



**RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
RULE 43/45 SUBCOMMITTEE**

February 13, 2026

**THE “COMPELLING CIRCUMSTANCES” REQUIREMENT FOR REMOTE
TESTIMONY SHOULD NOT BE REMOVED FROM RULE 43(a)**

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules (“Advisory Committee”) and its Rule 43/45 Subcommittee (“Subcommittee”).

INTRODUCTION

Rule 43(a)’s “compelling circumstances” standard for remote trial testimony provides appropriate guidance and should not be omitted. The Advisory Committee’s observation that face-to-face testimony incentivizes truth telling and augments the assessment of witness demeanor, articulated in 1996 Committee Note,² remains true today. There is no need to loosen the standard; the “compelling circumstances” rule is not preventing judges from effectively handling remote testimony issues. The Advisory Committee recently reexamined the rules governing remote proceedings in light of the COVID-19 pandemic experience and concluded that the rules provide courts sufficient flexibility.

In contrast, omitting that standard and replacing it with a “good cause” default would spawn new motion practice as parties object to attempts to prevent them from confronting adverse witnesses in the physical presence of fact finders. It would also detract from the gravitas of the trial process—which the Advisory Committee warned decades ago “cannot be forgotten.”³ In-person testimony preserves “the interests of the justice system”—“the factfinder’s ability to fully evaluate [witness] testimony, the [opponent’s] ability to confront and cross examine, and the

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

³ *Id.*

Court’s ability to assure the integrity of the proceedings.”⁴ The “view that widescale allowance of virtual trial testimony fully serves this Court’s duty to evaluate credibility carefully and preserve the integrity of this proceeding” is “broad, presumptuous, and frankly uninformed.”⁵ Re-inventing the rules governing remote testimony would disrupt a balance that is working well now by introducing unintended and unwelcome disputes.

I. **RULE 43(a) STRIKES THE RIGHT BALANCE FOR HANDLING DISPUTES OVER REMOTE TESTIMONY**

A. **The Preference for In-Court Testimony Should Remain in Place**

In-person testimony provides the court, the jury, and the parties with the best opportunity to present and evaluate testimony. The Committee Note to the 1996 amendment of Rule 43(a) reflects this understanding:

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.⁶

Neither advances in remote technology, nor increased voluntary use of that technology because of the COVID-19 pandemic, have altered this rationale.⁷ Trials conducted materially or entirely via video are a dramatic departure from the well-formed traditions of American litigation.

⁴ *Reichert v. Hornbeck*, 2026 WL 91473, at *3 (D. Md. Jan. 13, 2026).

⁵ *Monera v. Datis*, 2025 WL 3776652, at *2 (S.D. Fla. Feb. 5, 2025).

⁶ Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

⁷ See *Hensley v. Bossio*, 2024 WL 2799261, at *4 (6th Cir. May 31, 2024) (rejecting “argu[ment] that the court should have permitted remote testimony via video transmission because current technology provides appropriate safeguards”); *Donnelly v. Anand*, 2025 WL 2494376, at *3 (S.D.N.Y. Aug. 29, 2025) (“in-person testimony is required in order . . . to assess [the witness’ demeanor and credibility]”); *Emerson v. Prudential Ins. Co. of Am.*, 2024 WL 4730422, at *2-3 (N.D. Cal. Nov. 7, 2024) (“The Court lacks confidence that the opportunity to assess [the witness’s] credibility could or would be adequately safeguarded anywhere except ‘in court.’”); *Kluth v. Spurlock*, 2024 WL 3329046, at *1 (D. Colo. July 8, 2024) (“Based on this Court’s recent experiences with remote testimony at trial, which included technological difficulties and subsequent delays, the Court is not inclined to permit remote testimony.”); *Alston v. Jones*, 2022 WL 1809422, at *3 (M.D.N.C. June 2, 2022) (“For remote testimony at a trial to be appropriate, the Court must be satisfied that the witness will treat the remote testimony as if he were in court, with no distractions or interruptions. [The witness] has offered no such assurances, and it would likely be difficult to establish appropriate safeguards in light of [his] apparent hostility towards testifying and the very few days before trial.”); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2022 WL 1143327, at *2 (N.D. Fla. Apr. 18, 2022) (“There is no technology to date that can substitute for a juror looking a witness in the eyes”) (citation and quotation marks omitted).

B. The Advisory Committee’s CARES Act Subcommittee Concluded that the Current Rules on Remote Testimony Worked Well During the Pandemic

Less than six years ago, the Judicial Conference authorized the use of video and teleconference systems for certain proceedings.⁸ After the exigent circumstances of the COVID-19 pandemic abated, the Advisory Committee’s CARES Act Subcommittee examined how the courts handled remote testimony in civil proceedings and considered whether rules changes were needed. The Subcommittee concluded that Rule 43(a) is sufficiently flexible to allow courts to handle the issue in the future. The Advisory Committee’s report to the Standing Committee stated, “Experience during the COVID-19 pandemic suggests that the present rules are well designed to meet needs for remote proceedings.”⁹ The Advisory Committee further explained:

[T]he inherent discretion and flexibility of the Civil Rules, coupled with existing provisions for relying on remote technology, have served the courts and parties well during the COVID-19 pandemic.¹⁰

No new facts have arisen since the Advisory Committee’s report that change this conclusion or warrant a radical revision of Rule 43(a).

