

## Alabama Rules of Civil Procedure

### VI. TRIALS

#### Rule 43.

#### Evidence.

(a) *Form and admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided in 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. Testimony in any uncontested action involving a divorce or annulment of marriage shall be taken before the clerk, unless otherwise ordered by the judge. In such a case the clerk shall have the powers of a master as provided in Rule 53 and shall follow the procedure therein, or in cases of default or upon written waiver the testimony may be taken upon deposition or oral examination, in accordance with prior practice, and at any time and without notice of the time and place of the taking or other proceeding therein. When depositions or oral examination have been taken, they shall be filed in the clerk's office without any other transcript of the proceedings or of the evidence and without any further report by the clerk. However, nothing contained in this paragraph shall prevent the parties from taking testimony by agreement in a manner different from herein provided unless the court limits or prohibits such agreed manner.

All evidence shall be admitted which is admissible under statute or under the rules of evidence which are now applied or shall hereafter be applied in the courts of the State of Alabama.

(b) [Omitted.]

(c) [Omitted.]

(d) *Affirmation in lieu of oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof. The court may, but shall not be required to, frame such affirmation according to the religious faith of the witness.

(e) *Evidence on motions.* When a motion is based on facts not appearing of record the court unless a jury is required may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. Nothing herein shall be construed to enlarge or abridge the right to trial by jury.

(f) *Interpreters*. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(dc) *District court rule*. Rule 43 applies in the district courts except that (1) the reference to domestic-relations cases in Rule 43(a) is deleted and (2) the reference to a jury in Rule 43(e) is deleted.

[Amended eff. 10-1-95; Amended eff. 1-1-96; Amended eff. 11-23-2020; Amended eff. 3-25-2021.]

### **Committee Comments on 1973 Adoption**

*Rule 43(a)*. This rule makes a substantial change in equity practice in Alabama. Former Equity Rule 40, provides that, with certain exceptions, testimony in equity cases must be taken by interrogatories filed in the Register's Office. The exceptions relate to oral testimony before a commissioner or before the court upon motion by a party or ex mero motu. Rule 43(a) will make oral testimony before the court in an equity proceeding the rule, rather than the exception. This desirable change gives the trial court the obvious advantage of observing the demeanor of witnesses so as to determine more readily their veracity (or lack thereof) and the weight to be given their testimony. Further, this change will materially advance the ultimate termination of the proceeding in that the evidence can be considered by the court as it is taken rather than the former practice of piecemeal taking of testimony by interrogatories over a period of many months for presentation to the court in "canned" fashion.

Note that the requirement for oral testimony is qualified by reference to other rules which might provide otherwise. For example, see Rule 32(a) wherein provision is made for use of depositions at trial under certain circumstances. Rule 32 applies to depositions upon oral examination pursuant to Rule 30 and depositions upon written questions pursuant to Rule 31. See also Rule 53, Masters. Particularly, note Rule 53(d) wherein a reference can be ordered by the court and Rule 55, Default, also permitting a reference upon default. The present Alabama practice with respect to presentation of evidence to the Register or a Commissioner in a default divorce proceeding will not be changed. Rule 55 authorizes the court to order a reference wherein a default has occurred. The circumstances justifying a reference in Rule 53, Masters, limit the occasions wherein a reference is permissible. These limitations arguably apply to Rule 55 references. Further, Rule 55 requires notice to a party who has appeared and is now in default. Present Alabama practice does not require further notice to a

party who has appeared and subsequently has had a decree pro confesso entered against him in a divorce proceeding. (*Wright v. Wright*, 205 Ala. 519, 88 So. 828 (1921)) or other equitable case, (*Brue v. Vaughn*, 241 Ala. 322, 2 So.2d 396 (1941)).

In order to make it clear that these rules neither limit the power to refer default divorce proceeding to the register or commissioner, nor do they require notice after decree pro confesso, a special provision governing default in divorce proceedings has been included in Rule 43(a).

