

PRODUCT LIABILITY

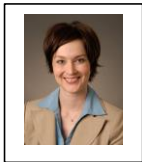
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Can a corporate witness be required to testify live at trial by remote video testimony even if she resides more than 100 miles from the federal courthouse where the trial is taking place? According to a few courts, yes, provided there is "good cause shown in compelling circumstances." This article looks at recent opinions interpreting Federal Rules of Civil Procedure 43 and 45, and provides several strategic considerations for defense counsel.

Satellite Witnesses: Can Corporate Witnesses be Required to Testify Live From Across the Country?

ABOUT THE AUTHORS



Sherry Knutson is a partner in Sidley Austin LLP's Chicago office. Her practice ranges from multi-plaintiff, multi-jurisdiction litigations to single-plaintiff cases. She has proven trial experience in product liability and toxic tort cases, including as co-lead trial counsel for Takeda in the first bellwether case tried in the Illinois *In re Actos* coordinated proceedings, which resulted in a defense verdict. She is Lead Defense Counsel in the Actos and Gadolinium-Based Contrast Agents Coordinated Proceedings in Cook County, and one of the National Coordinating Counsel in Actos. Ms. Knutson's experience has earned her acknowledgement in numerous industry publications, including recognition as a Law360 MVP for 2014, and being included in the 2014 *International Who's Who of Product Liability Defence Lawyers*. She can be reached at sknutson@sidley.com.



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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Can a corporate witness be required to testify live at trial by remote video testimony even if she resides more than 100 miles from the federal courthouse where the trial is taking place? According to a few courts, yes, so long as plaintiffs are able to show “good cause in compelling circumstances.”

A. The Rule: Good Cause Shown in Compelling Circumstances

Federal Rule of Civil Procedure 45, which sets forth the manner and circumstances in which parties may secure live testimony from trial witnesses, provides that “[a] subpoena may command a person to attend a trial . . . only” if the trial court is “within 100 miles of . . . where the person resides, is employed, or regularly transacts business in person.” Rule 45(c)(1)(A). If a witness is outside the trial court’s subpoena power, a party may, in lieu of live testimony, use the deposition testimony of a witness instead. Fed. R. Civ. P. 32(a)(4)(B).

Plaintiffs have recently attempted to circumvent these rules by asking courts to invoke a narrow and rarely-used procedural mechanism set forth in Rule 43(a). Rule 43(a) provides that trial testimony typically must be given in open court, but that “[f]or **good cause shown in compelling circumstances** and with appropriate safeguards, the court **may** permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. P. 43(a) (emphasis added). In support of their position, plaintiffs rely upon Rule 45 advisory committee’s notes, which state “[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).” Plaintiffs interpret this commentary to mean that the Rule 45 geographical limitations apply to the remote location; not the place of trial. (2013 amendment)

In the multidistrict litigation (“MDL”) context, plaintiffs argue that MDL proceedings impose structural barriers to compelling attendance of company witnesses at trial, and that it unfairly disadvantages plaintiffs whose case may rely on the testimony of witnesses from other locations. Plaintiffs also argue that live testimony is the “gold standard” and that it alone allows for the jury to assess the witness’s truthfulness.

Plaintiffs have had varying degrees of success using Rule 43 to compel live testimony by video, even though Rules 43 and 45 do not appear to authorize such power.

B. Using Rule 43 and Rule 45 to Compel Live Testimony

In a January 2014 memorandum and order, the court in the *Actos Products Liability Litigation* cited Federal Rules 43 and 45 to compel witnesses residing more than 100 miles away to testify live at trial by video transmission from a local courthouse. *In re Actos Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, 2014 WL 107153 (W.D. La. Jan. 8, 2014) (“Actos Opinion”). There, the plaintiffs argued the court had authority pursuant to Rule 43 to compel live contemporaneous transmission of witnesses who could not

otherwise be compelled to attend trial. See Pls. Mem. in Support of Mot. to Allow Live Trial Testimony via Contemporaneous Transmission [D.E. 3786-1] in No. 6:11-md-02299 (W.D. La.). Plaintiffs argued that the need for live satellite testimony was “heightened” in the MDL context, and that videoconferencing would permit the “fact-finder to more accurately evaluate the witnesses’ truthfulness.” *Id.* at 2-4. Plaintiffs also argued that the benefits of in-person testimony were lost in video depositions. *Id.* Although the court was unable to find any controlling jurisprudence on the issue, the court authorized testimony by satellite at trial for more than 15 witnesses. *Actos* Opinion at *1 n.2, *8. In issuing its ruling, the court in *Actos* emphasized that this case was the first bellwether trial in a MDL proceeding, and that plaintiffs had not been able to obtain the “necessary video trial depositions of a large number of defense witnesses.” *Id.* at *6. The court also expressed its preference for the use of live trial testimony. *Id.* at *7.

