

Alabama Rules of Appellate Procedure

Rule 44.

Constitutional questions.

(a) *Service.* 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 governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of that party's written brief, which shall clearly set out the question raised, on the attorney general, the city attorney, or the chief legal officer of the governmental body whose order is questioned.

(b) *Certificate of service.* A certificate of service shall be included in the brief of the party raising such question.

(c) *Right to respond.* The State, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to be heard orally or on brief or both.

(d) *Notice.* Except by special order of the court, in the absence of such notice and certificate, 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.]

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.