Rules Suggestion 25-CV-C

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Advisory Committee on Civil Rules
Rule 43/45 Subcommittee
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comments on Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure (24-CV-B)

Dear Subcommittee Members:

We respectfully submit the enclosed remarks to address (i) issues raised by the Rule 43/45 Subcommittee as reflected in the February 7, 2025 List of Questions on Remote Testimony,[1] and (ii) other issues raised by interested stakeholders since we proposed the amendments to Rules 43 and 45 in what is now designated as 24-CV-B.

We appreciate the diligence and hard work of the Subcommittee over the past months. The questions the Subcommittee has posed, and the alternative approaches it has articulated, demonstrate the significant thought and attention it has given to these important matters.

As the Subcommittee knows, the proposed changes in 24-CV-B seek both (i) to clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held, and (ii) to make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured.

We understand the Subcommittee has "concluded that immediate action on the Rule 43(a) issues [is] not possible, but also that the Rule 45 issues deserve immediate attention and, if possible, a prompt rule-amendment proposal to resolve the existing divergence" on the Rule

[1] Most of these questions are variations of those posed to the Advisory Committee during its October 10, 2024 meeting. *See* Agenda Book for Oct. 10, 2024 Meeting of Advisory Committee on Civil Rules at 203-04, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf.

45(c) issue.[2] With this in mind, the Subcommittee has focused on "how best to fashion a rule change that would make it clear that a subpoena may command a distant witness to provide remote testimony when the demanding standard of Rule 43(a) is met."[3] We assume, therefore, that the Subcommittee's questions presuppose no change at this time to the "good cause in compelling circumstances" requirement for remote trial testimony under Rule 43(a).

As the proponents of 24-CV-B, we remain strongly of the view that amendments to Rule 43(a) are necessary to make live trial testimony via contemporaneous transmission—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured. But we recognize that the Subcommittee may be committed to the sequence in which it will address these matters.

Therefore, our comments first respond to the Subcommittee's questions as to how best to amend Rule 45 while leaving intact (for now) Rule 43(a)'s "good cause in compelling circumstances" standard. We then turn to addressing the Rule 43 issue itself, i.e., regarding whether and how to remedy the undesirable and clearly antiquated preference for pre-recorded deposition video over trial testimony that occurs in real time, albeit remotely, before the Court and the jury.

A. Questions on Remote Testimony from Subcommittee on Rules 43/45

We respond below to the Subcommittee's February 7, 2025 questions.

1. *Would an amendment to Rule 45(c) effectively clarify that once a court rules under Rule 43 that remote testimony may be used, the court presiding over the action may [under Rule 45(b)(1)] command the remote witness to attend and provide testimony from a remote location so long as that location does not require the witness to travel farther than a subpoena can require under Rule 45(c)? Possible language to accomplish that result might be along the following lines:*

> ***Place of attendance.*** *If oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules, the place of attendance is the place the person is commanded to [physically appear] {appear in person}.*

Yes, an amendment to Rule 45(c) would clarify that remote testimony subpoenas can issue and command a witness to testify at trial from a location within 100 miles of the witness's location. The language suggested in the question, however, raises certain concerns.

In the October 10, 2024 Agenda Book, the Subcommittee set forth two possible approaches to amending Rule 45(c) to clarify that a court can command remote trial testimony

[2] *Id.* at 191–92.

[3] *Id.* at 192.

from any location within 100 miles of a witness's home or workplace:

ALTERNATIVE 1

> (1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition—in person or by contemporaneous transmission from a different location—only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person:
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense.

ALTERNATIVE 2

> (1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person:
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense.
> >
> > (C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for transmission complies with 45(c)(1)(A) or (B).[4]

Either of these proposed amendments should resolve the ambiguity of the current rule, correct

[4] *Id.* at 193–94.

Kirkland's misreading of Rule 45,[5] and align the rules with the decade-long intent of the Advisory Committee to permit a Rule 43 subpoena to command a witness to appear and testify remotely from any location within 100 miles of the witness's home or workplace.[6]

While the language of either version is sufficient to accomplish this goal, Alternative 2 more explicitly does so. Including a subsection stating unequivocally that a subpoena can compel testimony from any location within the geographic limitations of 45(c)(1)(A) or (B) provides courts with a clear mandate on the scope of the subpoena power.