The potential power of this interpretation of Rules 43 and 45 has not been lost on plaintiffs’ counsel, as evidenced by three recent cases:

- In *Roundtree v. Chase Bank USA, N.A.*, a case involving contested credit card charges, the plaintiff moved the court to apply Rules 43 and 45 to compel the defendant’s unwilling corporate deponent to testify at trial via live video link. *Roundtree v. Chase Bank USA, N.A.*, No. 13-239 MJP, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014). The court denied plaintiff’s

request, finding that Rule 43(a) “presupposes a witness willing or compelled to testify at trial.” *Id.* at *2 (emphasis added). As the corporate deponent was not willing to testify at trial, and was outside the court’s subpoena power, the court held there was “no reason . . . to consider whether th[e] situation merits the exceptional use of video transmission of testimony.” *Id.*

- In *In re: Nexium Antitrust Litigation*, plaintiffs subpoenaed six company employees who were outside of the Rule 45 subpoena power to testify via videoconference. See *In re: Nexium (Esomeprazole Magnesium) Antitrust Litig.*, No. 2:14-mc-00225-PD, slip op. at 1 (E.D. Pa. Oct. 3, 2014). The defendant moved to quash the subpoenas, arguing that plaintiffs had not shown “good cause in compelling circumstances” as required by Rule 43(a). *Id.* The court in *Nexium* agreed with respect to those employees whose video depositions had already been taken. *Id.* But, the court found that plaintiffs had met their Rule 43(a) burden with respect to one employee who had not been deposed, finding that plaintiffs’ “proposed areas of inquiry . . . appear to go to the central issues in this case.” *Id.* at 2.
- Finally, in *In re Prograf Antitrust Litigation*, plaintiffs moved to compel the trial testimony of a current and former company witness by live

contemporaneous video transmission from a Chicago federal courthouse, relying upon the Advisory Committee Notes to Rule 45. See *In re Prograf Antitrust Litig.*, No. 1:11-md-02242-RWZ, 2014 WL 7641156 at *5-6 (D. Mass. Dec. 23, 2014). The court found that the plaintiffs had shown neither good cause nor compelling circumstances, as required by Rule 43. *Id.* The court emphasized that plaintiffs took video depositions of both witnesses, and that it was not unforeseen that the witnesses were outside the court's trial subpoena power. *Id.*

C. Considerations for Future Cases

Although the *Actos* Opinion appears to have gone beyond the limits of what Rule 43 intended, at least one court has allowed the live contemporaneous testimony of a witness who resided outside of the court's Rule 45 subpoena power. See *In re: Nexium, supra*. Whether other courts will agree with the *Actos* ruling remains to be seen. In the meantime, there are several considerations defendants should keep in mind with respect to Rule 43:

Videotaped Depositions. The Advisory Committee Notes to Rule 43 unambiguously express a preference for videotaped depositions over remote video transmissions: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena . . .

Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying." Fed. R. Civ. P. 43 advisory committee's notes (1996 amendment). "[G]ood cause shown in compelling circumstances" may turn on whether or not the parties videotaped the deposition. See, e.g., *In re: Nexium Antitrust Litig.*, No. 2:14-mc-00225-PD (E.D. Pa.) [D.E. 18] at 1. See also *Union Pac. R.R. Co. v. Beemac Trucking, LLC*, No. 8:11CV8, 2013 WL 6795031, at *1 (D. Neb. Dec. 20, 2013) (rejecting plaintiff's Rule 43(a) request for remote testimony because "[video] deposition testimony is sufficient for trial").

Unforeseen Circumstances. The 1996 Advisory Committee Notes to Rule 43 explain what constitutes "good cause in compelling circumstances," focusing on the *unforeseen* nature of the unavailability: "The most persuasive showings . . . are most 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." Fed. R. Civ. P. 43(a) advisory committee's notes (1996 amendment) (emphasis added). The Advisory Committee expressly warned that "[o]ther possible justifications for remote transmission must be approached cautiously," *id.*, and that "[a] party *who could reasonably foresee the circumstances* offered to justify transmission of testimony will have special difficulty in [making the requisite] showing," *id.* In denying plaintiffs' motion, the court in *Prograf* noted that it was not unforeseen that the witnesses were beyond the court's subpoena power. In fact, during depositions plaintiffs'

counsel had repeatedly instructed the witness to explain various documents “to the jury,” suggesting that counsel intended to play the videotaped deposition during trial.

A “Willing” Witness. Although not explicit in Rule 43, the court in *Roundtree* made clear that Rule 43 “presupposes a witness willing or compelled to testify at trial.” *Roundtree*, 2014 WL 2480259, at *2. Presumably then, a corporate defendant outside of the court’s Rule 45 subpoena power must agree to testify by video conference. Of course, not all courts will be receptive to an argument that a corporate employee is an “unwilling witness.” Defense counsel should be prepared to provide an explanation for his or her unavailability even if it is not required by the Federal rules.

Reserving Right to Quash. Finally, under the revised rules, the “court for the district where compliance is required” has jurisdiction to quash or modify subpoenas. See Fed. R. Civ. P. 45(d)(3) (2014). The plain text of Rule 45(f) imbues the discretion to transfer subpoena-

related motions with the district court where compliance is required. Fed. R. Civ. P. 45(f) (“When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances . . .”). So, even if a court granted a motion to compel live contemporaneous testimony, the power to quash a subpoena would still reside in the state where compliance is required, providing another opportunity to contest the motion. Moreover, absent consent to transfer, the “proponent of the transfer bears the burden of showing that [exceptional] circumstances are present.” Fed. R. Civ. P. 45 advisory committee’s notes (2013 amendment).

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