Out-of-State Witnesses: Are Zoom Trial Appearances a New Normal?

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IN mass tort litigation, out-of-state employees of a corporate defendant party are routinely deposed and subject to discovery. The federal rules make clear that an out-of-state party and the officers, directors, and managing agents of that party are required to appear for deposition without regard to geographical limitations on the subpoena. The party can face sanctions for failure to appear.[1] A corporate employee who does not qualify as an officer, director, or managing agent is not subject to deposition by notice alone and, instead, is treated as a non-party who must be served with a subpoena pursuant to Rule 45.[2] Practically speaking, corporate defendants routinely and voluntarily produce non-party employee witnesses for deposition without the need for out-of-state subpoena practice.

However, when the cases reach trial, what obligation does the company have to produce out-of-state employee witnesses to testify at trial? How have the advances in

[1] FED. RULE CIV. P. 37(d)(1)(A)(i).

[2] Karakis v. Foreva Jens Inc., No. 08–61470, 2009 WL 113456, at *2 (S.D. Fla. Jan.19, 2009) (citing authorities).

technology and remote trial appearances in the age of Covid changed this obligation? This article will analyze the rights and obligations, and advocates for strict compliance with Rule 45(c) for out-of-state non-party witnesses.

I. Background

Federal Rule of Civil Procedure 45(c) governs the validity of trial subpoenas. The rule does not provide any authority to compel anyone from out of state to attend trial unless that party or party officer resides, is employed, or regularly transacts business in the state where the subpoena is issued. Prior to the 2013 amendments to Rule 45, there was a split in authority on whether a company had an obligation to produce an out-of-state party officer for trial.[3] With the 2013 amendments to the rule, the drafters made clear that Rule 45(c)(1)(A) does not authorize nationwide subpoena service for any witnesses, even including a party or party officer. Rule 45 is now clear that a subpoena for trial to require a party or party officer to travel more than 100 miles is invalid unless the party or party officer resides, is employed, or regularly transacts business in person in the state. Non-party witnesses are subject to the 100-mile rule, deeming subpoenas for out of state witnesses invalid unless they reside or work within 100 miles of the courthouse at the time they are called to testify.[4]

For plaintiffs who wish to call a defendant company's non-party employees to testify live at trial, traditionally those witnesses must reside or work within 100 miles of the courthouse to be compelled to appear live to testify. Subpoenas issued to employee witnesses who are beyond the court's jurisdiction are invalid, unenforceable, and properly subject to a motion to quash. Instead, plaintiffs ordinarily must rely on the deposition testimony of non-party employee witnesses in their case-in-chief. In a circumstance where plaintiffs have selected a forum beyond the subpoena power for defendant employees, a corporate defendant is uniquely situated to decide whether to produce live witnesses or shield

[3] *Compare In re* Vioxx Products Liability Litigation, 438 F. Supp.2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), *with* Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state).

[4] Note that several courts have found that the time for determining compliance is not at the time of service, but rather at the time of compliance and appearance. *See, e.g.,* Patterson v. W. Carolina Univ., No. 2:12cv03, 2013 U.S. Dist. LEXIS 73191, at *3 (W.D.N.C. May 23, 2013) ("The Rule is silent as to the time of issuance, concentrating instead on the time when the subpoenaed person must attend the trial.").

their witnesses and rely instead on deposition testimony.[5] When an out-of-state-corporate employee witness would not be produced, defendants understand the heightened need for adequate preparation and presentation of the out-of-state employee witnesses at their deposition. If the defendant company does not wish or is not able to call an out-of-state employee (or perhaps anticipates that the witness may later be beyond their control as a former employee) as a witness live at trial, the defendant company often conducts a direct examination of their employee witnesses at the time of the deposition to preserve any favorable testimony.