*Rule 43(b)*. The introductory statement is drawn from § 12-21-138, Code of Ala., and makes clear the impropriety of leading questions on other than direct examination except as otherwise stated in this Rule. The reference to the permissibility of leading questions, a departure from the Federal Rule, is justified by a desire to eliminate references to prior code sections whenever possible. Section 12-21-138, Code of Ala., is arguably broader than Rule 43(b) and that which is considered broader has been carried into this Rule to permit abrogation of § 12-21-138, Code of Ala. Provision for leading questions on other than cross-examination “when justice requires otherwise” has been included to cover such situations wherein leading questions may be necessary on direct examination to develop a witness’ testimony.

Present Alabama practice has often been criticized for its rather inflexible treatment of the adverse witness. The impeachment of one’s own witness is limited to situations wherein the examining party can show real surprise. See 1 McElroy, *Evidence*, §§ 165.01(6), 171.01 (2d ed. 1959). Section 12-21-138, Code of Ala., provides that leading questions on other than cross-examination can be permitted only in the discretion of the court. Under Rule 43(b) an adverse or hostile witness can as a matter of right be interrogated by leading questions, can be contradicted, impeached and otherwise treated as if it were cross-examination of a witness called by the adverse party. Note that the contradiction and impeachment then permitted to the adverse party is only upon the subject matter of the examination in chief.

With the foregoing exception, these Rules will in no way alter present Alabama practice of permitting cross-examination on matters material to every issue of the action, not simply those issues raised on direct examination. The corresponding federal rule limits cross-examination to the subject matter of the direct examination. The federal interpretation is said to stem from the opinion of Story, J. in *Philadelphia & T.R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448, 461, 10 L.Ed. 535 (1840) and has been much criticized. See 6 Wigmore, *Evidence*, 3d ed. 1940, § 1888; McCormick, *Evidence*, 1954, § 27. The April, 1937, draft of the Federal Rules of Civil Procedure contained language in line with the Alabama

rule (see *Fralick v. Presley*, 29 Ala. 457, 461, 65 Am.Dec. 413 (1856); *Kelly v. Brooks*, 25 Ala. 523 (1854)), but was rejected by the U.S. Supreme Court. This rule contains that rejected provision permitting more sensible broad cross-examination.

*Rule 43(c)*. This section enables the examining party to make an offer of proof when an objection to his examination has been sustained. This section, as applicable to jury cases, is largely a codification of the practice of excluding the jury for development of evidentiary objections approved in *Birmingham Nat'l Bank v. Bradley*, 108 Ala. 205, 19 So. 791 (1895). The last sentence of Rule 43(c) relates to non-jury matters and permits the court to take and report the challenged evidence in full. This procedure permits the reporting of the challenged evidence in full only after an objection has been interposed. It sets forth a procedure inconsistent with and different from Tit. 7, § 372(1), Code of Ala. (the Lazy Lawyer's statute) which has been superseded by this Rule. Rule 43(c) simply gives a party a right to place in the record for appellate purposes, the proof he was denied the opportunity to adduce at the trial level after the objection has been sustained against him.

*Rule 43(d)* contains a provision similar to § 12-21-136, Code of Ala., permitting affirmation in lieu of oath. It differs from the federal counterpart only so as to preserve its discretionary nature in §12-21-136, Code of Ala., thus permitting § 12-21-136 to be superseded.

*Rule 43(e)*. A motion turning on facts not of record is covered in this section. Tit. 7, Eq. Rule 95 is quite similar. Of course, under the new rules, Rule 43(e) will apply to both law and equity. Objections made under present practice at law by pleas in abatement or demurrer will be made by motion under the new rules. See Rule 12. Of course, some objections are already presented by motion in Alabama, as the motion to quash summons and the motion to strike and these appellations will not be changed by these rules. In *Ex parte Western Railway of Alabama*, 283 Ala. 6, 214 So.2d 284 (1968), the right to a trial by jury on a Plea in Abatement was recognized. This provision of Rule 43 has been drawn so as to preserve that right as it must do in order to be consistent with the provisions of the Rules Enabling Act (Act 1311, 1971 Regular Session). Note, however, that the Rule also includes express language which would preclude any construction looking to the expansion as well as the abridgement of a jury trial right.

*Rule 43(f)*. Express provision for use of interpreters is not without prior Alabama precedent. See § 12-21-130, Code of Ala. The power to appoint is within the court's discretion and could be quite helpful in appropriate cases.

**Committee Comments to October 1, 1995,  
Amendment to Rule 43**

The amendment is technical. No substantive change is intended.

**Committee Comments to January 1, 1996,  
Amendment to Rule 43**

The amendment omits former subdivisions (b) and (c) for the reasons stated in the following committee comments to the 1972 amendments to F.R.Civ.P. 43:

*“Subdivision (b).* The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 607, and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

*“Subdivision (c).* Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.”

The amendment removes from subdivision (dc) the reference to the applicability of Rule 43(c) in district courts.

**Committee Comments to Amendment to Rule 43  
Effective November 23, 2020**

Rule 43 has been amended to incorporate the exact language from Rule 43(a), Federal Rules of Civil Procedure, as amended in 1996, regarding transmission of testimony from a location other than open court. These comments follow closely, but not exactly, the Advisory Committee Notes for the 1996 amendment to Rule 43(a) of the Federal Rules of Civil Procedure. Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. A party seeking to use such testimony bears the heavy burden of establishing good cause in compelling circumstances. A party who could reasonably foresee the circumstances offered to justify transmission of testimony from a different location will have a greater difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a

deposition or to know whether to prepare to be present with the witness while testifying.

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact-finder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for a witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other -- and perhaps more important -- witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

No attempt is made to specify in the rule the means of transmission that may be used. Audio transmission without video images may be sufficient in some very rare circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Contemporaneous transmission of testimony must be undertaken with appropriate safeguards to ensure that the witness understands and appreciates the oath he or she has taken to testify truthfully and so that the parties have a full and fair opportunity to perceive and examine the witness and the fact-finder can reasonably assess the witness's competency, candor, and truthfulness. Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. For instance, any person present with the witness must be identified and remain visible at all times if requested by either party and ordered by the Court; documents or information present with the witness must be disclosed; and the exact location of the witness must be disclosed. Accurate transmission likewise

must be assured. The Committee believes that Ala. Code 1975, § 12-21-135.1, should be considered as guidance for structuring remote testimony.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

### **District Court Committee Comments**

The reference to domestic relations practice in Rule 43(a) is inapplicable because of the absence of jurisdiction over such cases in the district court. The procedure governing trials in the district court is expected to be rather flexible and, in recognition of this, specific reference has been made in Rule 43(dc) so as to insure the availability of evidence in the form of tape recordings or sworn statements where the parties have so agreed. For example, the parties could agree to take a cassette recording of a doctor's remarks as to the condition of a patient and, thereafter, the recording could be played to the judge at the time of the trial. The provision for a record of excluded evidence at Rule 43(c) is retained in those instances when a party has provided for a transcript of the proceedings pursuant to Code of Ala., § 12-12-2(c), and a waiver of jury trial permits an appeal to an appellate court, rather than the circuit court, under Code of Ala., § 12-12-72(1).

### **Committee Comments to Amendment to Rule 43(dc) Effective March 25, 2021**

This amendment deletes what was formerly Rule 43(dc)(2) ("Rule 43(a), second paragraph, is to be construed so as to permit, by agreement of the parties, evidence in the form of tape recordings or sworn statements"). Advances in audiovisual technology have rendered the limiting reference to "tape recordings" archaic. Rule 43(a) allows the parties, by agreement, to take testimony and to present evidence in any agreed manner, unless prohibited by the court.

**Note from the reporter of decisions:** The order amending Rule 43 and adopting the Committee Comments thereto, effective November 23, 2020, including Justice Bolin's special writing dissenting from that order, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 3d.

**Note from the reporter of decisions:** The order amending Rule 43(dc) and adopting the Committee Comments thereto, effective March 25, 2021, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 3d.