

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Notice of Proposed Amendments to Rule 43 of the
Superior Court Rules of Civil Procedure**

The District of Columbia Superior Court Rules Committee recently completed review of proposed amendments to Rule 43 of the Superior Court Rules of Civil Procedure. The Rules Committee will recommend to the Superior Court Board of Judges that the amendments be approved and adopted unless, after consideration of comments from the Bar and the general public, the proposed amendments are withdrawn or modified.

Written comments must be submitted by October 3, 2022. Comments may be emailed to Pedro.Briones@dccsystem.gov or may be mailed to:

Pedro E. Briones
Associate General Counsel
District of Columbia Courts
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

All comments submitted in response to this notice will be available to the public. New language is underlined, and deleted language is stricken through.

Rule 43. Evidence

(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.

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 (5) any unfair prejudice or surprise to another party.

Videoconferencing is ordinarily 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.