However, a defendant company often wishes to call all or some of their out-of-state employee witnesses live at trial in their case-in-chief. Often, plaintiffs accuse out-of-state corporate defendants of "gamesmanship" in selecting whether and when to produce certain witnesses at trial. Some courts have recognized the inherent unfairness in a defendant's making their own witnesses unavailable during plaintiffs' case-in-chief only later to seek to call these witnesses live in their defense case-in-chief.[6] In *Iorio*, the Southern District of California quashed subpoenas that would have compelled trial testimony outside of the 100-mile radius and held that witnesses could not testify in a defendant's case-in-chief unless the defendant made them available for plaintiffs' case-in-chief.[7] On the other hand, a Texas federal court found that there was no inequity in plaintiffs relying on the deposition video of unavailable employees in their case in chief, finding that if and when those employees are called live by defendants, plaintiffs will later enjoy the opportunity to "cross-examine these individuals live in front of the jury."[8] Other courts have ruled that if defendants refuse to procure the employee witness for plaintiffs' case in chief, plaintiffs may be permitted to hold their case open until the witness is called by defendants and then may call the witness both on direct and cross-examination.[9]

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[5] *See* Saget v. Trump, 351 F. Supp.3d 251, 255 (E.D.N.Y. 2019).

[6] Iorio v. Allianz Life Ins. Co., 2009 U.S. Dist. LEXIS 97617, 2009 WL 3415689 (S.D. Cal. Oct. 21, 2009).

[7] *Id*.

[8] Lea v. Wyeth LLC, No. 1:03-CV-1339, 2011 U.S. Dist. LEXIS 171728, 2011 WL 13195950, at *2 (E.D. Tex. Nov. 22, 2011).

[9] Cisson v. C.R. Bard, Inc. (*In re* C. R. Bard, Inc.), No. MDL No. 2187, 2013 U.S. Dist. LEXIS 94121, at *5-7 (S.D. W. Va. July 5, 2013); *Saget*, 351 F. Supp.3d at 255.

II. The Advent of Video-conferencing

With the modern developments and increased comfort with Zoom and Skype videoconferencing technology—particularly in light of the Covid-19 pandemic—federal courts, litigants, and jurors have become accustomed to remote proceedings like never before. Courts have recognized that modern video conferencing technology at trial "allows for near instantaneous transmission of testimony with no discernable difference between it and 'live' testimony, thereby allowing a juror to judge credibility unimpeded."[10] Some courts have noted that videoconferencing a witness at trial is more advantageous for determining witness credibility than traditional video deposition testimony:

> [C]ontemporaneous transmission of live witness testimony will better allow the jury to more realistically "see" the live witness along with "his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration," without editing or the unavoidable esthetic distance created by a video deposition and, thus, more fully and better satisfy the goals of live, in-person testimony, while avoiding the short-comings of either written or video deposition testimony perhaps recorded weeks or months earlier, prior to whatever developments might have occurred between the time the deposition was recorded and the time the testimony by video deposition is presented at trial.[11]

The traditional means of preparing a video deposition for trial are not without cost, including the time and expense of taking video depositions for trial; identifying the deposition excerpts and making objections to the designations; issuing rulings on the depositions; and editing of deposition videos for presentation at trial.[12]

As a result of the developments in technology, and the increased level of comfort and use of Zoom and Skype, a growing body of case law supports the use of Zoom or remote

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[10] *See* Liu v. State Farm Mut. Auto. Ins. Co., 507 F. Supp.3d 1262, 1265 (W.D. Wash. 2020); *see also In re* RFC and ResCap Liquidating Trust Action, 444 F. Supp.3d 967, 971 (D. Minn. 2020) ("Given the speed and clarity of modern videoconference technology, where good cause and compelling circumstances are shown, such testimony 'satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony.'").

[11] Allen v. Takeda (*In re* Actos® (Pioglitazone) Prods. Liab. Litig.), No. 6:11-md-2299, 2014 U.S. Dist. LEXIS 2231, at *8 (W.D. La. Jan. 8, 2014).

[12] *Id*. at *40-41.

videoconferencing trial appearances under Federal Rule of Civil Procedure 43(a), even where witnesses such as non-party employees live well beyond the jurisdiction of the court under Rule 45(c). While trials are to be conducted in open court and, so far as convenient, in a regular courtroom under Rule 77(b), Rule 43(a) grants the discretion for a trial judge to permit testimony "by contemporaneous transmission from a different location." In a growing number of jurisdictions, litigants are attempting skirt the jurisdictional subpoena power constraints of Rule 45(c) and compel Zoom trial appearance of witnesses virtually from any jurisdiction. Should the means of transmitting testimony under Rule 43(a) circumvent the limits of the court's subpoena power under Rule 45?