The Subcommittee's February 7, 2024 question appears to contemplate a third option. We disagree with this approach.

First, the prefatory clause—*"[i]f oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules"*—needlessly grafts the requirements of Rule 43 onto Rule 45, when those requirements ought to be distinct. Since this Subcommittee may alter the Rule 43 requirements through later amendments, Rule 45 should not now adopt those requirements by reference.

Second, the phrase "*the place of attendance is the place the person is commanded to [physically appear] {appear in person}*" is confusing and arguably vulnerable to the kind of reasoning in *Kirkland* that gave rise to the current problem. Why "place of *attendance*" versus "place of *compliance*," which is more consistent with the rest of the language in the rule, accompanying notes, and case law?

As noted in our original proposal (24-CV-B), some of the district courts that have found that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court did so by relying exclusively on the anachronistic 1996 Advisory Committee notes to Rule 43 providing that depositions are the preferred means of securing trial testimony from a witness who cannot be subpoenaed to testify in person. For example, in *Black Card LLC v. Visa USA Inc.*, the District of Wyoming concluded that Rule 43(a) cannot circumvent Rule 45 based on the Rule 43 notes stating (i) that in-person testimony is preferred, (ii) that the most persuasive showing of good cause in compelling circumstances occurs when a witness cannot attend trial for unexpected reasons, and, "most significantly," (iii) that depositions are the better means of

[5] *See In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023).

[6] *See* Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download (stating, in response to comment from a lawyer in Hawaii on the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a), that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location).

securing the testimony of a witness beyond the reach of a trial subpoena.[7] Based on "a full reading of Rule 43 and the committee notes"—and nothing else—the *Black Card* court concluded that subpoenas for live video testimony under Rule 43 are subject to Rule 45's geographic limits.[8] Similarly, in *Moreno v. Specialized Bicycle Components Inc.*, the District of Colorado found the Advisory Committee's notes to Rule 43(a) alone "highly persuasive on this issue." Citing the notes' instruction that depositions "provide a superior means of securing the testimony of *a witness who is beyond the reach of a trial subpoena*," the court concluded that "[t]here is nothing in the language of Rule 43(a) that permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power."[9] To prevent courts from seeking guidance on Rule 45 from the Rule 43 notes, any amendment to Rule 45 must make unambiguously clear that subpoenas for remote testimony can command a witness to testify via contemporaneous transmission from any location within Rule 45's geographic limits. This goal is best accomplished through Alternative 2.

2. *If such a change were made to Rule 45, should the rule also require that the party seeking remote testimony first obtain an order permitting such testimony under Rule 43 before serving a subpoena? If so, should the party serving the subpoena also be required to serve the witness with the order authorizing remote testimony?*

The answer to both questions is no. The Subcommittee should not recommend a requirement that the party serving the subpoena first obtain a Rule 43(a) order before serving the subpoena or that the order be served on the witness with the subpoena.

First, making the proposed change to Rule 45 (under Alternative 1 or 2)—but without the bracketed portions of subpart (C)—is sufficiently to correct *Kirkland*'s interpretation and aligns the rules with the intent of the 2013 amendments. When the Committee provided for nationwide subpoena power in these amendments, no such pre-authorization requirement was imposed, and there is no compelling reason to do so now.

Second, practical considerations militate against both requirements. In most circumstances, counsel will in any event find it best to first obtain the Rule 43(a) order; the issuance of such an order will have practical effect of maximizing enforcement of the order by the court for the district where compliance is required. But there are situations where Rule 43(a) proceedings and subpoena enforcement proceedings are not capable of being so sequenced. In such situations, parallel proceedings may be the more efficient, if not the only, practical option. And since the party seeking to compel remote testimony at trial will need to satisfy Rule 43(a) in any event, regardless of whether the subpoena issues before or after the Rule 43 adjudication, there is no concern for abuse; indeed, when the Rule 43(a) determination follows service of the

[7] No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020).

[8] *Id.*

[9] No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022).

subpoena, the subpoena recipient may then, as a practical matter, point to the absence of the Rule 43(a) as a basis for non-enforcement of the subpoena (or may even seek to weigh in on the Rule 43(a) proceeding itself). A subpoena recipient already has the powers granted under Rule 45(d) for protecting a person subject to a subpoena. A rule that requires attaching the Rule 43(a) order might itself (incorrectly) be interpreted as granting the subpoena recipient rights to attack that Rule 43(a) order, leading to two Rule 43(a) proceedings (one to first obtain the order that needs to be attached to the subpoena, and a second when the recipient wishes to revisit the providence of that Rule 43(a) order's issuance).

