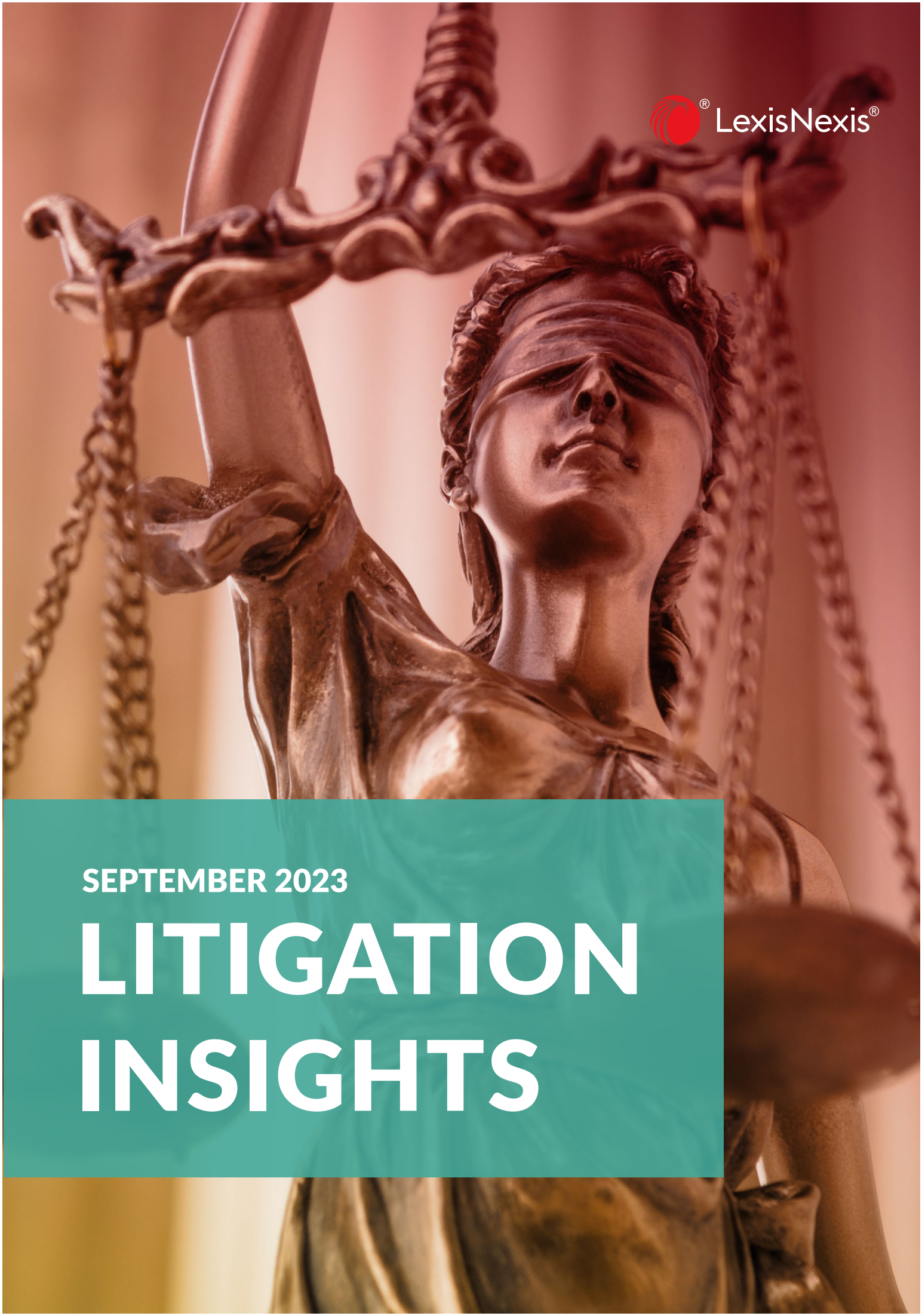

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SEPTEMBER 2023

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

DISCOVERY

Legislative Privilege

In re N.D. Legis. Assembly

70 F.4th 460, 2023 U.S. App. LEXIS 13939 (8th Cir. June 6, 2023)

Jump to full summary

The Eighth Circuit holds that when legislators or their aides are acting within the sphere of legitimate legislative activity, legislative privilege is an absolute bar to disclosure, even for communications with constituents, advocacy groups, and others outside the legislature.

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Time for Removal

Abbo-Bradley v. City of Niagara Falls

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TAKING TESTIMONY

Remote Testimony

Kirkland v. U.S. Bankr. Ct. (In re Kirkland)

75 F.4th 1030, 2023 U.S. App. LEXIS 19266 (9th Cir. July 27, 2023)

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In a case of first impression, the Ninth Circuit holds that the geographic limitations of Federal Rule of Civil Procedure 45(c), governing compelled attendance at trial, apply when a witness is permitted to testify by contemporaneous video transmission under Rule 43(a).

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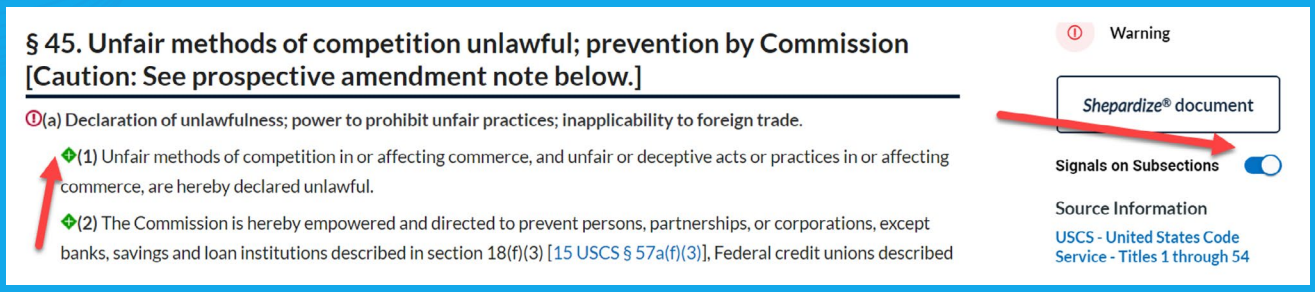
Shepardizing™ Statutes, Regulations, and Rules by Subsection on Lexis+®