III. Rule 45 Trumps Rule 43

Under Rule 45(c), the court's subpoena power extends 100 miles, or under certain circumstances such as a party or a party's officer, to the state border. The rule specifically articulates the geographic scope of a court's subpoena power to protect parties from the burden of traveling more than 100 miles in a proceeding where they are not a party. Rule 43(a) governs the mode of testimony, and not whether a person must testify, and requires both the discretion of the trial judge and that the plaintiff establish "good cause and compelling circumstances". The interplay between the two rules was addressed in the 2013 Advisory Committee's note to the 2013 Amendment to Rule 45, specifically: "[w]hen 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)." Where there is good cause in compelling circumstances, a court can authorize a witness to testify via contemporaneous video transmission and can then subsequently compel the witness to give the testimony from a location within 100 miles of his or her residence.

Many attorneys are familiar with motions to permit testimony contemporaneous transmission under Rule 43(a), where one party, sometimes unopposed, seeks *permission* from the court to allow often a willing witness to appear via remote testimony due to unforeseen circumstances that establish good cause. This is exactly what the advisory committee notes for Rule 43 contemplated when stating that "[t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place."

Courts routinely permit testimony via videoconference where a witness has relocated and would be required to travel a significant distance or has other hardships including responsibilities towards minor children.[13] Of course, nothing in the text or comments to Rule 43(a) limits remote testimony only to circumstances where the absent witness *agrees* to appear voluntarily. The plain reading of Rule 43 and the comments implies that the witness was once able to attend trial (i.e., either willingly or pursuant to a valid subpoena under Rule 45(c)) but for "unexpected reasons" no longer can. What is different about the new trend in cases on remote testimony is that parties are not seeking *permission* for a witness who wishes to appear remotely, but rather are seeking to *compel* remote testimony of witnesses who do not agree to appear voluntarily *and* are otherwise beyond the reach of the court's subpoena power. The question then becomes whether a party subpoena a witness to testify remotely when that witness cannot otherwise be subpoenaed to testify in person.

Courts that have addressed this issue head on have disagreed over the application and overlap between Rule 43(a) and Rule 45(c). Some courts have held firm that live video testimony under Rule 43(a) are subject to the same jurisdictional limits as a trial subpoena under Rule 45(c).[14] These courts focus on a reading of Rule 45(c) that addresses not how far a person must travel, but rather "the location of the proceeding at which a person would be required to attend."[15] These courts have 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."[16] They have recognized that reading Rule 43(a) to circumvent Rule 45 would "render Rule 45(c)'s geographic limitations a nullity and bestow upon any [court] sitting anywhere in the country the unbounded power to compel remote testimony from any person

[13] *See, e.g.,* Jackson v. Mendez, No. 1:11-cv-00080-BAM, 2015 U.S. Dist. LEXIS 154719, at *2 (E.D. Cal. Nov. 13, 2015) (permitting remote trial testimony where a defendant witness "will incur a combination of significant trial time and expenses which will not be reimbursed, and hardships with regard to finding childcare"); Humbert v. O'Malley, 303 F.R.D. 461, 465-466 (D. Md. 2014).

[14] *See* Black Card LLC v. Visa USA Inc., No. 15-cv-27, 2020 WL 9812009 (D. Wyo. Dec. 2, 2020); Roundtree v. Chase Bank USA, N.A., No. 13-239 MJP, 2014 WL 2480259, *2 (W.D. Wash. June 3, 2014); Broumand v. Joseph, 522 F. Supp.3d 8, 10 (S.D.N.Y. 2021); Williams v. Arctic Cat, Inc., No. 3:11-cv-445, 2014 U.S. Dist. LEXIS 33090, 2014 WL 1028476, at *6 (N.D.N.Y. Mar. 13, 2014).

[15] *Broumand*, 522 F. Supp.3d at 10.