Finally, the mere service of a subpoena authorized under Rule 45 does not make that subpoena valid or enforceable. There is no reason to treat the requirements of Rule 43(a) any differently than the substantive requirements applicable to any other kind of Rule 45 subpoena.[10] To require otherwise could obstruct the ability of parties to obtain such testimony by forcing them to litigate a Rule 43(a) motion and a remote witness's motion to quash sequentially, rather than concurrently, during a short period before (or, possibly, during) trial, when time is of the essence. The sequencing requirement would also hinder the district court's exercise of discretion to manage its trial proceedings as appropriate in evolving circumstances.

3. *If Rule 45 is changed to address remote testimony in this manner, should it also provide a minimum notice period (say 14 days) unless the court orders otherwise?*

No. With Alternative 2, the rule would be clear that compliance with a subpoena issued for remote testimony would occur at a location for transmission that "complies with 45(c)(1)(A) or (B)." There is also no such notice requirement that presently applies to a subpoena for in-person trial testimony, and there is no reason to treat subpoenas for remote testimony any differently. There is simply no meaningful distinction between the burden on a subpoena recipient that is compelled to testify live in-person versus one commanded to testify live by remote transmission.

4. *Rule 45 of the Washington Rules of Civil Procedure (regarding remote deposition testimony) now includes the following provision:*

> *If the person commanded to appear by remote means does not have adequate access to the necessary technology, they shall notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology for the witness, or issue an amended subpoena to conduct the deposition in person.*

[10] For example, Rule 26 governs the substantive scope of all discovery subpoenas, *see, e.g.*, 9A Charles A. Wright et al., *Federal Practice and Procedure* § 2452 (3d ed. 2002) ("Today, despite the elimination of specific references within the amended text of Rule 45, Rule 26 still governs the scope of discovery."), but there is no requirement in Rule 45 for the issuing court to adjudicate the propriety of the discovery demanded prior to the subpoena's issuance.

> *If Rule 45 is amended to authorize a subpoena for remote testimony at a trial or hearing, should a provision along these lines be added to Rule 45?*

No. The proposed amendments to Rule 45(c) (under either Alternative 1 or 2) are sufficient to correct *Kirkland*'s misreading of Rule 45 and align the rules with the decade-long intent of the Advisory Committee. There is no good reason to add these other requirements.

First, the Advisory Committee's intent to allow for nationwide subpoena power has been the case for many years and has been so without the need for special notice periods and other logistical hurdles.

Second, just like the commonplace in-person deposition, the now equally commonplace "Zoom" deposition occurs every working day. For deposition practice, the parties typically agree on logistics, and, generally, the proponent of the testimony makes the appropriate logistical arrangements (e.g., location, court reporter, videography, etc.). No civil rule requires these provisions, nor is such a rule necessary. For hearings or a trial that includes remote transmission under the current rules, the same in-court practice occurs, i.e., the parties jointly, or the proponent of the testimony, handles logistical arrangements. And, post-COVID, district courts are now better equipped than ever to accommodate live testimony via contemporaneous transmission.

Technological issues also do not impel any procedural or sequencing requirement for Rule 45 remote testimony subpoenas. Our research and experience show that rarely, if ever, do parties clash over the "appropriate safeguards" required under Rule 43(a). We have found that proponents of remote testimony can easily work with court staff and furnish remote witnesses with whatever technology is required, including (as has sometimes been the case) by overnighting to the remote witness a testimony-ready laptop or other transmission device—all without any involvement of the trial judge. Indeed, we have all seen how quickly federal courthouses across the country seamlessly adapted to conduct remote proceedings during the pandemic. The technology issues should therefore not be a significant concern or serve to complicate the rules governing any of the remote testimony options.

5. *Rule 43(a) provides for remote testimony during a trial, and Rule 43(c) authorizes the court, during a motion hearing, to "hear it wholly or partly on oral testimony." Should the criteria for remote testimony during a trial and a hearing be different? Should an advance court order authorizing remote testimony be required before service of a subpoena commanding remote testimony at a hearing?*

Trial versus hearing. If the Subcommittee is not now addressing the "exceptional circumstances" requirement in Rule 43(a), then we are of the view that there is no reason to address other aspects of Rule 43 currently, including the ostensible difference between Rule 43(a) and 43(c).