By Chet Lexvold
LexisNexis® Solutions Consultant on Federal Government Team

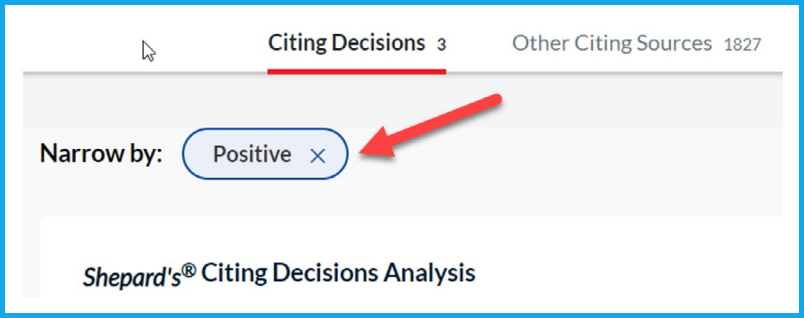
As a Consultant, I know legal researchers often default to keyword searching across case law, even when searching for cases interpreting certain sections of statutes, regulations, and rules. But there's a better way: using the gold-standard of legal citators, *Shepard's*®!

Most researchers already know how valuable *Shepard's* is for validating cases and linking to relevant legal analysis from subsequent citing decisions. Most don't know, however, that they can use the same powerful linking technology and editorial analysis on statutes, regulations, and rules. Here's how.

For statutes, simply open a statute and "turn on" the "Signals on Subsections" toggle switch on the right-hand side of the document. That will activate *Shepard's*, and *Shepard's* signals will appear next to each respective subsection of the statute. Clicking on the symbol will generate the *Shepard's* report for that subsection only, showing researchers every case (and other source) that has ever cited that subsection.



Keep in mind that clicking on a particular *Shepard's* signal will filter the list by that type of *Shepard's* treatment, so you may want to immediately delete that filter in order to see the "full" list of every citing decision for that subsection.



For Regulations, simply hit the big "*Shepardize*®" button on the right of the document, then click the "See court treatment of subsections" link immediately above the list of cases. For Rules (Rules of Procedure, Evidence, Court Rules, etc.), clicking the big "*Shepardize*" button on the right of the document will immediately take you to a page listing all subsections cited by courts.

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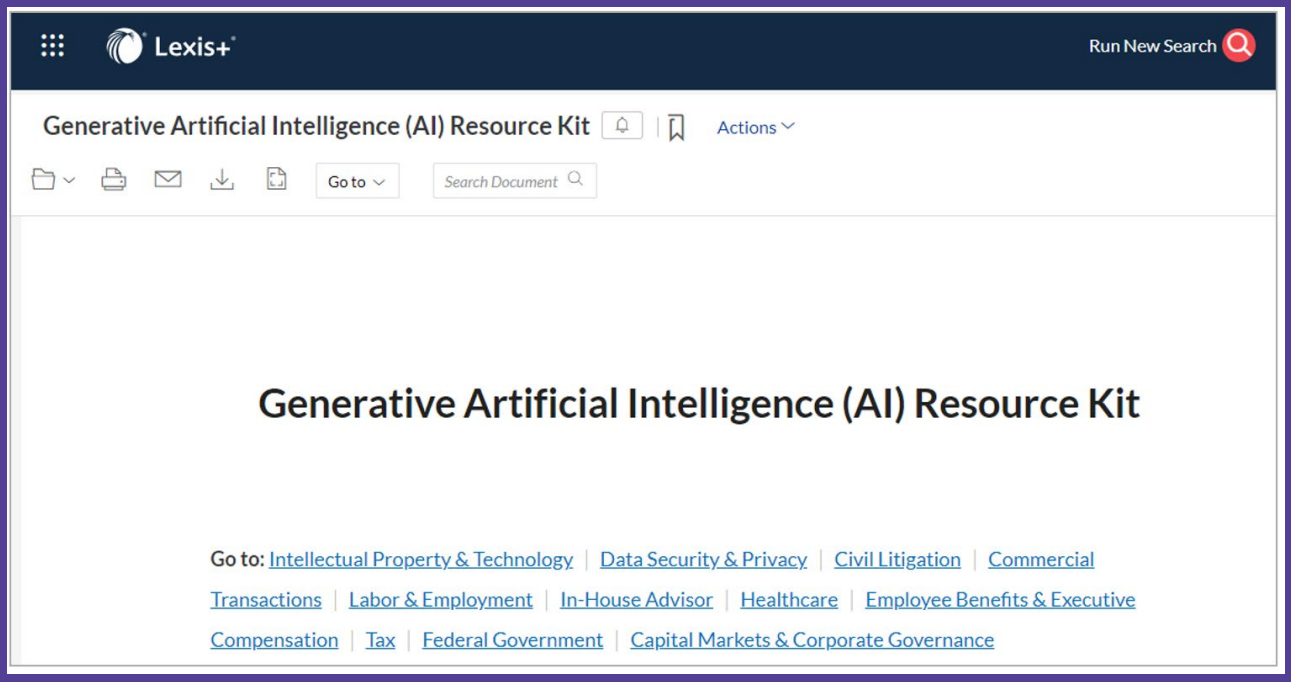
New Generative Artificial Intelligence Resource Kit on Practical Guidance

By Marisa Beirne
LexisNexis® Solutions Consultant on Federal Government Team

Whether you are reading the hot news stories of the day on Law360® or watching the news on tv, the topic on everyone's mind is Artificial Intelligence ("AI"). Practical Guidance is extremely up to date on hot topics, such as Artificial Intelligence, that are critical to practicing attorneys and support staff. To make sure LexisNexis end users stay up to date on everything AI Practical Guidance has created a Generative AI Resource Kit. This resource kit provides an overview of current practical guidance on generative artificial intelligence, ChatGPT, and similar tools.

