

AUGUST 2019

Innovatively Presenting Witnesses Virtually in 21st Century Trials



1. Introduction – Welcome to 21st Century Litigation

Famed inventor Dean Kamen cogently said that, “every once in a while, a new technology, an old problem, and a big idea turn into an innovation.” You want innovation in modern litigation practice? Try presenting virtual testimony at trials via the new technologies of video conferencing devices such as Skype and FaceTime.

In 21st Century litigation we need to use 21st Century tools. And like it or not this includes broadening the use of virtual appearances in court by lawyers and witnesses. And this means, as we will see, understanding the controlling terms of [Fed. R. Civ. Proc. 43\(a\)](#) and how they will evolve in the years to come.

The incentives for allowing virtual appearances and testimony are multifold: addressing the often-crippling expense of travel; providing an alternative to unexpected or necessary witness unavailability; and expanding the use of video conferencing to live time depositions, virtual court appearances and enabling vital witnesses in widespread MDL-like litigation to avoid the uneconomical aspects of repeat court room performance.¹

And mark the wise old words of a LexisNexis practice guide author: the prevalence of live time virtual exchanges in everyday life combined with the inevitable advent of AI and holographic relocation could someday have us all come to think of “live” appearances and testimony as we do the phonograph and iPod—worthwhile, but economically inferior to modern alternatives.

2. A Not So Very Scary Litigation Innovation

Today’s judges should know that every smart phone can connect people almost anywhere in the world through two-way video using free services—fundamentally altering the ability to be present. And what kind of litigation world are we in when tools I use every weekend with faraway grandkids (FaceTime and Skype) can’t be used by litigators wanting to put on their cases in court?

As few as 20 years ago, video conferencing was expensive and technologically challenged as it typically required the use of close circuit TV transmission. Judges and their staff understandably resisted the extraordinary planning and disruption such requests entailed—to say nothing of the sense that online testimony seemed the stuff of science fiction.

Of course, for decades, we’ve become accustomed to presenting edited excerpts of videotaped deposition testimony at trial. See *The Wagstaffe Group Practice Guide: Fed. Civ. Pro. Before Trial* at § 36.108; [Fed. R. Civ. Proc. 30\(b\)\(3\)](#).² Yet, presenting one-sided video excerpts is far inferior to live time transmitted questions and answer, and such technology is now inexpensive and part of everyday life. See *Taylor v. FedEx*, 2017 U.S. Dist. LEXIS 12 (E.D. Cal. December 20, 2017) (live time testimony inexpensive, practical and easy to set up).

However, given some entrenched and historic resistance to admitting virtual testimony at trial, one can entertain skepticism about how soon this everyday innovation will find its way routinely to the court room. These doubts indubitably stem from the strange truism that courts and the legal community are often the very slowest to adapt to new technologies and change.

3. The “Modern” 1996 Solution: Rule 43(a)

Since 1996 and although it expresses a preference for in-person trial witnesses, Rule 43 of the Federal Rules of Civil Procedure has provided that courts have discretion to admit trial testimony “by contemporaneous transmission from a different location.” Upon motion, a party can ask that the court grant such a request upon a “showing of good cause in compelling circumstances with the appropriate safeguards in place.”

As a general matter, courts will consider multiple factors when analyzing whether to utilize the innovation of remote testimony at deposition or trial. These include the demonstrated need to bypass the normal in-court testimony paradigm, the relative prejudices to the parties and the flexibility required by the nature of the case and the court’s available technology. See *In re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liability Litig.*, 2016 U.S. Dist. LEXIS 195409 (N.D. Tex. September 20, 2016) (court allows remote testimony in MDL case calling for flexibility and with appropriate safeguards).

4. Establishing Good Cause in Compelling Circumstances

As suggested above, courts will not routinely order live time video testimony as witnesses appearing in court is still preferred. However, if the requesting party can show “good cause in compelling circumstances” Rule 43(a) allows a court to compel testimony in this virtual manner.³

The 1996 Advisory Committee Notes on Rule 43(a) understandably express a preference for live testimony (due to a perception of improved assessment of demeanor and truth telling). Mere inconvenience is said not to be a compelling reason for FaceTime or Skype—even when compared to video depositions. *Id.* However, the case law and the 1996 Advisory Committee Notes describe multiple situations in which live time transmitted testimony will satisfy the “good cause in compelling circumstances” criteria. These include the following:

- *Medical Issues:* A showing that a witness is unable to attend due to an illness or medical condition can satisfy the required standard.⁴
- *Disability:* It can be particularly compelling when a court allows live time testimony as an accommodation to disabled witnesses.⁵



- *Difficult and Expensive Travel:* A showing related to travel challenges also can satisfy the standard—although the order may be more difficult to obtain for party-controlled witnesses.⁶
- *Serious Prejudice:* Courts also are amenable to remote testimony when a denial would seriously prejudice the moving party, such as an unexpected unavailability of critical percipient or expert witnesses, or substantial administrative costs such as procuring the testimony of a party or witness in prison.⁷

In each of these circumstances, courts have appeared more willing to allow remote testimony when the costs or needs of travel were unforeseeable or involved legal limits on such travel (e.g., international restrictions).⁸

5. The Challenge of Safeguarding Fairness

Even if there is good cause in compelling circumstances to allow remote testimony, courts can still deny such a request if there are not appropriate safeguards to ensure fairness in maintaining the vital aspects of live testimony. See *Fed. R. Civ. Pro. 43(a)*. These safeguards, while understandably involving the technical capabilities of the trial court, also include the following:

- The interactive capabilities of the chosen technology;
- The ability to identify, administer the oath to, and exchange exhibits with the witness;
- The protection of attorney-client communications (especially at deposition); and
- Avoiding undue influences and limiting persons in the room.⁹

While a virtual witness (at deposition or trial) may often appear voluntarily, the real trick is to utilize the

compulsory subpoena process of Rule 45 to compel attendance at the chosen faraway location. This technique works as Rule 45(b)(2) now reads that a subpoena “may be served at any place in the United States” – thus allowing for nationwide service of a subpoena issued by the forum court.

