civ.P. 5(e), but omits the language in the federal rule authorizing filing by facsimile transmission under rules established by the Judicial Conference of the United States. See *Ex parte Tuck*, 622 So.2d 929 (Ala.1993).

Committee Comments Adopted February 13, 2004, to Rule 5

All litigants should be aware that there is a statutory requirement that the attorney general be served when a statute or ordinance is being challenged on constitutional grounds. See § 6-6-227, Code of Alabama 1975. This requirement is mandatory, and the failure to serve the attorney general deprives the court of jurisdiction to resolve any constitutional issues related to the statute or ordinance being challenged. See *Ex parte Jefferson County*, 767 So.2d 343, 345 (Ala.2000), and *Bratton v. City of Florence*, 688 So.2d 233, 234 (Ala.1996).

Committee Comments to Amendments to Rule 5 Effective October 24, 2008

The additions to Rule 5(b) and Rule 5(e) recognize that electronic filing is now an optional means of filing and service in every county in Alabama. Electronic filing must be accomplished within the electronic-filing system established by order and rules of the Supreme Court of Alabama, not merely e-mail communication. The Rule 5(d) addition regarding inclusion of e-mail addresses in certificates of service is to be read in the context of filings within the electronic-filing system. In that same section language has been added to provide for electronic filing of discovery and responses thereto, both of which are excluded from the existing provisions regarding the filing of paper copies.

**Committee Comments to Amendment t 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.

Note from the reporter of decisions: The order adopting the Committee Comments to Rules 5, 15, 21, 23, 24, and 42, Alabama Rules of Civil Procedure, effective February 13, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 865 So.2d.

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.

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.