

Alabama Rules of Civil Procedure

VI. TRIALS

Rule 44.

Proof of documents.

(a) *Authentication.*

(1) DOMESTIC. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within a territory subject to the administrative or judicial jurisdiction of the United States or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or by the officer's deputy. If the official record is kept without the state, the copy shall be accompanied by a certificate under oath of such person that such person is the legal custodian of such record and that the laws of the state require the record to be kept.

(2) FOREIGN. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) *Lack of record.* A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case

of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) *Other proof.* This rule does not prevent the proof of records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

(d) *Original documents.* Documents of any class, no matter where kept, may be proven by the original, authenticated as provided in this rule. If a document has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, the party producing the document as genuine must account for the appearance or alteration. Such party may show that the alteration was made by another, without that party's concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning of the language of the instrument. If the party producing the document makes such showing, such party may give the document in evidence. If the party producing the document is unable to make such showing, the document may be received in evidence with any objections as to the alterations affecting the weight to which the document is entitled, but not the admissibility of the document.

(e) *Documents recorded under recording act.* Every instrument permitted or required by law to be recorded in the office of the judge of probate, and which has been proved or acknowledged in the manner provided by law in force at the time of its execution, may be read in evidence without further proof and shall be prima facie evidence of the facts therein stated. The record of any such instrument or a certified copy of the record may also be read in evidence with like effect as the original. The official entry of the proper officer on a paper shall be sufficient evidence of its registry. If the original of any paper, properly registered, is lost or destroyed, a certified copy from the registry shall be deemed good secondary evidence. If the original is found to have been recorded, and it does not appear whether it was done on proper probate, the court shall presume, until the contrary appears, that the same was done on proper probate.

(f) *Judgments.* A judgment is admissible between any parties to show the fact of the rendition thereof; between parties and privies thereto it is conclusive as to the matter directly in issue, until reversed or set aside.

(g) *Books, maps, etc., as evidence.* Historical works, books of science or art and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

(h) *Business entries.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if it was made in the regular course of any business, profession, occupation, or calling of any kind, and it was the regular course of the business, profession, occupation or calling to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. Such a writing may be photostated, or it may be photographed or microphotographed on plate or film, and such photostat, photographic or microphotographic plate or film, or prints thereof, whether enlarged or not, shall be deemed to be an original record and shall be presumed to be a true and correct reproduction of the original record it purports to represent. The circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, and the circumstances of making such photostat or other photographic copy thereof, may be shown to affect its weight but they shall not affect its admissibility. Any person having a right to have an original record preserved or to inspect the original writing or record or other rights in connection therewith shall have the same rights as to any photostat, photographic or microphotographic plate or film or prints made therefrom, in the event the original is not available, and custodian of such plate and film shall provide for the ready location of particular records so reproduced and shall provide a projector or other convenient means for viewing the records so reproduced by those entitled thereto and said custodian shall furnish a legible print or copy of such plate or film to such persons as are entitled to a copy of the original record.

(i) *Proof of private documents.* The execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting for the absence of attesting witnesses. In all other cases the subscribing witness must be produced, if possible, to prove execution of private documents, unless the document is an ancient writing which proves itself, or is self-proving or properly acknowledged, or is an official bond required by law to be approved or tested by a particular functionary, or is only incidentally or collaterally material to the case. Whenever the subscribing witnesses are dead, insane, incompetent, or are without the state, or their residence is unknown, or, being produced, they do not recollect the transaction, then proof of the actual signing by, or of the handwriting of, the alleged maker or subscribing witness, shall be received as primary evidence of the fact of execution; and if such evidence be not attainable, the court may admit evidence of the handwriting of the subscribing witness, or other secondary evidence, to establish such fact of execution.

(j) *Proof of Handwriting.* Whenever the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison to prove or disprove such genuineness. Comparison of a disputed writing with any writing admitted or proven to the reasonable satisfaction of the court to be genuine shall be permitted to be made by witnesses who are qualified as experts, or who are familiar with the handwriting of the person whose handwriting is in question.

(dc) *District court rule.* Rule 44 applies in the district courts.

[Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

Alabama has a multitude of statutes on Proof of Official Records and other documents. Many of these statutes overlap while many cover only limited records or limited public officers. In some instances, the method of proof is as simple and as liberal as under this rule, but in other instances, the statutes call for complex and restrictive methods of proof. According to Wigmore, these statutes “encumber the law with petty meticulous rules, each applicable only to an individual class of officers or documents”. 5 Wigmore, § 1638 (3rd Edition 1940).

Rule 44 consolidates into one rule many statutes and insures one simple method of proof which can be used for all official records.

There are some Alabama statutes, however, which not only state a method of proof of official records or other documents, but go on to give these records and documents effect in evidence as prima facie proof of the facts stated therein. The Federal Rule does not treat this situation. Subdivisions (d) through (g) incorporate these provisions in existing Alabama law in a method similar to the provision of Arizona Rules of Civil Procedure 44. Further, the Federal Rule does not cover methods of proof of documents other than official records. In order to have all the law in one convenient place, Alabama statutes on this subject have been added as subdivisions (g) through (j) of the rule.

Rule 44(a) is very similar to the companion Federal Rule. Section 12-21-72, Code of Ala., provides that the certificate of the head of any bureau or department of the Government of this state is sufficient authentication of any paper or document appertaining to his office. The companion Federal Rule requires, in addition to the certificate of the officer, an additional certificate stating that such officer in fact has the custody of the document. The advantages of this provision have been woven into Rule 44(a)(1). Therefore, an official record of the

State of Alabama may be evidenced by a copy attested by a person purporting to be the officer having the legal custody of the record without further certification as to the authority of that officer. This is based upon a similar provision contained in the Vermont Rules of Civil Procedure.

The last sentence of Rule 44(a)(1) accomplishes the same purpose as §§ 12-21-70 and 12-21-71, Code of Ala.

Rule 44(a)(2), Rule 44(b) and Rule 44(c) are identical to the Federal Rule.

Rule 44(d) incorporates the provisions of § 12-21-73 (6-8), Code of Ala., permitting proof of any document by the original of said document. Section 12-21-62, Code of Ala., denies admissibility to any document which appears to have been altered in a part material to the question in dispute which said alteration cannot be explained away. A literal reading of the statute would make it almost impossible to introduce in evidence any written instrument of any kind, as almost all contain erasures. The responsibility for accounting for such erasures before the instrument can be admitted in evidence places upon the party offering the instrument too high a burden of proof. An instrument that bears erasures or alterations should not be inadmissible but its legal effect and the weight to be given to such instrument in view of its condition, should be for the trier of fact. Section 12-21-63, Code of Ala., is superseded by this Rule. As now contained in the Rule, any such defect goes to the weight rather than the admissibility of the evidence.

Rule 44(e) is based on Arizona Rules of Civil Procedure 44(b). It carries over, but generalizes, the provisions of §§ 12-21-36, 12-21-66, 12-21-106, 12-21-107, 35-4-65 and 35-4-67(b), Code of Ala., dealing generally with documents recorded under a recording act.

Rule 44(f) treats the effect of judgments as evidence and is taken verbatim from § 12-21-100, Code of Ala.

Rule 44(g) allows the use of maps, books, etc., and is taken verbatim from § 12-21-108, Code of Ala.

Rule 44(h) permits proof of business entries and incorporated provisions of Tit. 7, § 383, Code 1940, and §§12-21-43 and 12-21-44, Code of Ala.

Rule 44(i) sets out methods for proof of instruments other than official records (private documents) and is adapted from §§ 12-21-60 through 12-21-62, Code of Ala.

Rule 44(j), on handwriting, is adapted from §§ 12-21-39 and 12-21-40, Code of Ala.

**Committee Comments to October 1, 1995,
Amendment to Rule 44**

Subdivision (a). This amendment incorporates generic references to territories under the jurisdiction of the United States. It also includes a provision for authentication of foreign records pursuant to a treaty.