C. The FRCP’s Existing Remedy for Unavailable Witnesses Is Well Accepted

Rule 43 provides a remedy for situations where a witness is unavailable at trial: deposition testimony. Although the use of depositions is not a perfect substitute for in-person testimony, it is widely used and well accepted. The Committee Note to the 1996 amendment to Rule 43 states:

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.¹¹

Nothing, including the availability of new technologies, has changed the viability of the use of depositions when appropriate in the absence of a witness at trial. This should heighten the Advisory Committee’s caution to avoid creating unintended consequences that are worse than the status quo. Creating a rules-based presumption that remote trial testimony is always superior to using deposition testimony for all witnesses in all trials would up-end over a century of established precedent and would cause many foreseeable problems for judges, parties, lawyers,

⁸ *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, available at:

<https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

⁹ Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 176,

https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

¹⁰ Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 165,

https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

¹¹ Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment.

and witnesses. In addition to the likely added burdens on party witnesses, such a change will also lead to significant burdens on distant non-party witnesses who could be subject to the rigors of a “trial deposition” and yet face the added burden of having to be available for trial testimony (which could be at inconvenient days/times) if a party decides it wants to have a second shot at the testimony for strategic or tactical purposes.

II. RULE 43(a) SHOULD NOT BE AMENDED TO REVERSE THE PRESUMPTION IN FAVOR OF LIVE, IN-COURT TESTIMONY OR TO REDUCE JUDICIAL DISCRETION

Rule 43(a) requires that only for good cause and under compelling circumstances should a trial witness’s testimony be permitted via contemporaneous transmission from a different location.¹² Reversing Rule 43(a)’s presumption by permitting (or requiring judges to permit) remote testimony regardless of the importance of any particular witness, including whether substitute witnesses are available, or factoring in other unique circumstances of a particular case, would have significant unintended consequences. A fundamental reason why judges need discretion over when to permit (or require) remote testimony is that not all witnesses are equally important to the case, let alone “necessary” or “essential,” as defined by Federal Rule of Evidence 403. Eliminating that discretion would reduce judges’ control over their courtrooms, interfere with parties’ litigation strategies, force some people to testify who otherwise would not, and substitute some witnesses who expect to testify for others who do not. The merits of such decisions cannot be contemplated in advance or otherwise mandated by a blanket rule such as the one proposed.

III. THE PROMULGATION OF FRCP AMENDMENTS RELATING TO REMOTE TESTIMONY WILL EMBROIL THE COMMITTEE IN A HEATED DISPUTE ABOUT APEX WITNESSES

Any changes to Rule 43(a) relating to remote trial testimony would have broad effect on many witnesses and a particularly significant impact on fights over so-called apex witnesses—high-ranking corporate or organizational leaders who could conceivably, but usually do not, have any first-hand knowledge of the facts and circumstances of a particular dispute. Satellite litigation over the appropriateness of apex witnesses is as contentious as it is common.¹³

A change to Rule 43(a) will also impact non-party witnesses. If the default becomes remote trial testimony regardless of witness location, then it is highly likely that counsel will reserve the right

¹² Fed. R. Civ. P. 43.

¹³ Most state appellate courts have restricted depositions of “apex” corporate officers. *See, e.g., National Collegiate Athletic Association v. Finnerty*, 191 N.E.3d 211, 221-23 (Ind. 2022) (order allowing apex deposition reversed and remanded); *General Motors, LLC v. Buchanan*, 874 S.E.2d 52, 64-66 (Ga. 2022) (same); *In re Amendments to Florida. Rule of Civ. Procedure 280*, 324 So.3d 459, 461-63 (Fla. 2021) (codifying apex deposition doctrine); *State ex rel. Massachusetts Mutual Life Insurance Co. v. Sanders*, 228 W. Va. 749, 760, 724 S.E.2d 353, 363-64 (2012) (order allowing apex deposition reversed and remanded); *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1004-05 (Okla. 2007) (same); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607-09 (Mo. 2002) (same); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (adopting apex deposition doctrine); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494 (Mich. App. 2010) (same); *Liberty Mutual Insurance Co. v. Superior Court*, 13 Cal. Rptr.2d 363, 367 (Cal. App. 1992) (same); *but see Stratford v. Umpqua Bank*, 534 P.3d 1195, 1201-03 (Wash. 2023) (declining to adopt apex deposition doctrine).

to call many, if not all, non-party witnesses even if they have a complete “trial deposition” video or transcript in hand. The uncertainties and burdens on non-parties are unquestionable, and it is entirely predictable that such witnesses will oppose appearing remotely, creating even more satellite litigation before and during trials.

CONCLUSION

Rule 43(a) strikes the appropriate balance for courts and parties, including the presumption in favor of in-person testimony and the ability to use deposition testimony when appropriate. Removing the “compelling circumstances” requirement would reduce courts’ discretion, change litigation strategies, and lead to more motion practice. Because courts and parties do not need a rule change in order to manage remote testimony issues, and the risks of unintended consequences is very high, the Advisory Committee should not amend Rule 43(a) governing remote trial testimony.