[16] *Lea*, 2011 WL 13195950, at *1.

residing anywhere in the country."[17] These cases apply the traditional rules by holding that parties must rely on depositions to present the testimony of out-of-state witnesses.[18] This line of case law is consistent with the Advisory Committee notes to Rule 43, which directs: "[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."

IV. A Shift in Direction

Despite this precedent, a growing number of other district courts that have addressed the issue have found the opposite and read Rule 43(a) and Rule 45(c) to automatically allow the court to compel remote testimony of a witness located anywhere in the United States. These courts reason that Rule 45(c) does not limit the court's subpoena power only to those residing within 100 miles of the proceedings, but instead merely protect how far a third party must travel.[19] Because remote transmission requires little to no travel – it can be done from one's own home or at a courthouse within 100 miles of the witness' home— these courts have found no violation of Rule 45(c).[20] These courts focus on the advances in remote video-conferencing technology that are far better than a deposition and more closely resemble "live" testimony consistent with the objectives of Rule 43(a). Similar rulings have been made in the context of remote depositions of witnesses who live beyond the court's subpoena power.[21]

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[17] *In re* EpiPen, No. MDL No: 2785, 2021 U.S. Dist. LEXIS 125939, at *33-45 (D. Kan. July 7, 2021) (internal quotations omitted); *see also Broumand*, 522 F. Supp.3d at 10 (refusing to read Rule 43 and Rule 45 such that "testimony via teleconference somehow moves a trial to the physical location of the testifying person.").

[18] Cross v. Wyeth Pharms., Inc., No. 8:06-cv-429-T-23AEP, 2011 WL 2517211, at *9 (M.D. Fla. June 23, 2011) (denying plaintiffs' request to compel live remote testimony and concluding that, instead, plaintiffs "may proffer the [witnesses'] deposition testimony for admission at trial"); *Williams*, 2014 WL 1028476, at *6 ("Since testimony by deposition can be 'equivalent to testimony at the trial,' and Plaintiffs had an opportunity to elicit all relevant testimony during the deposition, the Court finds that Plaintiffs will not be prejudiced by presenting the testimony of the unavailable witnesses in this case.").

[19] United States v. $110,000 in U.S. Currency, No. 21 C 981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021).

[20] *Id.*; *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2017 U.S. Dist. LEXIS 81047 at *3-12 (E.D. La. May 26, 2017).

[21] *See* Int'l Seaway Trading Corp. v. Target Corp., No. 0:20-mc-86, 2021 WL 672990, at *5 (D. Minn. Feb. 22, 2021) ("Virtual attendance of this nature is consistent with the plain language of Rule 45(c)(1)(A) because . . . [the witness] can comply with the deposition from his home or anywhere else he chooses that is within 100 miles of his residence."); *In re* Newbrook Shipping

After finding that Rule 45(c) does not pose a barrier to compelling remote testimony of a witness under Rule 43(a), these courts generally then apply the "good cause and compelling circumstances" standard in invoking their discretion to allow for remote trial testimony.[22] As the case law develops, there is great disparity on what constitutes "good cause and compelling circumstances."

Some courts find it sufficient that the witness lives far from where the trial is happening.[23] But as the court in *Lea* found, a party's inability to elicit live testimony from a witness outside of the court's subpoena power "occurs all the time and does not present a compelling circumstance" when the party can introduce deposition testimony instead.[24] Other courts have found good cause and compelling circumstances to permit remote testimony where a party withheld information about a witness' whereabouts [25] or where the witness is a key or critical witness to the case and already testified live in a previous bellwether trial.[26]

Many courts that have addressed the issue more recently have done so in the context of a request by a plaintiff to compel live remote testimony of a corporate defendant's current or former employees.[27] In *Chapman*, the court specifically called out the attempted

Corp., 498 F.Supp.3d 807, 816 (D. Md. 2020) ("Given the modification of the deposition notice to provide for a remote deposition over Zoom or other teleconferencing platform, the deposition notice no longer requires GMS or Sharma to travel more than 100 miles (or at all) to comply.").

