

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

**RULE PROMULGATION ORDER 22-10**

(Amending Super. Ct. Civ. R. 5, 6, 37, and 43)

**WHEREAS**, pursuant to D.C. Code § 11-946 (2012 Repl.), the Board of Judges of the Superior Court approved amendments to Superior Court Rules of Civil Procedure 5, 6, 37, and 43; and

**WHEREAS**, pursuant to D.C. Code § 11-946 (2012 Repl.), the amendments to these rules, to the extent that they modify the federal rules, have been approved by the District of Columbia Court of Appeals; it is

**ORDERED**, that Superior Court Rules of Civil Procedure 5, 6, 37, and 43 are hereby amended as set forth below; and it is further

**ORDERED**, that the amendments shall take effect immediately and shall govern all proceedings hereafter commenced and insofar is just and practicable all pending proceedings.

## Rule 5. Serving and Filing Pleadings and Other Papers

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### (d) FILING.

(1) *Required Filings.* Any paper after the complaint that is required to be served, other than those referred to in [Rule 5\(d\)\(2\)](#) and Rule 12-l(d) and (e), must be filed no later than 7 days after service. ~~The following discovery requests and responses must not be filed except as provided in Rule 5(d)(2) or until they are used in the proceeding: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.~~

#### (2) *Discovery Requests and Responses.*

(A) *Without Leave of Court.* Discovery requests and responses may be filed, without leave of court, if they are:

- (i) appended to a motion or opposition to which they are relevant; or
- (ii) used in a proceeding.

(B) *By Court Order.* ~~If not appended to a motion or opposition~~ Except as provided in ~~under~~ Rule 5(d)(2)(A), a party may ~~only~~ file discovery requests and responses only by court order.

(C) *Retaining Discovery Papers.* The requesting party must retain the original discovery paper, and must also retain personally, or make arrangements for the reporter to retain, in their original and unaltered form, any deposition transcripts until the case is concluded in this court, the time for noting an appeal or petitioning for a writ of certiorari has expired, and any appeal or petition has been decided.

#### (D) *Certificate Regarding Discovery.*

(i) In General. A “CERTIFICATE REGARDING DISCOVERY,” setting forth all discovery that has occurred, must be filed with the court as an attachment to:

- (a) any motion regarding discovery;
- (b) any opposition to a dispositive motion based on the need for discovery; and
- (c) any motion to extend scheduling order dates.

(ii) Prohibition. Unless attached to a motion listed in Rule 5(d)(2)(D)(i), a “CERTIFICATE REGARDING DISCOVERY” must not be filed.

(3) *Non-Electronic Filing.* A paper not filed electronically is filed by delivering it:

- (A) to the clerk’s office; or
- (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk’s office.

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## COMMENT TO 2022 AMENDMENTS

Amendments to Rule 5(d) clarify that discovery materials should not be filed except in the circumstances specified in the rule. Consistent with the 2022 amendment to Rule 12-l, the reference to a memorandum of points and authorities was deleted from Rule 5(d)(4).

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## **Rule 6. Computing and Extending Time; Time for Motion Papers**

### **(a) COMPUTING TIME.**

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(6) *“Legal Holiday” Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, [District of Columbia Emancipation Day](#), Memorial Day, [Juneteenth](#), Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and

(B) any day declared a holiday by the President or Congress, or observed as a holiday by the court.

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### COMMENT TO 2022 AMENDMENTS

Subsection (a)(6)(A) has been amended to include [District of Columbia Emancipation Day](#) and [Juneteenth](#) in the definition of legal holiday.

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## Rule 37. Failure to Cooperate in Discovery; Sanctions

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(c) FAILURE TO ADMIT. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A~~1~~) the request was held objectionable under Rule 36(a);
- (B~~2~~) the admission sought was of no substantial importance;
- (C~~3~~) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D~~4~~) there was other good reason for the failure to admit.

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### COMMENT TO 2022 AMENDMENTS

Subsections (c)(A)–(c)(D) have been corrected to redesignate them (c)(1)–(c)(4), respectively, to conform with the general restyling of the Superior Court rules.

## Rule 43. Evidence

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

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### 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.

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(B) *By Court Order.* Except as provided in Rule 5(d)(2)(A), a party may file discovery requests and responses only by court order.

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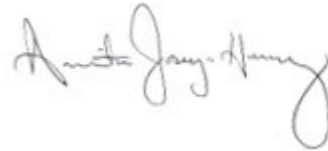
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By the Court:



Date: 11/18/2022

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Anita M. Josey-Herring  
Chief Judge

Copies to:

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