End users can access this resource kit by navigating to the Practical Guidance Experience and searching "Generative Artificial Intelligence Resource Kit" or by clicking the following hyperlink: Generative Artificial Intelligence (AI) Resource Kit. Once inside the resource kit you see that it is organized by practice area. A few notable practice areas include Intellectual Property & Technology, Data Security & Privacy, Civil Litigation, Labor & Employment, Tax, and Federal Government. The practice areas are continuously updated with new developments. See the screenshot below for a list of all the current practice areas.



Moreover, once inside the Resource Kit, you can access trackers, practice notes, articles, state law surveys, and much more. For example, one tracker located in the Federal Government practice area is the Artificial Intelligence Legislation Tracker. This tracker includes state, federal, and notable municipal legislation related to the use of artificial intelligence pending as of or proposed after January 1, 2023. While viewing this tracker

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you can ascertain the potential risks and benefits that come with using artificial intelligence in a specific legal field. The tracker separates state and federal content and includes hyperlinks to all applicable citations. See the screen shot below to get a taste of what legislators at the federal level are talking about.

Federal

State	Area/Industry	Dates and Status	Description	Private Right of Action?
			to the work of the covered individual for the employer.	
Water Quality and Environmental Innovation Act, 118 H.R. 873	Government Consumer Protection	Status: Pending Introduction February 8, 2023 Water Quality and Environmental Innovation Act, 118 Bill Tracking H.R. 873	Authorizes the Administrator of the Environmental Protection Agency to award grants and contracts for projects that use emerging technologies to address threats to water quality, including AI.	No
Data and Algorithm Transparency Agreement Act, 118 S. 688 (lexis.com)	Consumer Protection Social Media	Status: Pending Introduced March 7, 2023 DATA Act, 118 Bill Tracking S. 688	Imposes notice and consent requirements on internet platforms that use algorithms to manipulate the availability of content on the platform.	Yes
AI for National Security Act, 118 H.R. 1718	Government	Status: Pending Introduction March 22, 2023 AI for National Security Act, 118 Bill Tracking H.R. 1718	A bill to make certain improvements to the enterprise-wide procurement of cyber data products and services by the Department of Defense, and for other purposes.	No
Promoting Precision Agriculture Act of 2023, 118 H.R. 1697	Government	Introduction March 22, 2023 Promoting Precision	Requires the secretary to develop guidelines and best practices for precision	N/A

Navigating around sources in Practical Guidance is simple as everything is hyperlinked so you can easily jump from a practice note to the corresponding primary law. An end user can access the Artificial Intelligence Legislation Tracker by the hyperlink embedded into the Generative AI Resource Kit or by clicking the following hyperlink: Artificial Intelligence Legislation Tracker.

If you are new to artificial intelligence or for a general primer on legal issues related to AI, see Artificial Intelligence Key Legal Issues. As public interest in AI grows you do not want to be left out of loop. Make sure to stay up to date on all new legislation and advancements in Artificial Intelligence with Practical Guidance's Generative Artificial Intelligence Resource Kit.

In addition to all the fantastic resources listed about, consider reviewing the Lexis+ Legal AI Update to keep your finger on the pulse of all things Artificial Intelligence in the legal field. This article offers results of a survey of legal professionals and their planned use and perception of generative AI. Through the results of this survey, it was established that 88% of the legal market have an awareness of generative AI versus 57% of the general population! LexisNexis continues to keep its customers up to date and ahead of the curve when it comes to generative artificial intelligence. Be part of that movement by signing up for a complimentary Lexis+® AI® insider program. Insiders will be given first access to Lexis+ AI as features (such as AI Search, AI that Summarizes, and AI that Drafts) roll out and will lead the conversation while engaging with thought leaders and product teams

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to help shape the future or legal artificial intelligence. Click the following link to sign up for the Lexis+ AI Insider Program today: Legal Artificial Intelligence (AI) Tools | LexisNexis.

For more information on any of the new Lexis+ AI enhancements please contact your LexisNexis® Client Manager, Rachel Gilbert or Solutions Consultant, Marisa Beirne. Both of their contact information can be found on the LexisNexis DOJ Support Portal: LexisNexis Support.

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Current Awareness Insights!

WARNING:
Counsel Could Be Sanctioned for Irrelevant Lines of Questioning at Deposition

Plaintiff brought a vote dilution case, under a novel legal theory, against a school district. During depositions of school board members, Plaintiff's counsel pursued discovery on wholly irrelevant topics, such as state standardized testing and allowing teachers to carry guns on campus. After dismissing Plaintiff's, the district court granted the school board's motions for sanctions against Plaintiff and counsel. Although the appellate court concluded the lawsuit was not frivolous, and reversed certain of the sanctions, it upheld the sanctions relating to misuse of discovery to multiply the proceedings. It noted that Plaintiff's counsel offered no theory of relevance on the deposition topics. It also rejected Plaintiff's argument that sanctions were unwarranted because Defendants failed to move to quash the depositions or seek protective orders. It remanded for the district court to identify the specific costs attributable to the sanctionable deposition conduct. Vaughan v. Lewisville Indep. Sch. Dist., 62 F.4th 199 (5th Cir. 2023).

Fed Civ Proc Before Trial: The Wagstaffe Group §36-V—Deposition Conduct; Fed Civ Proc Before Trial: The Wagstaffe Group §50-IV—Inherent Authority to Sanction.

