COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

Rule 42. Consolidation; Separate Trials

(a) CONSOLIDATION. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Subdivision (a) is based upon U.S.C., Title 28, [former] §734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) §1081; Calif.Code Civ.Proc. (Deering, 1937) §1048; N.M.Stat.Ann. (Courtright, 1929) §105–828; N.Y.C.P.A. (1937) §§96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) §1048; N.Y.C.P.A. (1937) §96; American Judicature Society, Bulletin XIV (1919) Art. 3, §2 and Art. 10, §10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, *Routine Bifurcation of Negligence Trials*, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g.*, *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking Testimony

(a) IN OPEN COURT. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. 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.

(b) AFFIRMATION INSTEAD OF AN OATH. When these rules require an oath, a solemn affirmation suffices.

(c) EVIDENCE ON A MOTION. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) INTERPRETER. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, [former] §635 (Proof in common-law actions), §637 [see 2072, 2073] (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-examination modify U.S.C., Title 28, §725 [now 1652] (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] §631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) §1885 *et seq*.

Note to Subdivision (c). See [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1 (1876); *Nelson v. United States*, 201 U.S. 92. 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, §1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

NOTES OF ADVISORY COMMITTEE ON RULES—1946
SUPPLEMENTARY NOTE REGARDING RULES 43 AND 44

These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence* (3d ed. 1940) 200–204; Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States* (C.C.A.2d, 1941) 117 F.(2d) 387, cert. den. (1941) 313 U.S. 587; *Mosson v. Liberty Fast Freight Co.* (C.C.A.2d, 1942) 124 F.(2d) 448; *Hartford Accident & Indemnity Co. v. Olivier* (C.C.A.5th, 1941) 123 F.(2d) 709; *Anzano v. Metropolitan Life Ins. Co. of New York* (C.C.A.3d, 1941) 118 F.(2d) 430; *Franzen v. E. I. DuPont De Nemours & Co.* (C.C.A.3d, 1944) 146 F.(2d) 837; *Fakouri v. Cadais* (C.C.A.5th, 1945) 147 F.(2d) 667; *In re C. & P. Co.* (S.D.Cal. 1945) 63 F.Supp. 400, 408. But *cf. United States v. Aluminum Co. of America* (S.D.N.Y. 1938) 1 Fed.Rules Serv. 43a.3, Case 1; Note (1946) 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F.R.D. 124, 137–138.

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1972
AMENDMENT

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

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 601 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.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1996
AMENDMENT

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

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 fact-finder may exert a powerful force for truthtelling. 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 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.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (a), are set out in this Appendix.

EFFECTIVE DATE OF AMENDMENTS PROPOSED NOVEMBER 20, 1972, AND DECEMBER 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of this title.

Rule 44. Proving an Official Record

(a) MEANS OF PROVING.

(1) *Domestic Record*. Each of the following evidences an official record—or an entry in it—that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record—or by the officer's deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) *Foreign Record*.

(A) *In General*. Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record—or a copy—that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) *Final Certification of Genuineness*. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) *Other Means of Proof*. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) LACK OF A RECORD. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) OTHER PROOF. A party may prove an official record—or an entry or lack of an entry in it—by any other method authorized by law.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some of those statutes are:

U.S.C., Title 28:

§ 661 [now 1733] (Copies of department or corporation records and papers; admissibility; seal)
§ 662 [now 1733] (Same; in office of General Counsel of the Treasury)
§ 663 [now 1733] (Instruments and papers of Comptroller of Currency; admissibility)
§ 664 [now 1733] (Organization certificates of national banks; admissibility)
§ 665 [now 1733] (Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666 [now 1733] (Same; certificate by Secretary or Assistant Secretary)
§ 670 [now 1743] (Admissibility of copies of statements of demands by Post Office Department)
§ 671 [now 1733] (Admissibility of copies of post office records and statement of accounts)
§ 672 [former] (Admissibility of copies of records in General Land Office)
§ 673 [now 1744] (Admissibility of copies of records, and so forth, of Patent Office)
§ 674 [now 1745] (Copies of foreign letters patent as prima facie evidence)
§ 675 [former] (Copies of specifications and drawings of patents admissible)
§ 676 [now 1736] (Extracts from Journals of Congress admissible when injunction of secrecy removed)
§ 677 [now 1740] (Copies of records in offices of United States consuls admissible)
§ 678 [former] (Books and papers in certain district courts)
§ 679 [former] (Records in clerks' offices, western district of North Carolina)
§ 680 [former] (Records in clerks' offices of former district of California)