As the Subcommittee has observed, the text of Rule 43 is drafted in a way that draws a

distinction between two types of proceedings, i.e., between a "trial" and a "motion." Under Rule 43(a), the first sentence provides that, "[a]t trial, the witnesses' testimony must be taken in open court," and the second sentence states that, "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Presumably, both sentences of Rule 45(a) apply only to trials. Under Rule 43(c), "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."

While this distinction appears in Rule 43, there is no reason to think that changes to Rule 45 need to be tailored around this distinction, at least not until the Subcommittee takes up proposed changes to Rule 43. Making the proposed change to Rule 45 (under Alternative 1 or 2) sufficiently corrects for *Kirkland* and aligns the rules with the decade-long intent of the Committee. As with trials, it is often the case that for pretrial matters courts often hear live testimony by witnesses (e.g., on motions for preliminary injunctive relief or for prejudgment security, to address *Markman* issues, etc.), and use of the subpoena power can be quite important, particularly since the relief is often provisional in nature with a need to "get it right." There ought not be a suggestion in the rules that the powers of the court in securing attendance of needed witnesses depends categorically on the type of proceeding.

The proposed amendments to Rule 45 (under either Alternative 1 or 2) are, and should be, agnostic as to the type of proceeding (e.g., trial, hearing, deposition). No such distinction was contemplated when, in 2013, the Advisory Committee's notes to the 2013 amendments to Rule 45 stated, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)." There is no reason to do so now.

Advance court order. For the reasons stated in the answer to Question 2, the amendments to Rule 45 should not add a requirement for an advance Rule 43 court order before issuance of a subpoena for remote testimony.

6. *Rule 32(a)(4) provides that the deposition of an "unavailable witness" may be used at trial. Fed. R. Evid. 804(a)(5) provides that certain statements of an "unavailable" declarant are admissible over a hearsay objection. Should there be a concern that a change to Rule 45(c) would affect the application of Rule 32(a)(4) or Evidence Rule 804(a)(5)?*

The changes contemplated to Rule 45 (under either Alternative 1 or 2) do not implicate problems for the application of either Rule 32(a)(4) or Federal Rule of Evidence 804(a)(5).

Rule 32(a)(4) addresses the use of a deposition for any purpose when the witness is unavailable. Among the findings a court may make regarding unavailability include "that the witness is more than 100 miles from the place of hearing or trial or is outside the United States" or "that the party offering the deposition could not procure the witness's attendance by subpoena." In current practice (i.e., before a change to Rule 45 of the type considered here), if

the proponent of the testimony obtains a Rule 43(a) "compelling circumstances" order and compels attendance of remote testimony through a properly issued and served Rule 45 subpoena, then the court may consider those facts in determining whether one or more of the "unavailable" findings may be made. In short, the current rules do not have "Rule 45(c) . . . affect[ing] the application of Rule 32(a)(4)." Nor would the proposed amendments.

Federal Rule of Evidence 804(a)(5) says that former testimony is admissible over a hearsay objection if the proponent of the evidence could not obtain "the declarant's attendance." In current practice (with or without the proposed amendments), one could argue under that rule that remote testimony authorized under Rule 43(a) and commanded under Rule 45 constitutes the declarant's "attendance" and, therefore, prior deposition testimony is inadmissible hearsay. As this Subcommittee has noted, "it seems that hair-splitting difference would not matter much to a jury, though it might matter to a Rule 50(a) or (b) motion." In any event, the proposed changes to Rule 45 will neither expand nor contract the operation of Rule 804(a)(5).

7. *Amendments to Rule 43(a) have been proposed that appear to require extended study. Also, proposed changes to Fed. R. Bankr. P. 7043, 9014, and 9017 stating that Rule 43 applies (under a different standard) in adversary proceedings, but not contested matters, is open for public comment until February 17, 2025. Is there a reason to defer examining Rule 45 for possible amendment until the decision is made whether Rule 43 should also be refined, or until the Public Comment period on the Bankruptcy Rules expires?*

For purposes of Rule 45, there is no real difference between trials and motion hearings (or depositions, for that matter). Each can require the attendance of witnesses, and Rule 45 provides the circumstances in which testimony and documents may be commanded. The proposed change to Rule 45 (under Alternative 1 or 2)—but without the bracketed portions for (C) to address first obtaining and/or serving a Rule 43(a) order—sufficiently corrects for *Kirkland* and aligns the rules with the decade-long intent of the Committee. Back in 2013, when the Committee first provided for the nationwide subpoena power, there was no need to take up Rule 43 issues, and if the Subcommittee is not addressing the Rule 43(a) "good cause in compelling circumstances" requirement at this time, there is no reason to address these other Rule 43 issues.