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DISCOVERY

Legislative Privilege

In re N.D. Legis. Assembly

70 F.4th 460, 2023 U.S. App. LEXIS 13939 (8th Cir. June 6, 2023)

The Eighth Circuit holds that when legislators or their aides are acting within the sphere of legitimate legislative activity, legislative privilege is an absolute bar to disclosure, even for communications with constituents, advocacy groups, and others outside the legislature.

- **Background.** Several current and former members of the North Dakota Legislative Assembly and a legislative aide petitioned for a writ of mandamus, seeking relief from orders of the district court directing them to comply with subpoenas for documents and testimony in a civil case brought against the State of North Dakota. The underlying lawsuit alleged violations of section 2 of the Voting Rights Act [52 U.S.C. § 10301(a)]. The plaintiffs sought to develop evidence of alleged "illicit motive" by legislators who enacted a redistricting plan for state legislative districts. The petitioners argued that the discovery orders infringed on legislative privilege and that the subpoenas should be quashed.

- **Issuance of Writ of Mandamus.** The Eighth Circuit noted that three conditions must be satisfied for the appellate court to issue a writ of mandamus. First, the party seeking the writ must have no other adequate means to attain the relief desired. Second, the petitioner must show that his or her right to relief is clear and indisputable. Third, the court must be satisfied that the writ is appropriate under the circumstances. Mandamus is an appropriate remedy if a claim of privilege is erroneously rejected during discovery, because the party claiming privilege has no other adequate means to attain relief, and the enforcement of the discovery order would destroy the privilege.

- **Legislative Privilege.** The petitioners asserted a claim of legislative privilege. The Eighth Circuit explained that state legislators enjoy a privilege under federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the Constitution. Further, a privilege that protects legislators from suit or discovery extends to their aides. Although state legislators do not enjoy the same privilege as federal legislators in criminal actions, state legislators otherwise generally have the same legislative immunity accorded Members of Congress under the Constitution. Legislative privilege, like legislative immunity, reinforces representative democracy by fostering an environment in which public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation.

  Legislative privilege applies when legislators or their aides are acting in the sphere of legitimate legislative activity. When legislators are functioning in that sphere, the privilege is an absolute bar to interference. The privilege protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. The bar to interference extends beyond immunity from liability to the compelled discovery of documents or testimony, because legislators should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. This protection applies whether or not the legislators are parties in a civil action. A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures may be just as intrusive. The degree of intrusion is not material; any probing of legislative acts is sufficient to trigger the immunity and the privilege.

  The Eighth Circuit found that the conditions for legislative privilege were satisfied in this case. The plaintiffs in the underlying lawsuit sought documents and testimony from legislators and an aide concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota. The district court did not dispute that the acts were undertaken within the sphere of legitimate legislative activity. The acts were therefore privileged from inquiry. Absent a waiver of the privilege, the subpoenas should have been quashed based on legislative privilege.

  The appellate court concluded that the district court's failure to quash the subpoenas was based on a mistaken view of the legislative privilege. In its order enforcing the document subpoenas, the district court reasoned that

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legislative privilege did not apply because the subpoena sought communications between legislators and third parties. The legislative privilege, however, is not limited to a bar on inquiry into communications among legislators or between legislators and their aides. The privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly. Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and their aides to gather evidence about this legislative activity is thus barred by the legislative privilege.

The appellate court also disagreed with the district court's use of a five-factor test akin to that used to determine the scope of the deliberative-process privilege. The district court reasoned that redistricting legislation "presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." The appellate court acknowledged the potential for "extraordinary instances" in which testimony might be compelled from a legislator about legitimate legislative acts. This was not such a case, however, and the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege should have been applied. Even when "intent" is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole. The underlying case here did not even turn on legislative intent. A claim under section 2 of the Voting Rights Act does not depend on whether the disputed legislative districts were adopted "with the intent to discriminate against minority voters," for the statute repudiated an "intent test." Any exception to legislative privilege that might be available in a case that is based on a legislature's alleged intent was thus inapplicable.

- **Conclusion.** For these reasons, the Eighth Circuit granted the petition for writ of mandamus, with the exception of one petitioner who had already waived the privilege by testifying in another case concerning redistricting legislation.

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REMOVAL

Time for Removal

Abbo-Bradley v. City of Niagara Falls

73 F.4th 143, 2023 U.S. App. LEXIS 17957 (2d Cir. July 14, 2023)

The Second Circuit has held that a notice of removal filed seven years after the original complaint was untimely, as any basis for subject-matter jurisdiction in the amended complaint also existed in the original complaint.

Background. The Love Canal was built in the late 1800s to connect the upper and lower parts of the Niagara River in order to provide cheap hydroelectric power, but the plan was abandoned following the invention of alternating-current electricity. The half mile already dug remained unused until 1941, when it was purchased by a chemical and plastics corporation, the predecessor in interest of one of the defendants.

The Love Canal site was used for waste disposal by the corporation and the city of Niagara Falls for 12 years, until it was deeded to the Niagara Falls Board of Education, which built an elementary school on the property. The area was further developed and populated.

In 1973, after residents reported noticing odors and residues, the New York State Department of Health began studying the area and found that women living around the site were experiencing greater than normal rates of miscarriages and birth defects. The state issued a health emergency declaration, and ultimately close to a thousand families were evacuated from the area.

New York hired some of the defendant companies to remediate the contamination. The federal government began to oversee the remediation as well in 1980, following the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund.

Eventually, both the federal and state governments sued the chemical and plastics corporation under the Superfund program, seeking injunctive relief and reimbursement of cleaning costs relating to the Love Canal site. On February 23, 1988, the district court found the company's successor in interest jointly and severally liable for the costs.

Also in 1988, the New York State Department of Health issued a decision finding certain areas around the Love Canal site habitable for residential use. The federal Environmental Protection Agency issued a Preliminary Close-Out Report in 1999, and a Final Close-Out Report in 2004, reflecting a determination that the site remediation was complete and "protective of human health."

