

Rule 43. Evidence

(a) IN GENERAL. The admissibility of evidence and the competency and privileges of witnesses are governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience, except when a statute or these rules otherwise provide.

(b) IN OPEN COURT. At trial, the witnesses' testimony must be taken in open court unless otherwise provided by these rules. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(c) MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE. *Federal Rule of Evidence 611* is incorporated herein.

(d) RULINGS ON EVIDENCE. *Federal Rule of Evidence 103* is incorporated herein.

(e) AFFIRMATION INSTEAD OF AN OATH. When these rules require an oath, a solemn affirmation suffices.

(f) EVIDENCE ON A MOTION. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

COMMENT TO 2022 AMENDMENTS

Rule 43(b) is amended to facilitate remote testimony in jury and bench trials. Rule 43(b) retains the "good cause" standard in Fed. R. Civ. P. 43(a), but it eliminates the requirement that a party seeking to present live testimony from a remote location establish "compelling circumstances." According to the advisory committee notes on the 1996 amendment to Fed. R. Civ. P. 43(a) that included the "compelling circumstances" requirement, depositions taken before trial are superior to remote live testimony, but extensive experience in the District of Columbia during the COVID-19 pandemic has disproved this assumption. Advances in videoconferencing technology make such testimony significantly more like live, in-court testimony than it may have been in 1996. Videoconferencing therefore may be a reasonable means to secure the testimony of a witness who cannot testify in person without undue inconvenience or to resolve difficulties in scheduling a trial in which all witnesses can participate.

Factors that may be relevant to whether good cause exists to allow contemporaneous remote testimony include, but are not limited to: (1) any agreement of the parties; (2) the age, infirmity, or illness of the witness; (3) the convenience of the proposed witness and the parties; (4) the willingness of the witness to testify in person; (5) the cost of producing the witness in person in relation to the importance of the testimony; and (6) any unfair prejudice or surprise to another party.

Videoconferencing is strongly preferred over audio-only transmission, although the latter may be sufficient in some cases, and the court may require videoconferencing as an appropriate safeguard. Other examples of appropriate safeguards include, but are not limited to: (1) prohibiting anyone from being physically present with the witness, or requiring the identification of any such person; (2) prohibiting the witness from consulting notes or other documents, or requiring disclosure of any such documents; (3) prohibiting electronic or other communications with the witness during the testimony; (4) establishing procedures for showing documents or exhibits to the witness during

direct and cross examination; (5) establishing procedures to ensure that the witness's testimony can be seen and/or heard; (6) establishing requirements to ensure that the witness's surroundings or backdrop does not cause unfair prejudice; and (7) requiring the witness and the parties to test arrangements before the witness testifies.

COMMENT TO 2017 AMENDMENTS

Rule 43 differs substantially from *Federal Rule of Civil Procedure 43*, as amended in 2007, and from the prior rule. Section (a) is taken from Criminal Rule 26. Sections (c) and (d) incorporate by reference *Federal Rules of Evidence 611* and *103*, respectively. Sections (b), (e), and (f) are substantially identical to sections (a), (b), and (c) of the federal rule. The section regarding interpreters has been deleted. The subject of interpreters is addressed in statutes, administrative orders, and Department of Justice guidance.