For purposes of Rule 43, there is currently a difference between trials and motion hearings in the text of the rule. That distinction appears intended to be drawn more for the purpose of describing when proceedings must be in "open court" under Rule 43(a) (when "[a]t trial") as opposed to when the proceedings fall outside that requirement under Rule 43(c) (for "a motion"). We address proposed changes to Rule 43 later.

8. *Concerns about a clarifying amendment to Rule 45 regarding remote trial testimony have been raised, claiming that expanded subpoena power may be used tactically to put pressure on defendants. The concerns expressed by organizational defendants include (a) that subpoenas compelling remote testimony may require "apex" witnesses, such as CEOs, to testify at trial by remote means; (b) that they may be used to coerce defendants to bring their witnesses to court from long distances to avoid jury antipathy toward a party that insists on remote testimony; and (c) that they may be used to present testimony from "weaker" witnesses than the ones defendants might bring to testify at trial. How do you respond to these concerns? Do you have any concerns about tactical use of a potential amendment by defendants?*

The current rules provide ample protections from abuse of subpoenas for testimony via contemporaneous transmission. Rule 45(d)(3) requires a court to quash or modify a subpoena that subjects a person to undue burden, which includes, for example, "compel[ling] an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute . . . ."[11] Federal Rule of Evidence 601 grants courts broad discretion "over the mode and order of examining witnesses and presenting evidence," including for the purpose of "protect[ing] witnesses from harassment or undue embarrassment," and Rule 403 permits courts to exclude relevant evidence that is needlessly cumulative. As the Northern District of Illinois recently noted, the existing rules already serve as "guardrails against willy-nilly compulsion of nationwide remote testimony" and ensure that "[n]ationwide remote testimony will be neither the norm nor unbounded in application."[12]

B. Further Comments on the Rule 43 Issues

As the Subcommittee has observed, the discussions regarding Rule 45 powers, and the interrelationship of them to Rule 43, invites further attention to Rule 43 in the future. We make the following few remarks (in addition to those made in the original proposal, 24-CV-B).

In any discussion of the Rule 43, it is fundamentally important to point out that a major purpose of the rule is to ensure that witness trial testimony is taken in open court. Rule 43(a) states that, "[a]t trial, the witnesses' testimony must be taken in open court" unless otherwise provided by law or court rule. The rule then provides that, "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."

Accordingly, the "good cause in compelling circumstances" requirement is a stringent standard because it seeks to preserve the "open court" requirement for trials, i.e., when there is a choice between live, in-person testimony rather than live, remote testimony. Therefore, 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

[11] Fed. R. Civ. P. 45 advisory committee's notes to 1991 amendment.

[12] *Gray v. City of Chi.*, No. 18-cv-2624, 2023 WL 7092992, at *9 (N.D. Ill. May 8, 2023).

remains able to testify from a different place" such that "[c]ontemporaneous transmission may be better than an attempt to reschedule the trial."[13]

In short, the Rule 43(a) "good cause in compelling circumstances" test serves only to ensure live, in-person testimony when such testimony can be secured. The proposed amendments to Rule 43 made in 24-CV-B do not, in any way, seek to undermine the longstanding preference for live, in-person testimony when the alternative is live, remote testimony.

But what about when there will be no live, in-person testimony at the trial? (This is, of course, a common circumstance for fact witnesses in federal court trials because witnesses often live distant from the trial courtroom). What if, instead, the choice is between live testimony via contemporaneous transmission in open court before the judge and the jury, where the witness answers questions under oath in real time, including any spontaneous and clarifying questions the judge might pose, verses playing previously recorded testimony taken outside the presence of the judge and the jury, i.e., deposition video, which is inherently static and cannot be adapted to address emerging trial issues, questions, and nuances?