As time went on, the residents claimed that their homes became "virtually unsalable" after they noticed numerous medical problems, and chemicals that were visible to the naked eye.

The plaintiffs, members of three families residing in Niagara Falls, brought this suit in 2012 in New York state court against the City of Niagara Falls, its water board, the chemical corporation, and various companies tasked with remediation of hazardous waste disposal. Over 18 identical complaints were filed by other plaintiffs between 2013 and 2017. The cases alleged injury caused by toxic exposure from the Love Canal site.

In 2013, the defendants removed this case and one of the other cases to federal court on the basis of federal-question jurisdiction, but the district court concluded that it lacked federal-question jurisdiction and remanded the cases to state court. Under 28 U.S.C. § 1447(d), the remand order was not appealable because the case was not removed pursuant to §§ 1442 (federal-officer removal) or 1443 (civil-rights removal).

The defendants did not remove the other 17 cases within 30 days of filing.

The cases remained in state court until 2020, when the plaintiffs in all 19 cases filed identical amended complaints, alleging additional sources of injury: the sewers around the Love Canal site, an area in the City of Niagara Falls where sewer remediation took place, and a chemical plant in the City of Niagara Falls owned by one of the defendants.

In a notice of removal dated January 31, 2020, the defendants removed all 19 cases on the basis of both federal-officer and federal-question jurisdiction.

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Following the plaintiffs' motion to remand, the district court held that the removal was untimely and again remanded the cases to state court.

The defendants appealed to the Second Circuit.

- **Defendants' Notice of Removal Was Untimely Under 28 U.S.C. § 1446(b)(3).** The Second Circuit first recounted that although orders remanding a case to state court generally are not reviewable, it had appellate jurisdiction to review the remand order because one of the grounds for removal was federal-officer jurisdiction. This appellate jurisdiction was not limited to review of the federal-officer grounds, but also included the federal-question grounds for removal.

  The court, however, indicated that it must first answer the dispositive issue of whether the motion was timely.

  The Second Circuit reiterated that a defendant has 30 days from receipt of an initial pleading to file a notice of removal [28 U.S.C. § 1446(b)(1)]. To remove a case more than 30 days after the initial pleading was filed, the defendant must meet two requirements: (1) the case stated in the initial pleading must be "not removable," and (2) the defendant must file the notice of removal within 30 days after receipt of a paper (which can be an amended pleading) "from which it may first be ascertained that the case is one which is or has become removable" [28 U.S.C. § 1446(b)(3)].

  Here, the court found that any basis for federal jurisdiction in the plaintiffs' amended complaints also existed in their original complaints. The original complaints alleged injury from improper remediation of a site subject to remediation under the Superfund program, and the amended complaints (which included three additional sites) alleged the same injury resulting from remediation under the same Superfund program.

  The Second Circuit emphasized the defendants' concession at oral argument that the amended complaints did not establish jurisdiction in a way that was different from their original complaints. The court determined that this concession was dispositive. The plain language of § 1446(b)(3) requires that the case stated by the initial pleading not be removable, and the defendants could not meet this requirement if the amended complaints were removable.

  The court rejected the defendants' argument that the ground for removal appearing for the first time must only be a "different set of facts that state a new ground for removal." Although it is undisputed that the amended pleading alleged injuries caused by inadequate remediation at three other CERCLA sites, the Second Circuit found that these sites did not affect the basis for jurisdiction. The defendants could have asserted "the same basis for federal-officer and federal-question jurisdiction regardless of whether [the] Plaintiffs alleged their injury was caused by the Love Canal site and the three additional sites, the three additional sites alone, or any one of the sites."

  The Second Circuit went on to find that the defendants did not meet § 1446(b)(3)'s second requirement, that the notice of removal be filed within 30 days from when "it may first be ascertained that the case is one which is or has become removable." Because the amended pleading did not establish jurisdiction in a different way from the plaintiffs' initial pleading, the removability of the cases could have been first ascertained in the original complaints, and the defendants did not seek to remove until many years later.

- **Case Did Not Fall Within Parameters of "Revival Doctrine."** The Second Circuit noted that the Fifth, Seventh, and Tenth Circuits have adopted a judicially created exception to the 30-day requirement, known as the "revival doctrine." The revival doctrine allows for removal even when the requirements of § 1446(b)(3) are not met, if the complaint is amended so substantially as to "constitute essentially a new lawsuit." The court stressed that the Second Circuit has "never recognized the revival doctrine, nor have we ever considered a case applying the revival doctrine."

  Although the defendants argued that their motion for removal was timely under the revival doctrine, the Second Circuit concluded that it did not need to "adopt or reject the revival doctrine because, in any event, this case does not fall within the parameters of the doctrine established by our sister circuits."

  The court found that the amendments did not substantially change their complaint so as to "constitute essentially a new lawsuit." The plaintiffs continued "to allege the same injuries, against the same defendants, caused by the same toxins, and resulting in the same damages. The amended complaint highlighted only additional sources of already-alleged injury."

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The Second Circuit concluded, "Even if we were to deviate from Congress's clear statutory language on timeliness and consider the revival doctrine, the changes in Plaintiff's pleadings are not substantial, and the amendments did not result in essentially new lawsuits."

Concurring Opinion. Judge Sullivan concurred with the conclusion that the defendants' 2020 removal was untimely under § 1446(b)(3), and with the decision to affirm the remand order. However, Judge Sullivan wrote separately to address the defendants' "most compelling argument," which was not addressed by the majority, but which reflected "understandable confusion over our Circuit's caselaw concerning the nature and extent of a district court's obligation to sua sponte raise jurisdictional questions not presented by the parties."

The defendants contended that the district court was obliged to consider federal-officer removal jurisdiction in 2013 even though the defendants failed to invoke that jurisdictional ground in their removal papers, and that the 2013 remand order constructively ruled that the plaintiffs' 2013 complaints were not removable under the federal-officer removal statute.