[22] *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885, 2021 U.S. Dist. LEXIS 121444, 2021 WL 2605957, at *4 (N.D. Fla. May 28, 2021); *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., MDL Docket No. 3:11-MD-2244-K, 2016 WL 9776572, at *1-2 (N.D. Tex. Sept. 20, 2016).

[23] Warner v. Cate, No. 1:12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) (holding that "good cause and compelling circumstances may exist where a significant geographic distance separates the witness from the location of court proceedings").

[24] *Lea*, 2011 WL 13195950, at *2; *see also* Official Comm. of Unsecured Creditors v. Calpers Corp. Partners LLC, No. 1:18-cv-68-NT, 2021 U.S. Dist. LEXIS 135316, at *10 (D. Me. July 20, 2021) (recognizing that "reading deposition transcripts to a jury is not the ideal format for the admission of testimony" but holding that even a "critical" witness who lived beyond the Court's jurisdiction did not warrant the use of contemporaneous video transmission of his trial testimony).

[25] Walsh v. Tara Constr., Inc., No. 19-CV-10369-AK, 2022 U.S. Dist. LEXIS 99318, at *2-4 (D. Mass. June 3, 2022).

[26] *In re Combat*, 2021 U.S. Dist. LEXIS 121444, *16.

[27] *Black Card LLC*, 2020 WL 9812009 (motion to compel live remote testimony of defendants' out of state executives); *Roundtree*, 2014 WL 2480259 (motion to compel Arizona-based corporate deponent to testify in Washington state); *Lea*, 2011 WL 13195950 (motion to compel live remote testimony of four former employees of out of state defendant); *In re Xarelto*, 2017

tactical advantage where the corporate defendant intended to call their out-of-state Chief Operating Officer live, but refused to produce that witness live in plaintiffs' case-in-chief, as factor weighing in favor of allowing live videoconference testimony in plaintiffs' case in chief.[28] The court in *Chapman* permitted the defendant to opt to produce the witness in person in plaintiff's case instead of through live remote testimony, effectively compelling the live appearance of the COO in plaintiff's case-in-chief.

Defendants that have brought motions to quash trial subpoenas for remote testimony have done so both in the district where the action is pending and in districts where they reside. The success of these motions depends largely on the case law in each district on the application and interplay between Rule 43(a) and Rule 45(c).[29] In *U.S. v. $110,000*, the court denied a motion to quash remote testimony filed in district where the witness lived in Illinois for a deposition subpoena issued by a district court in Nebraska. Conversely in *In re Xarelto*, the court denied a motion to quash remote testimony filed where case was pending in Louisiana for former employee witness residing in New Jersey. A comprehensive review of the case law reveals that no court has yet addressed whether a witness must give live remote testimony where there is a successful motion to compel out-of-state remote testimony where the case is pending, but where the witnesses is also successful in moving to quash the subpoena in their home jurisdiction. Counsel should consider the case law in both the jurisdiction where the witness resides and where the case is pending to determine the proper venue for bringing a motion to quash a subpoena for out-of-state remote trial testimony.

V. Compelling Out-of-State Witnesses in MDLs

The most common and perhaps compelling case for "good cause and compelling circumstances" occurs in mass tort and multi-district litigation (MDL) where cases filed nationwide are often consolidated to one jurisdiction; there are multiple and often out-of-state parties involved; and where

U.S. Dist. LEXIS 81047, at *5 (motion to quash trial subpoenas issued by plaintiff in Louisiana to former employee in New Jersey); Chapman v. Tristar Prods., No. 1:16-CV-1114, 2017 U.S. Dist. LEXIS 104344, at *2 n.8 (N.D. Ohio July 6, 2017).

[28] *Chapman*, 2017 U.S. Dist. LEXIS 104344, at *3.