Combining the geographic breadth of Rule 45 with the innovation of contemporaneous video transmission, courts have held that this allows, for example, video testimony presented live time with a faraway subpoena-compelled appearance.¹⁰

6. Convincing Your Judge to Allow Virtual Appearances and Testimony

Despite the general use of video conference in everyday life, it can still be a tall task to overcome the 1996 rubric of Rule 43(a) that such an order is exceptional and limited to “compelling circumstances.” Here are some formulations to convince your judge to accept this “new” technology:

- Live time testimony is routinely used across the country. See, e.g. *Jackson v. Mendez*, 2015 U.S. Dist. LEXIS 154719 (E.D. Cal. November 13, 2015).

- Embrace change. See, e.g., *In re: Actos Prod. Liability Litig.*, *supra* (use of remote testimony allowed because court “open to re-examination of old habits and routines which might have... created the types of Gordian knots that can lead to the stasis this Court and the parties seek to avoid”).
- Live time testimony can ensure fairness and economy. See *Nelson v. City of New York*, 60 Misc. 3d 353 (2018) (avoidance of travel expense, witness unavailability and other prejudice).
- *It can work easily and without technological distraction or court expense.* Be sure to demonstrate the ease of use, especially in courtrooms already equipped with judge and jury computer screens in place.

7. Conclusion—It’s a Changing World

In an age of routine Skype/FaceTime family calls, telemedicine, virtual parental visitations and even some Skype Marriages, it might be difficult to understand why it remains essential to convince your judge that the innovation of live time virtual testimony (and court appearances) is nothing to fear. But as Tom Freston wisely advised: “Innovation is taking two things that already exist and putting them together in a new way.”



Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation’s top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

¹ See *In re Viox Prod. Liability Litig.*, 439 F.Supp.2d 640, 664 (E.D. La. 2006) (court orders upper-level Merck officer over whom the copy had significant control to testify by contemporaneous video conferencing).

² Similarly, courts routinely examine video testimony and video evidence on summary judgment. It can even demonstrate, if incontrovertible, no genuine issue is disputable. *Scott v. Harris*, 550 U.S. 372, 380 (2007); TWG at § 43.22.

³ This is a particular easy showing to make if the parties actually consent to the procedure. See *Scott Timber v. United States*, 93 Fed. Cl. 498, 500 (2010); M. Hindman, FJC Research Appendix: *Review of Case Law Related to Witness Testimony by Remote Transmission* (2017).

⁴ See *Humbert v O'Malley*, 303 F.R.D. 461, 465 (D. Md. 2014) (travel could trigger PTSD symptoms for rape victim); but see *Martal Cosmetics, Ltd. v. Int'l Beauty Exch. Inc.*, 2011 U.S. Dist. LEXIS 25157 (E.D. N.Y. March 11, 2011) (finding insufficient medical records evidence to prove witness unable to appear).

⁵ *S.E.C. v. Yang*, 2014 U.S. Dist. LEXIS 42580 (N.D. Ill. March 30, 2014) (citing advanced pregnancy in permitting remote witness testimony).

⁶ See *Rodriguez v. SGLC, Inc.*, 2012 U.S. Dist. LEXIS 120862 (E.D. Cal. August 24, 2012) (more discretion for third-party witnesses); *Katzin v. United States*, 124 Fed. Cl. 122, 126 (2015) (substantial

expense for witness with medical practice located 900 miles from court); *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D. D.C. 2000) (travel from Oklahoma to District of Columbia a serious inconvenience); but see *Herman v. United States*, 129 Fed. Cl. 780 (2017) (travel to D.C. from New York not compelling circumstance).

⁷ See *Scott Timber v. United States*, 93 Fed. Cl. 498 (2010); *Perotti v. Quinanes*, 790 F.3d 712, 725 (7th Cir. 2015) (balancing test in weighing costs to state in allowing remote testimony from inmates).

⁸ See *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007) (witness unable to secure visa to U.S.); *Sille v. Parball Corp.*, 2011 U.S. Dist. LEXIS 158765 (D. Nev. July 8, 2011) (motion denied as there as “nothing unexpected concerning the ability of Plaintiff’s witnesses to attend”).

⁹ See e.g., *Lopez v. NTI, LLC*, 748 F.Supp.2d 471 (D. Md. 2010) (visual and cross-examination safeguards provided); *Scott Timber, Inc.*, *supra* at 501 (limiting persons in room); *Alcala v. Hernandez*, 2015 U.S. Dist. LEXIS 54526 (D.S.C. April 27, 2015) (describing multiple safeguards for foreign testimony including reporting to Foreign Relations Secretary’s local office).

¹⁰ *In re Actos (Pioglitazone) Products Liability Litig.*, 2014 U.S. Dist. LEXIS 2231 (W.D. La. January 8, 2014) (allowing witnesses to testify by videoconference since defendant’s employees were unavailable to testify in court).