The defendants invoked the "oft-repeated" references to federal courts' "obligation to consider the *presence or absence* of subject-matter jurisdiction sua sponte." Judge Sullivan opined that using language like "'presence or absence' . . . is regrettably apt to sow confusion." Moreover, although it is well-settled law that courts have an obligation to consider whether they might *lack* subject-matter jurisdiction for reasons that neither party has suggested, the Second Circuit has never expressly decided whether that obligation cuts both ways and requires the courts to consider whether they might *have* subject-matter jurisdiction.

In order to address the confusion, Judge Sullivan cited decisions from several other circuits that explicitly held that a court's duty to consider unargued *obstacles* to subject-matter jurisdiction does not affect its discretion to decline to consider waived arguments that might have *supported* jurisdiction. And citing two Supreme Court decisions, he concluded that "a removing defendant's burden of establishing jurisdiction would be utterly meaningless if the district court were required to pick it up and carry it on the defendant's behalf" [*see* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 809 n.6, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *see* also Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (burden of establishing subject-matter jurisdiction rests on party asserting jurisdiction)].

Judge Sullivan concluded that the defendants' argument would violate the congressional purpose of § 1446(b)(3), that "'defendants are not entitled to more than one bite at the apple' unless and until an amended pleading has 'substituted a new apple.'"

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TAKING TESTIMONY

Remote Testimony

Kirkland v. U.S. Bankr. Ct. (In re Kirkland)

75 F.4th 1030, 2023 U.S. App. LEXIS 19266 (9th Cir. July 27, 2023)

In a case of first impression, the Ninth Circuit holds that the geographic limitations of Federal Rule of Civil Procedure 45(c), governing compelled attendance at trial, apply when a witness is permitted to testify by contemporaneous video transmission under Rule 43(a).

Background. Between 2007 and 2009, John Kirkland invested in EPD Investments (EPD) by making a series of loans to this entity (EPD Loans). The negotiations for the EPD Loans occurred in California where Kirkland and his wife lived at the time. In September 2009, the Kirklands created the Bright Conscience Trust (BC Trust) for their minor children, and Mr. Kirkland assigned the EPD Loans to BC Trust. Mrs. Kirkland was the sole trustee for BC Trust. Also in 2009, Mr. Kirkland began serving as EPD's lawyer.

In December 2010, EPD's creditors forced it into involuntary Chapter 7 bankruptcy. BC Trust filed proofs of claim in EPD's bankruptcy case, based on the EPD Loans. In October 2012, the Chapter 7 trustee initiated an adversary proceeding against Mr. Kirkland and BC Trust in the U.S. Bankruptcy Court for the Central District of California. The action sought to disallow or equitably subordinate BC Trust's proofs of claim and to avoid allegedly fraudulent transfers that EPD made to Mr. Kirkland and BC Trust in the form of mortgage payments on the Kirklands' home. Specifically, the trustee alleged that EPD was a Ponzi scheme and that Mr. Kirkland, while acting as its outside counsel, was aware of and engaged in inequitable conduct to hide the company's insolvency. The trustee further alleged that Mr. Kirkland's misconduct should be imputed to BC Trust and the trust's proofs of claim disallowed or subordinated because BC Trust did not separately invest in EPD and was merely the assignee of Mr. Kirkland's interests in EPD. By 2014, the Kirklands had moved to the U.S. Virgin Islands. Nonetheless, they agreed to be deposed in Los Angeles in June 2017.

After Mr. Kirkland asserted his right to a jury trial on the fraudulent-transfer claims, the district court withdrew the reference of the entire adversary proceeding from the bankruptcy court, because of the commonality and overlap between the claims asserted against Mr. Kirkland and BC Trust. The district court then bifurcated for trial the fraudulent-transfer claims against Mr. Kirkland from the other claims asserted against BC Trust. The Kirklands both testified in person at Mr. Kirkland's fraudulent-transfer trial held in California, and the jury returned a verdict in his favor. Afterward, the district court dismissed the trustee's equitable-subordination claim against Mr. Kirkland and returned the claims against BC Trust to the bankruptcy court.

The bankruptcy court determined that it was necessary for the Kirklands to testify at BC Trust's trial, and it authorized the trustee to serve the Kirklands with trial subpoenas commanding them to testify remotely via video transmission from the U.S. Virgin Islands. The Kirklands moved to quash their trial subpoenas, primarily arguing that they violated Rule 45(c)'s geographic limitations. The bankruptcy court denied the Kirklands' motions to quash, concluding that "good cause and compelling circumstances" warranted requiring their testimony "by way of contemporaneous video transmission" under Federal Rule of Civil Procedure 43(a). The bankruptcy court analyzed the split among district courts regarding whether Civil Rule 45's geographical restriction applies if a witness is permitted to testify by videoconference from a location chosen by the witness. The bankruptcy court recognized that it could not compel the Kirklands to attend the trial in person because they lived in the Virgin Islands. And it reasoned that when a witness has been ordered to provide remote video testimony transmitted from the witness's home under Rule 45(c), "that witness has not been compelled to attend a trial located more than 100 miles from the witness's residence." Thus, the bankruptcy court found that the challenged subpoenas satisfied Rule 45(c), because the purpose of Rule 45 is to protect witnesses from the burden of extensive travel.

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The bankruptcy court relied heavily on its prior ruling granting the trustee's motion in limine to exclude transcripts of the Kirklands' depositions and testimony given in Mr. Kirkland's trial. BC Trust had informed the bankruptcy court that it intended to introduce these transcripts because the Kirklands were unwilling to travel to California to testify at BC Trust's trial and they could not be compelled to testify because they lived more than 100 miles from the bankruptcy court. BC Trust argued that the Kirklands were "unavailable" under Federal Rule of Evidence 804, and the transcripts of their prior testimony were therefore admissible hearsay. The bankruptcy court disagreed that a hearsay exception applied because it concluded that the Kirklands' "unavailability . . . has been engineered by the BC Trust for purely strategic purposes."

The bankruptcy court also reasoned that the prior transcripts would be insufficient because certain testimony relevant to the equitable subordination claim was not introduced at Mr. Kirkland's trial, and additional testimony was necessary. Additionally, in determining whether BC Trust engaged in any inequitable conduct, the bankruptcy court concluded that it needed to assess the credibility of the Kirklands, which it could not do based solely on transcripts.

After the bankruptcy court refused to quash the trial subpoenas, it also denied the Kirklands' motion to certify an immediate interlocutory appeal under 28 U.S.C. § 158(d)(2). The Kirklands subsequently petitioned the Ninth Circuit for a writ of mandamus directing the bankruptcy court to quash their trial subpoenas. They argued that Rule 45(c)(1) prohibits the bankruptcy court from compelling them to testify, even remotely, when they reside out of state over 100 miles from the location of the trial. Mindful of the "extraordinary nature" of mandamus relief, the Ninth Circuit concluded that it was warranted in this case because the Kirklands presented a novel issue involving the interplay of two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted.

- **Requirements for Mandamus Relief.** The Ninth Circuit explained that mandamus is an "extraordinary remedy" appropriate only in "exceptional circumstances amounting to a judicial usurpation of power" or a "clear abuse of discretion." In determining whether issuance of a writ of mandamus is appropriate, the court weighs five "*Bauman*" factors: (1) the party petitioning for the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression [*see* Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–655 (9th Cir. 1977)].

  Moreover, issuance of mandamus relief is discretionary; the court is not compelled to grant the writ when all five factors are present, nor prohibited from doing so when fewer than five are present. However, absence of clear error as a matter of law is dispositive and will always defeat a petition for mandamus. Mandamus relief is appropriate to resolve novel and important procedural issues. Therefore, although the courts of appeals generally do not become involved with the procedural details of discovery or trial, mandamus may be used to resolve new questions that otherwise might elude appellate review. #

- **Bankruptcy Court Committed Clear Error.** In its analysis of whether to grant mandamus review, the court began with the third factor, which "is almost always a necessary predicate for the granting of the writ." The clear-error standard is highly deferential and typically requires prior authority from the appellate court that prohibits the lower court's action. However, this standard is met even without controlling precedent if the plain text of the statute prohibits the course taken by the district court. The appellate court must be left with a firm conviction that the lower court misinterpreted the law or committed a clear abuse of discretion.

  The issue raised in this case was narrow: whether Federal Rule of Civil Procedure 45(c)'s 100-mile limitation applies when a witness is permitted to testify by contemporaneous video transmission. Federal Rule of Civil Procedure 45(c) defines the "place of compliance" for subpoenas and the geographical scope of a federal court's

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power to compel a witness to testify at a trial or other proceeding. There are two metrics. First, a person can be commanded to attend trial "within 100 miles of where the person resides, is employed, or regularly transacts business in person" [Fed. R. Civ. P. 45(c)(1)(A)]. Second, a person can be commanded to attend a trial "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) . . . would not incur substantial expense" [Fed. R. Civ. P. 45(c)(1)(B)]. If a trial subpoena exceeds these geographical limitations, the district court "*must* quash or modify" the subpoena [Fed. R. Civ. P. 45(d)(3)(A)(ii) (emphasis added)].

The trustee subpoenaed the Kirklands to testify at a trial in California, where the Kirklands no longer lived, worked, or regularly conducted in-person business. Therefore, the court focused on Rule 45(c)(1)(A)'s 100-mile limitation. For in-person attendance, the plain meaning of this rule is clear: a person cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business. The Federal Rules of Bankruptcy Procedure incorporate this same limitation. Thus, the Kirklands could not be compelled to testify *in person* at a trial in California.

The trustee argued that Federal Rule of Civil Procedure 43(a) avoids Rule 45(c)'s 100-mile limitation as applied to remote testimony. Specifically, the trustee (and the bankruptcy court) asserted that remote testimony moves the "place of compliance" under Rule 45(c) from the courthouse to wherever the witness is located, so long as that location is within 100 miles of the witness's home or place of business. Federal Rule of Civil Procedure 43, titled "Taking Testimony," provides that "testimony must be taken in open court" unless a federal statute or rule provides otherwise. But it permits courts to allow remote testimony "[f]or good cause in compelling circumstances and with appropriate safeguards" [Fed. R. Civ. P. 43(a)].

The Ninth Circuit acknowledged that, on its face, Rule 43(a) does not address the scope of a court's power to compel a witness to testify or reveal any overlap with Rule 45. Rather, Rule 43(a) establishes *how* a witness must provide testimony at trial: "in open court" unless the law allows otherwise or there is sufficient basis for allowing remote testimony. Stated another way, Rule 45(c) governs the court's power to require a witness to testify at trial, and Rule 43(a) governs the mechanics of how trial testimony is presented. Logically, determining the limits of the court's power to compel testimony precedes any determination about the mechanics of how such testimony is presented.

Examining the advisory committee's notes, the court found the only express reference to interplay between Rules 43(a) and 45(c) is in the notes to Rule 45, which state: "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)*" [Fed. R. Civ. P. 45, Advisory Committee Note of 2013 (emphasis added)]. The *places* described in Rule 45(c)(1) are "a trial, hearing, or deposition" located within prescribed geographical proximity to where the witness lives, works, or conducts in-person business [Fed. R. Civ. P. 45(c)(1)]. The note does not state that Rule 43(a) changes the "place described in Rule 45(c)(1)" from the location of the proceedings to the location of the witness. Rather, the note clarifies that Rule 45(c)'s geographical limitations apply even when remote testimony is allowed, and a witness is not required "to attend" a trial or other proceedings in the traditional manner.

