

IN THE SUPREME COURT OF ALABAMA  
November 23, 2020

ORDER

IT IS ORDERED that Rule 43, Alabama Rules of Civil Procedure, be amended to read in accordance with Appendix A to this order;

IT IS FURTHER ORDERED that the Committee Comments to the amendment to Rule 43 be adopted to read in accordance with Appendix B to this order;

IT IS FURTHER ORDERED that the amendment of Rule 43 and the adoption of the Committee Comments thereto are effective immediately; and

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to the follow Rule 43:

"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."

Parker, C.J., and Shaw, Wise, Sellers, Mendheim, Stewart,  
and Mitchell, JJ., concur.

Bolin and Bryan, JJ., dissent.

Witness my hand this 23rd day of November, 2020.

A handwritten signature in black ink that reads "Julia Jordan Miller". The signature is written in a cursive style.

Clerk, Supreme Court of Alabama

**FILED**  
**November 23, 2020**  
**1:29 pm**  
**Clerk**  
**Supreme Court of Alabama**

BOLIN, Justice (dissenting).

I dissent to the amendment of Rule 43, Ala. R. Civ. P. The mission of the COVID-19 Task Force was "to provide the Chief Justice and the Alabama Supreme Court recommendations or suggestions to promote an orderly and safe return to active civil jury trials across the state." Based on the Task Force report, the Standing Committee on the Alabama Rules of Civil Procedure was asked to consider a change to Rule 43, Ala. R. Civ. P., that would permit remote audio/visual testimony in limited circumstances, such as when a witness tests positive for COVID during trial.

The amendment proposed by the Standing Committee on the Alabama Rules of Civil Procedure and adopted by the Alabama Supreme Court applies to "all trials," including jury trials and bench trials in the circuit courts and the district courts. The amendment is not limited in application to emergencies such as COVID-19 but allows remote testimony by unspecified means on the request of a party whenever the trial court finds "good cause in compelling circumstances" to exist. The amendment incorporates the language of Rule 43, Fed. R. Civ. P., as to remote testimony, and the Committee Comments expressly adopt the Advisory

Committee Notes to the 1996 amendment to that rule, permitting the use of telephonic testimony in some circumstances.

The amendment appears to conflict with the Alabama Constitution and several existing statutes. The amendment would also, importantly, have direct effect on existing law as to the presentation of testimony from incarcerated persons, on distinguishing direct and indirect contempt of court, and on the application of the ore tenus rule.

### Constitutional and Statutory Ramifications

Article I, § 13, Ala. Const. 1901, begins with the mandate "[t]hat all courts shall be open." Rule 43(a) begins with the premise that witness testimony is to be taken "in open court, unless otherwise provided in these rules." "[T]he expression 'open court' means that the court must not only be open for the transaction of business but also means that the court must be sitting openly, so that all persons who conduct themselves in an orderly manner may freely see and hear the proceedings in the court." Rush v. State, 253 Ala. 537, 540, 45 So. 2d 761, 764 (1950).

"Open court" is defined by Black's Law Dictionary 1314 (11th ed. 2019), as "[a] court that is in session, presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business." In

Greener v. Killough, 1 So. 3d 93, 102 (Ala. Civ. App. 2008), the Court of Civil Appeals, applying the definition of "open court" set out in an earlier edition of Black's, rejected telephonic testimony. The court also quoted the 1973 Committee Comments to Rule 43, Ala. R. Civ. P., and noted that the Committee Comments indicated that "open court" contemplates "the presence of the witness in the courtroom." 1 So. 3d at 102. That court went on to opine that, even if Alabama had adopted that portion of the federal rules allowing contemporaneous transmission of a witness's testimony from a different location, the telephonic testimony would not have been allowed in Greener because there were no appropriate safeguards in place and no special circumstances necessitating the use of telephonic testimony. Consequently, the amendment to Rule 43(a) providing that "the court may permit testimony in open court by contemporaneous transmission from a different location" is arguably an attempt to bring remote testimony within the constitutional mandate of "open court" through rule-making. The amendment fails to acknowledge that remote testimony in "open court" is an oxymoron.

As to conflict between the amendment and existing statutes, § 12-21-135, Ala. Code 1975, provides that "[a]ll testimony, except as

otherwise directed, must be given in open court on the oath or affirmation of the witness." The legislature subsequently "otherwise directed" two statutory exceptions to the "open court" mandate when it enacted § 12-21-135.1, Ala. Code 1975, specifically providing for remote audio/visual testimony by active-duty service members who are out-of-state on military orders and for certain State forensic-department employees, both subject to the conditions and requirements set out in the statute. The amendment to Rule 43(a) acknowledges the existence of § 12-21-135.1 in the Committee Comments and, contra to §§ 12-21-135 and -135.1, permits remote testimony by unspecified means by all witnesses at the court's discretion. Such permissive language ("the court may permit testimony") in the amendment does not comply with the plain statutory requirement of § 12-21-135 that any change to the statutory testimony "in open court" mandate is to be "otherwise directed" by the legislature.

#### Impact of Rule Change on Existing Law

The common-law writ of habeas corpus ad testificandum requesting the transportation of a prisoner to court to testify in person was superseded by statute in the 1907 Code of Alabama, § 6559. That statute replaced the writ with a procedure by which the prisoner was to provide

testimony on oral examination or upon written questions rather than being brought to court. The statute was included in subsequent Codes (see Tit. 45, § 60, Alabama Code 1940 (Recomp. 1958)), until it was expressly superseded by Rule 43, Ala. R. Civ. P., and Rule 26, Ala. R. Civ. P. See Whitehead v. Bi-Petro Mktg., Inc., 356 So. 2d 150, 152 (Ala. 1978) (holding that prisoner's "proper remedy was to take his own testimony upon oral examination under Rule 30, [Ala. R. Civ. P.], upon written questions under Rule 31, [Ala. R. Civ. P.], or upon written questions under Rule 33, [Ala. R. Civ. P.]. See also Rule 32(a)(3)(C), [Ala. R. Civ. P.]"). The amendment to Rule 43(a) allows an incarcerated person to request the court to permit him or her to provide contemporaneous remote testimony as an additional alternative to the testimony presently allowed by the Rule 43 language -- "unless otherwise provided in these rules" -- and under Rule 26 -- allowing depositions upon oral examination or written questions. The decision on the request would be at the court's discretion, upon a finding that incarceration constitutes good cause in compelling circumstances. Neither the amendment itself nor the Committee Comments address whether incarceration is to be considered a good cause in compelling circumstance in every case, in some cases, or in no case.

Section 12-1-8, Ala. Code 1975, limits the specific grounds for a finding of contempt that will support summary punishment for contempt of court. Those grounds set out in § 12-1-8(1) and (2) are "[d]isrespectful, contemptuous or insolent behavior in court, tending in any way to diminish or impair the respect due to judicial tribunals or to interrupt the due course of trial" or "[a] breach of the peace, boisterous conduct, violent disturbance" or obstruction "committed in the presence of the court or so near thereto as to have that effect." Additionally, "[r]efusing to be sworn or to answer" "in the court ... any lawful question" will support summary punishment. § 12-1-8(5). Acts of contempt not committed in open court are considered indirect contempt, and due process requires that the alleged contemnor must be given prior notice of the charge and the opportunity to be heard in person with witnesses. State v. Thomas, 550 So. 2d 1067 (Ala. 1989). Rule 70A(a)(2)(A), Ala. R. Civ. P., dealing with contempt in civil cases, defines direct contempt as occurring in open court in the presence of the judge. The amended Rule 43(a) does not address in text, nor do the Committee Comments address, whether a remote witness who is an alleged contemnor is "in the presence of the court" and subject to summary punishment or is entitled to a due-process hearing.

Finally, the application of the ore tenus rule in bench trials when the testimony is remote is put in issue by the amendment to Rule 43(a). Section 12-2-7(1), Ala. Code 1975, mandates that no weight be given to the trial judge's findings upon facts "where the evidence is not taken orally before the judge," in which case the appellate courts' review is de novo. Domestic-relations cases are generally bench trials that rely largely on the ore tenus presumption for the determination of the facts by the trial judge. Again, neither the text of nor the Committee Comments to the amendment address whether remote testimony falls within the ore tenus rule.

The amendment to Rule 43(a), Ala. R. Civ. P., the purpose of which was to alleviate issues resulting from a medical pandemic, seems problematic for a number of reasons. At a minimum, such a sweeping change to Alabama jurisprudence affecting "all trials" may require review to include an updated district-court provision to Rule 43 itself, as well as review of the existing District Court Committee Comments. Further review is also required regarding the intersection of this amendment with § 12-21-135 and § 12-21-135.1 that are specifically directed to remote testimony. Lastly, I recognize that technology has dramatically evolved

and improved, but as the Advisory Committee Notes to the 1996 amendment to Rule 43 of the Federal Rules of Civil Procedure recognize, the exception made for remote testimony was never intended to swallow the rule of live testimony.

I respectfully dissent.

Bryan, J., concurs.

## APPENDIX A

### 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 on 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 on 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, (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, and (3) the reference to a jury in Rule 43(e) is deleted.

## APPENDIX B

### 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.