

AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE



COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME
COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE
THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28
U.S.C. 2072



APRIL 24, 1996.—Referred to the Committee on the Judiciary and ordered
to be printed.



U.S. GOVERNMENT PRINTING OFFICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 23, 1996

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 5 and 43.

[See *infra*, pp. _____.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1996, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO
RULES OF CIVIL PROCEDURE**

**Rule 5. Service and Filing of Pleadings and Other
Papers**

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in

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proper form as required by these rules or any local rules or practices.

Rule 43. Taking of Testimony

(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

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L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

October 12, 1995

**MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT**

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 5 and 43 of the Federal Rules of Civil Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

L. Ralph Mecham

Enclosures

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1995**

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

**III. AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee amendments to Federal Rule of Civil Procedure 5 together with a Committee Note explaining their purpose and intent. The proposed amendments to Rule 5 were circulated to bench and bar for comment in September 1994. No request to testify on the proposed amendments was received, and the scheduled public hearing was canceled.

The proposed amendments to Rule 5 (*Service and Filing of Pleadings and Other Papers*) are part of a package of uniform amendments with the Appellate and Bankruptcy Rules that would authorize a court, by local rule, to permit documents to be filed, signed, or verified by electronic means so long as the means were consistent with any technical standards established by the Judicial Conference.

At its January 1995 meeting, your committee approved proposed amendments to Rule 43 (*Taking of Testimony*), but delayed their transmission to the Judicial Conference until its September meeting. The proposed amendments would allow testimony at trial from a witness who is unable to communicate orally, but who is able to communicate by other means, e.g., sign language. It would also permit testimony by contemporaneous transmission from a different location (e.g., video transmission).

Concerns were raised that the absence of the physical presence of the opposing attorney during the witness' testimony could lead to abuses, including improper coaching outside the view of the camera. In most cases, video depositions of the witness taken before trial seemed feasible and would be preferable. Accordingly, the original version of the proposed amendments to Rule 43, which was published in 1993, was revised to permit testimony by contemporaneous transmission only on a showing of compelling circumstances.

The proposed amendments to Rules 5 and 43 of the Federal Rules of Civil Procedure, as recommended by your committee, appear in *Appendix C* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Civil Rules 5 and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Alicemarie H. Stotler
CHAIR

Peter G. McCabe
SECRETARY

June 2, 1995

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APPELLATE RULES

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BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Committee on Rules of Practice
and Procedure (Standing Committee)

Dear Colleagues:

The Advisory Committee brings four items requiring action of the Standing Committee. Please refer to the relevant portions of the Minutes of the Advisory Committee meeting for greater detail regarding each item. The first is a recommendation for transmission to the Judicial Conference. The other three are recommendations of rules to be published for comment.

Rule 5(e) (see Minutes pp.6-8)

We recommend forwarding to the Judicial Conference the attached proposed changes to 5(e) with committee note. A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed to the changes to the published draft at its October 1994 and April 1995 meetings and those changes are reflected in the draft now before you.

* * * * *

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Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

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may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 77(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

was the same. Greater experience is needed before it will be time to move in this direction.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

December 13, 1994

CHAIRS OF ADVISORY COMMITTEES

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SECRETARY

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D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Committee on Rules of Practice and Procedure
Standing Committee

Re: Report of Advisory Committee on Civil Rules

Dear Colleagues:

The Advisory Committee on Civil Rules met on October 20-21, 1994. Professor Ed Cooper, Reporter to the committee, has prepared draft Minutes of the meeting, a copy of which is attached. I will refer to these Minutes in this report.

This was the first meeting for two new members. Justice Christine Durham of the Utah Supreme Court replaces Chief Justice Holmes. Judge David Levi, United States District Court in Sacramento replaces Magistrate Judge Wayne Brazil. The American College of Trial Lawyers was represented by Robert Campbell, and the Litigation Section of the American Bar Association by Barry McNeil. This was the first meeting attended by a representative of the Litigation Section.

I.

Five items require action by the Standing Committee:

* * * * *

- 3. Rule 43(a) (Minutes pp. 13-14). The history of the proposed revision of Rule 43(a) is set out at pp. 13-14 of the Minutes. The only recommended change from the published version is to require "good cause shown in compelling circumstances." It was the judgment of the committee that since the only change from the published version narrows the availability of transmission, no additional period of comment is required. Conforming changes to the Committee Note are also made. The full text of Rule 43(a), as recommended with changes shown, is attached as Exhibit 2, with a summary of public comments on the published version.