The first observation is that Rule 43 (or at least a commonplace reading of it) is flawed because the language of Rule 43(a) suggests that the "good cause in compelling circumstances" requirement applies *both* to (a) the in-person-or-remote question and (b) the remote-or-deposition question. While the "good cause in compelling circumstances" requirement could remain for the former, it makes no sense for the latter. There is no such strong preference for deposition testimony taped during discovery and taken outside the presence of the judge and jury. When deciding whether trial testimony should happen in real time before the judge and the jury (live but remote), or through a previously taped deposition, it should not be the case that the proponent of a live but remote presentation first must show that doing so is "for good cause in compelling circumstances."[14]

Other comments in the rule would support this. As the Advisory Committee's notes observe, the "importance of presenting live testimony in court cannot be forgotten" and the "very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling."[15] Both these circumstances apply to live remote testimony but are inapplicable to

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[13] Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment.

[14] Statements made about the Rule 43(a) requirement should be interpreted as directed only to the need to preserve live in-court testimony when available. *See* Agenda for Apr. 9, 2024 Meeting of Advisory Committee on Civil Rules at 590 (questioning need for "stringent standard" of Rule 43(a)); *id.* at 612 ("the high standard set forth in Rule 43"); Agenda for Oct. 10, 2024 Meeting of Advisory Committee on Civil Rules at 189 ("the demanding requirements of Rule 43(a)"); *id.* at 192 ("the demanding standard of Rule 43(a)"); *id.* at 203 ("the demanding 'compelling circumstances' requirements"); *id.* at 194 ("the rigorous 'compelling circumstances' standard"); *id.* at 206 ("very demanding requirements"); *id.* ("exacting requirements"); *id.* at 207 ("stringent requirements to protect the trial process."); *id.* ("the exacting standards"); 215 ("[t]hese exacting requirements"); *id.* at 233 ("the compelling circumstances requirement sets a higher bar").

[15] Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment.

pre-recorded deposition testimony. Indeed, the "opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition" such that "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial."[16] But, with deposition video, assessing a witness's demeanor is far more difficult.

The current comments to Rule 43 should not be interpreted, as they have been, as preferring pre-recorded deposition video over live contemporaneous transmission. The comments state only that "[o]rdinarily 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."[17] This statement does not apply in circumstances where the remote attendance of a witness may be secured.

1. *Are juries able to assess the credibility of a witness who testifies via contemporaneous transmission as well as one who testifies in-person?*

Whether jurors can better evaluate the credibility of a witness who testifies live in person versus one who testifies live via contemporaneous transmission is the wrong question. The proposal is not seeking to alter the rules' longstanding preference for live, *in-person* testimony, which remains the gold standard; rather, the proposed amendments seek to ensure that key witnesses who *cannot* be compelled to testify in person are able to testify live via remote means rather than by deposition video. Courts and litigants resoundingly agree that live testimony by contemporaneous transmission offers the jury better quality evidence than spliced video from years-old depositions,[18] which creates an "unavoidable esthetic distance"[19] that reduces jurors' comprehension, engagement, and interest. As one court aptly commented, "the deposition, whether read into the record or played by video . . . is a sedative prone to slowly

[16] *Id.*

[17] *Id.*

[18] *See, e.g.*, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021) ("[T]here is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 11-md-2299, 2014 WL 107153, at *8 (W.D. La. Jan. 8, 2014) (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[19] *Actos*, 2014 WL 107153, at *8.

erode the jury's consciousness until truth takes a back seat to apathy and boredom."[20]

That said, numerous courts have noted that, given the speed and quality of modern videoconferencing technology, there is no meaningful difference between in-person versus remote testimony.[21] One study of remote jury trials found that some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom."[22] A similar UK pilot study likewise found that virtual trials "had a positive impact on sightlines in the courtroom" and observed that "the presence of all key participants in the trial on a screen just a few centimetres away from others generated a sense of close engagement with" and "facilitated participation" in the trial process.[23]

Respectfully submitted,

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[20] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[21] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Swedish Match*, 197 F.R.D. at 2 ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference.").

[22] Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[23] Linda Mulcahy, Emma Rowden & Wend Teeder, *Testing the Case for a Virtual Courtroom with a Physical Jury Hub: Second Evaluation of a Virtual Trial Pilot Study Conducted by JUSTICE* at 11 (2020), https://files.justice.org.uk/wp-content/uploads/2020/06/06165935/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf.