

Alabama Rules of Appellate Procedure

Rule 44.

Constitutional questions.

(a) Service Generally. If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the appellate court, and the State, municipal corporation, or other governmental body which enacted or promulgated such questioned order is not a party to the proceeding, then:

(1) within seven days after the party raising such question receives the appellate court's notice of docketing, the party shall serve upon the attorney general, the city attorney, or the chief legal officer of the governmental body whose order is challenged a copy of the docketing statement or another statement sufficient to identify the case number of the appeal, the statute or order challenged, and any ground for the challenge; and

(2) when the party files any brief in the appeal, the party shall serve a copy of its brief on the governmental body's chief legal officer.

(b) Service on the Attorney General. Service required by this rule on the attorney general shall be by email to an electronic address designated by the attorney general for this purpose.

(c) Certificate of Service. Any brief covered by this rule shall include a certificate of service showing that it was served on the relevant governmental body's chief legal officer in compliance with this rule.

(d) Right to be Heard.

(1) The State, municipal corporation, or other governmental body shall be entitled to file a brief. Unless otherwise provided by the court, the brief shall be filed within the time allowed the party whose position the brief will support, or, if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief.

(2) If the court schedules oral argument, the governmental body may move to participate in oral argument. Such requests shall

be freely granted, but will not cause a party to lose equal time in oral argument.

(e) Notice. Except by special order of the court, in the absence of such notice and certificate of service, the appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court.

[Amended 11-19-96, eff. 1-1-97; Amended 3-7-2024.]

Committee Comments

Rule 44 carries forward the existing requirement that an affected governmental body or the Attorney General as the case may be shall be given notice when the validity of a statute, ordinance, etc., is drawn in question by a party on an appeal. However, the failure to give notice to such governmental body or to the Attorney General is not fatal, but is an omission which may be supplied in accordance with subdivision (d). Such notice will necessarily occasion a delay to the party raising the question, which is appropriate inasmuch as it is his fault. However, subdivision (d) permits the action to proceed in a case without such notice by special order of the court if the court feels it is urgent or necessary. No time is set by subdivision (d) for the response of the Attorney General or other legal officer as this would be handled on a case by case basis or by order of the court covering this class of cases.

The appearance of the chief legal officer, etc., when the governmental body is not a party to the lawsuit would ordinarily be in accordance with the provisions for briefs of an amicus curiae. There is no requirement that the governmental body respond or enter the case at all if it does not wish to do so. The court may, however, under Rule 29 dealing with briefs of an amicus curiae, request a brief from the governmental body affected.

The term “validity” is intended to be broad enough to encompass the method of enactment as well as form and substance of any ordinance, regulation, statute, etc.

The rule has no application when the governmental body is already a party to the litigation. The rule is also broad enough to include not only appeals, but also any extraordinary proceeding before the court. Rule 29 is broadened in this instance to permit oral argument by the affected body whereas oral argument is not ordinarily likely in the event of an ordinary amicus curiae brief.

The provision of subdivision (d) for special order of the court to proceed without notice is not only for emergency situations but also for those instances in which the statute, ordinance, etc., is patently invalid and the court sees no point in requiring briefs from the affected body.

**Court Comment to Amendment to Rule 44(a)
Effective January 1, 1997**

The amendment to Rule 44(a) removes gender specific pronouns.

**Committee Comments to Amendment of Rule 44
Effective March 7, 2024**

The amendment to Rule 44(a) requires additional, earlier notice to State and local governments about appeals that challenge the validity of their statutes, ordinances, etc. The party challenging the governmental body's law can satisfy this obligation by providing a copy of the docketing statement if it is sufficient to identify the nature of the party's challenge. If the docketing statement does not identify the nature of the party's challenge -- for example, the appellant's docketing statement does not identify the challenge that the appellee is raising -- the party raising the challenge should provide the governmental body some other written statement that provides sufficient notice.

The addition of subsection (b) ensures a consistent form of service on the attorney general when the State has not yet appeared in a proceeding.

Subsection (c) carries forward the certificate-of-service requirement that had previously appeared in subsection (b).

Because Rule 44(a)(1) ensures that an affected governmental body will receive notice of an appeal earlier in the appellate process, subsection (d)(1) provides that the governmental body's brief will be due within the time allowed the party whose position the brief will support, or, if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. This change ensures that any party to the appeal will have the opportunity to respond to the governmental body's brief during the ordinary briefing schedule, either in an appellee's brief or appellant's reply brief.

Subsection (d)(2) requires a governmental body to move for leave to participate in oral argument. The previous version of the rule provided that the governmental body was "entitled to be heard orally," but the rule did not address other information about that right, including how oral-argument time should be allotted. By requiring a governmental body to move for leave to participate in oral

argument, while providing that such requests shall be freely granted, this amendment will encourage parties and the governmental body to confer regarding how oral-argument time should be allotted before a governmental body seeks leave to participate in oral argument.

Subsection (e) carries forward the notice requirement that had previously appeared in subsection (d).

Note from the reporter of decisions: The order amending Rule 10, Rule 11, Rule 21(a)(1)(F), and Rule 44, Alabama Rules of Appellate Procedure, and adopting the Committee Comments to the amendments of Rule 10, Rule 11, and Rule 44, effective March 7, 2024, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.