This conclusion is reinforced by the rule that remote testimony is the exception, and live, in-person testimony is strongly preferred. The advisory committee's note states, "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 truthtelling." These notes further instruct that the most persuasive showings of good cause and compelling circumstances justifying remote testimony 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. The court concluded that the strong preference for in-person testimony would be greatly undermined if the rules were interpreted to impose fewer limits on a court's power to compel remote testimony than on its power to compel in-person testimony.

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Federal Rule of Civil Procedure 32(a)(4) also supports the conclusion that the Kirklands fell outside the bankruptcy court's subpoena power because it defines witnesses who are "more than 100 miles from the place of . . . trial" as "unavailable." Again, there is no indication in this rule that the geographical limitation can be recalibrated under Rule 43(a) to the location of a remote witness rather than the location of trial, nor is there any indication that courts can avoid the consequences of a witness's unavailability by ordering remote testimony. The fact remains that *all* witnesses—even those appearing remotely—must be compelled to appear, and a court can only compel witnesses who are within the scope of its subpoena power. Rule 43 does not give courts broader *power* to compel remote testimony; it gives courts *discretion* to allow a witness otherwise within the scope of its authority to appear remotely if the requirements of Rule 43(a) are satisfied. That is, neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the "place of compliance" under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely.

Interpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend a *trial*" [Fed. R. Civ. P. 45(c)(1) (emphasis added)]. A trial is a specific event that occurs in a specific place: where the court is located. No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court. If the "place of compliance" for a trial subpoena could change from the courthouse to the witness's location, there would be no reason to consider a long-distance witness "unavailable" or for the rules to provide an alternative means for presenting evidence from long-distance witnesses that are not subject to the court's subpoena power. Courts could simply find, as the bankruptcy court did, that live testimony from a witness located outside the geographical limitations of Rule 45 was nonetheless necessary, which constitutes "good cause in compelling circumstances" to justify compelling their remote testimony [*see* Fed. R. Civ. P. 43(a)]. In sum, accepting the trustee's and bankruptcy court's reasoning in this case would stretch the federal subpoena power well beyond the bounds of Rule 45, which focuses on the *location of the proceeding* in which a witness is compelled to testify.

Therefore, the Ninth Circuit concluded that the bankruptcy court "misinterpreted the law" in its construction of Rule 45(c) as applied to witnesses allowed to testify remotely under Rule 43(a), and the third factor weighed in favor of granting mandamus relief.

- **Important Issue of First Impression.** The Ninth Circuit found that the fifth factor also weighed in favor of granting mandamus relief. This factor considers whether the petition raises new and important problems or issues of first impression. The court reiterated that mandamus is particularly appropriate when the court is called upon to determine the construction of a federal procedural rule in a new context. Whether a witness can be compelled to testify remotely despite falling outside Rule 45's geographic limitations is an important issue given the recent proliferation of videoconference technology in all types of judicial proceedings. The common-law tradition favors live testimony, in court and subject to adversarial questioning. Face-to-face confrontation and cross-examination ensure the integrity of the factfinding process. As evidenced by the diverging views in the district courts, application of the rules to testimony provided via contemporaneous video transmission has been perplexing and likely will continue to be so. Therefore, the issue raised by the Kirklands' petition was ripe for consideration and was "a new and far-reaching question of major importance" the resolution of which would add importantly to the efficient and orderly administration of the district courts.

- **Remaining *Bauman* Factors.** The Ninth Circuit concluded that the third and fifth factors were sufficient on their own to warrant granting mandamus relief, but nevertheless considered the remaining factors. As to the first factor, alternative means of relief, the court noted that the Kirklands' challenge to their subpoenas was a collateral matter, and an order denying a motion to quash a Rule 45 subpoena generally cannot be immediately appealed. Instead, absent discretionary interlocutory review, to obtain effective review a litigant generally must either seek mandamus, or disobey the order and then appeal the resulting contempt citation. Because the Ninth Circuit does not require a litigant to incur a sanction, such as contempt, before it may seek mandamus relief, there was support for the first factor. While the Kirklands failed to exhaust all possible avenues for discretionary interlocutory review

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in the district court, the Ninth Circuit concluded that their failure did not mandate denial of mandamus relief under the unique circumstances of this case. Therefore, the first factor did not weigh against granting mandamus relief.

As to the second factor, the likelihood of irreparable harm, the Kirklands had to demonstrate that they would suffer harm that could not be remedied through normal postjudgment appeal. The Kirklands contended that they would be harmed by having to testify at BC Trust's trial after they had already given testimony in the underlying proceeding twice. They also contended that testifying remotely would be inadequate, and that if they were forced to wait to challenge the bankruptcy court's denial of their motions to quash until after BC Trust's trial, the error of being wrongly forced to testify would be irremediable. The court found that if the Kirklands were to comply with their subpoenas and testify at trial, the violation of having to give testimony when the bankruptcy court had no authority to compel them to do so could not be fully remedied after judgment. Therefore, the second *Bauman* factor also supported granting mandamus relief.

Finally, the fourth factor looks to whether the case involves an "oft-repeated error." The court noted that the fourth and fifth factors are rarely present at the same time. However, the fourth and fifth factors can both be present when a procedural rule is being applied in a new context because this situation presents a novel question of law that is simultaneously likely to be oft-repeated. Because the court concluded that the fifth factor strongly weighed in favor of exercising mandamus authority, it did not analyze the fourth factor in depth and simply reiterated that, given the importance and novelty of the issue presented and the ongoing confusion in the district courts, providing guidance regarding Rule 45's application to remote testimony was warranted, especially because this collateral issue was likely to continue to evade review.

- **Conclusion.** Therefore, the Ninth Circuit granted the Kirklands' petition and issued a writ of mandamus ordering the bankruptcy court to quash the trial subpoenas.