[29] *Compare United States v. $110,000 in U.S. Currency*, 2021 WL 2376019, at *3 (denying motion to quash filed in district where witness lived in Illinois for subpoena issued by a district court in Nebraska) *with In re Xarelto*, 2017 U.S. Dist. LEXIS 81047, at *5 (denying motion to quash filed where case was pending in Louisiana for former employee witness residing in New Jersey).

multiple bellwether trials are expected. These factors heighten the need for a more precise "truth-telling" means not always available through the use of multiple videotaped depositions.[30] Although the very essence of MDLs defies traditional jurisdictional norms, "the need for flexibility in [an] MDL doesn't permit the court to ignore the requirements of the Federal Rules of Civil Procedure."[31]

The court in *In re Vioxx Production Liability Litigation* set forth a five-factor test to determine good cause and compelling circumstances under Rule 43(a), particularly in complex MDL cases. The five factors include: "(1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation."[32] Some district courts have applied this test when deciding whether to allow contemporaneous transmission for out of state non-party witnesses.[33]

VI. Conclusion

The body of case law regarding under what circumstances live video testimony may be used varies greatly and depends largely on the court's interpretation of Rule 45(c). To permit essentially nationwide subpoena power under Rule 45(c) through contemporaneous transmission under Rule 43(a) improperly gives district courts limitless power to compel testimony of witnesses across the United States. The plain text of Rule 43(a) simply permits "contemporaneous transmission from a *different* location" other than in open court

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[30] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 12.334 & n.344; *see also Allen*, 2014 U.S. Dist. LEXIS 2231, at *50-51; *In re Xarelto*, 2017 U.S. Dist. LEXIS 81047, at *5; *In re Epipen*, 2021 U.S. Dist. LEXIS 125939.

[31] *In re EpiPen*, 2021 U.S. Dist. LEXIS 125939, at *32; *see also In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020) ("[T]he requirements of the Civil Rules" in an MDL "'are the same as those for ordinary litigation on an ordinary docket.'" (quoting *In re* Korean Air Lines Co., 642 F.3d 685, 700 (9th Cir. 2011))).

[32] 439 F. Supp.2d 640 (E.D. La. 2006).

[33] *See In re Epipen*, 2021 U.S. Dist. LEXIS 125939; Mullins v. Ethicon, Inc., 2017 WL 532102, at *4 (S.D. W. Va. Feb. 8, 2017) (permitting contemporaneous transmission of testimony where "defendants unquestionably have control of the witnesses because they currently employ [the witnesses]" and both key witnesses); *In re Combat*, 2021 U.S. Dist. LEXIS 121444 at *16 (permitting video transmission of testimony for key witness who testified in prior bellwether trial, but not for another key employees whose video deposition had already been shown in a prior bellwether trial).

where the trial is happening, and Rule 43(a) should not be read to compel testimony from *any* location anywhere. The use of live video transmission should be limited to cases where the witness wishes to appear voluntarily or where the court has jurisdiction over a witness pursuant to Rule 45(c) as a threshold matter, and where good cause and compelling circumstances exist under Rule 43(a). As the committee notes to Rule 43(a) point out, remote trial testimony "cannot be justified by a showing that it is inconvenient for the witness to attend the trial." The fact that a witness lives far from where the case is filed should not be sufficient "good cause" for compelling the live remote testimony of an out of state non-party witness.

But the growing body of case law suggests that compelling remote video transmission of live witness testimony over platforms like Zoom and Skype is likely here to stay, particularly in MDL cases; where the witness is a key or critical witness to the case; where the defendants maintain control over the witness and intend to present him or her live in their case-in-chief; or perhaps, as a small number of cases have found, simply where distance separates the witness from the location of the proceedings. While this change may have advantages to defendants as to other non-party witnesses or plaintiff witnesses who live beyond the court's jurisdiction, the rule will most certainly and consistently be used to target out-of-state corporate non-party witnesses. While modern advances in technology promote the increased use of "live" testimony at trial, these platforms should not be used in a way that circumvents the jurisdictional intent and purpose of Rule 45 to require corporate defendants to prepare and present non-party witnesses for trial over Zoom from any location in the United States. Given the ease and cost-effectiveness of Zoom technology, plaintiffs will be able to create a live Zoom side show at trial of multiple employee witnesses over whom defendants may no longer have control; whom may have little import to the trial; and whom plaintiffs may not have otherwise traditionally incurred the expense of calling. In these instances, video depositions that are properly restricted to the proper scope of testimony – and the scope of Rule 45(c) -- should be the primary means of presenting live testimony.