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Rule 43(a)

A revision of Rule 43(a) was published for comment in October, 1993. The revision was considered in light of the comments at the April, 1994 meeting of the Committee. No difficulty was caused by the first revision, which strikes the requirement that testimony be taken "orally." This revision makes it clear that testimony can be taken in open court from a witness who is unable to communicate orally but is able to communicate by other means.

The other revision added a new provision that the court may, for good cause, permit testimony "by contemporaneous transmission from a different location." This provision provoked substantial discussion and uncertainty. Doubts were expressed about moving toward "the courtroom of the future" in which everyone participates by remote electronic means from many scattered locations. A motion to send the revised rule forward to the Standing Committee for recommendation to the Judicial Conference failed by even division of the Committee.

Reconsideration of the Rule 43(a) proposals again produced no disagreement as to deletion of the requirement that testimony be given orally.

Discussion of the provision for transmitting testimony from a different location began with a protest that this device can appeal only to those anxious to be "trendy," "with it," and adept with "all the new toys." A lawyer confronted with a proposal to transmit testimony must face the choice of trusting to unseen arrangements made by others or of arranging to be present with the witness in person or by representative. Only physical presence with the witness can ensure that there is no improper coaching. If testimony is needed from a witness who cannot be present, the party desiring the testimony should arrange a video deposition after notice that ensures the opportunity to be present.

These concerns were met with various reassurances. Transmission of testimony could be useful in prisoner cases. State courts have substantial experience with conducting arraignments in this way. Transmission of testimony works well in admiralty proceedings. The lawyers for other parties can choose between participating through the system used to transmit the testimony or participating by arranging for someone to be present with the witness.

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Facing these concerns, it was moved that the draft be amended for purposes of further discussion by retaining the requirement of good cause and adding a requirement that compelling circumstances justify transmission of testimony. This amendment was adopted without dissent.

Further discussion of the amended proposal provoked new expressions of doubt whether available technology is yet sufficiently reliable to support transmission of testimony. It was observed again that it works in admiralty. Another illustration offered was the need to take formal authenticating testimony from the custodian of records in a remote location; this illustration was met by the response that ready resort to deposition or other means should show that there is no compelling need in such circumstances.

The next illustration was the witness who has an accident, a death in the family, or like calamity. Transmission is better than a "deposition" during trial. It is not a response that an earlier deposition should have been taken - the party calling a witness often will not seek to frame a deposition, no matter by whom taken, in the shape of expected trial testimony.

It was moved to delete the entire sentence providing for contemporaneous transmission of testimony from a remote location. The motion failed by vote of 5 in favor, 7 against.

The proposal, as amended to require "good cause shown in compelling circumstances," was then adopted with a recommendation that the Standing Committee recommend its adoption to the Judicial Conference. It was concluded that since the only change from the published version is to narrow the availability of transmission, there is no need to republish the proposal for an additional period of comment. It also was concluded that the Committee Note should be revised to make clear that remote transmission should be permitted only for truly compelling reasons.

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**PROPOSED AMENDMENTS TO
RULES OF CIVIL PROCEDURE***

**Rule 5. Service and Filing of Pleadings and
Other Papers**

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1 **(e) Filing with the Court Defined.** The filing of
2 papers with the court as required by these rules shall
3 be made by filing them with the clerk of court, except
4 that the judge may permit the papers to be filed with
5 the judge, in which event the judge shall note
6 thereon the filing date and forthwith transmit them
7 to the office of the clerk. A court may, by local rule,
8 permit papers to be filed, signed, or verified by
9 ~~facsimile or other~~ electronic means ~~if such means are~~
10 ~~authorized by and~~ that are consistent with technical
11 standards, if any, established by that the Judicial
12 Conference of the United States establishes. A paper

*New matter is underlined; matter to be omitted is lined through.

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13 filed by electronic means in compliance with a local
14 rule constitutes a written paper for the purpose of
15 applying these rules. The clerk shall not refuse to
16 accept for filing any paper presented for that purpose
17 solely because it is not presented in proper form as
18 required by these rules or any local rules or practices.

Committee Note

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

The most significant change discards the requirement that the Judicial Conference authorize local electronic filing rules. As before, each district may decide for itself whether it has the equipment and personnel required to establish electronic filing, but a district that wishes to establish electronic filing need no longer await Judicial Conference action.

The role of Judicial Conference standards is clarified by specifying that the standards are to govern technical

matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address these issues until Judicial Conference standards are adopted.

The amended rule also makes clear the equality of filing by electronic means with written filings. An electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification. An electronic filing that otherwise satisfies the requirements of 28 U.S.C. § 1746 need not be separately made in writing. Public access to electronic filings is governed by the same rules as govern written filings.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder 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 the 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

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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.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special 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 secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video

transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

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.

