

PRODUCT LIABILITY

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A growing number of courts overseeing product liability multi-district litigation (MDLs) have granted motions to allow live satellite testimony of a company witness outside of the court's Rule 45 subpoena power during bellwether trials. This article is the second in a two-part series on such trend, and will focus on strategic considerations to best position defendants regarding this issue before and during trial.

Satellite Witnesses Part II: Strategic Considerations Before and During Trial

ABOUT THE AUTHOR



Sherry Knutson is a trial lawyer with 20 years of experience in product liability and toxic tort cases, with an emphasis on defending pharmaceutical and medical device companies. She has served as national coordinating counsel in one of the largest pharmaceutical mass torts and as lead counsel in multiple coordinated proceedings involving pharmaceuticals in Chicago. Sherry has tried cases to verdict in Illinois, Wisconsin, New Jersey, and West Virginia. Clients describe Sherry as “an exceptional attorney” with “a knack for understanding very complex scientific and medical issues and making them easy to understand to both clients and a layperson on the jury.” Ranked in *Chambers USA 2017*, clients and peers “think very, very highly” of Sherry and her work in defending pharmaceutical clients in mass torts. Sherry is a Fellow of the International Society of Barristers, and she was named *Law360's* 2014 Product Liability MVP. She is also listed in *Who's Who Legal*, *The Legal 500*, and *LMG Life Sciences*. She can be reached at Sherry.Knutson@tuckerellis.com.

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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A growing number of courts overseeing product liability multi-district litigation (MDLs) have granted motions to allow live satellite testimony of a company witness outside of the court's Rule 45 subpoena power during bellwether trials, including in the *Xarelto*, *Ethicon Mesh*,¹ *Pinnacle*, and *Actos* MDLs. This is the second in a two-part series on such trend.² Part one summarized recent legal developments. Part two will focus on strategic considerations to best position defendants regarding this issue before and during trial.

Considerations before Trial

Rule 43(a) allows for live testimony via video transmission for "good cause in compelling circumstances and with appropriate safeguards." Fed. R. Civ. P. 43(a). However, the Advisory Committee Notes to Rule 43 express a clear preference for videotaped depositions over remote satellite testimony of a witness who is outside of the court's subpoena power. Fed. R. Civ. P. 43 Advisory Committee Notes (1996 amendment).

Defendants therefore can argue that good cause in compelling circumstances has not been shown when plaintiff videotaped a deposition of the company witness at issue. In other words, because an available video deposition is sufficient for trial and in fact preferred according to the Committee Notes, plaintiff cannot meet the narrow exception set forth in Rule 43(a).

In addition, a videotaped deposition will allow the jury to see the witnesses' reactions to questions. This can be used to try to rebut plaintiff's argument that live testimony provides the jury with an enhanced opportunity to assess credibility.

Further, counsel should consider conducting a direct examination during the deposition. Securing testimony from your witness on a broad range of topics – and allowing the opportunity for counsel to conduct a cross-examination – may help to rebut any argument that the deposition did not cover all of the relevant topics.

During motion practice, defendant should consider arguing that Rule 43(a) is intended for unexpected and unforeseen situations of witness absence. As a result, a showing of compelling circumstances cannot be met when it is well known and expected that the witness is outside the court's Rule 45 subpoena power. Satellite testimony pursuant to Rule 43(a) is meant to be an exception and not the rule, so it should not be interpreted to apply whenever a company witness is outside subpoena power in an MDL bellwether trial.

It also is essential to understand the practices of your judge which may affect her view of the equities. In the *Actos* MDL, the court believed that the parties were entitled to trial depositions in addition to discovery depositions. When, for various reasons,

¹ The trial in which this ruling was made was continued, so the satellite witnesses did not testify.

² See IADC Product Liability Committee Newsletter, May 2015-Second Edition and August 2017, for initial reporting on this issue.

such trial depositions of company witnesses were not conducted before the bellwether trial, the court used that factor to rationalize the need for satellite testimony. *In re Actos Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, 2014 WL 107153, *6 (W.D. La. Jan. 8, 2014) (emphasizing the plaintiffs had not been able to obtain a large number of video trial depositions of defense witnesses). A judge who shares this unique view may be more inclined to conclude a second bite at the apple is always allowed in one form or another, whether via a trial deposition, satellite testimony, or live testimony.

Trial Strategy

If your court allows satellite testimony, consider preparing your witness with a mock cross via live video so that your witness is more comfortable with the technology and procedure. For example, some judges require the witness to sit in the transmission room without a lawyer and the objecting attorney to be live in the courtroom. Practice can help ease nerves about such an unusual procedure

Experience with satellite testimony at trial is mixed at best for many reasons. First, there is always the potential for delayed signals, which can break up the flow of testimony, thereby rendering the cross-examination less impactful. For instance, in the *Actos* bellwether trial, 15 former and current company employees were subpoenaed for live video testimony. After calling their first satellite witness, plaintiff's counsel abandoned the procedure. It appeared that he found slight delays in the feed and the

inability to use demonstratives rendered his style ineffective. The set-up of the courtroom can also render the procedure awkward, such as requiring the plaintiff's counsel to stand with her back to the jury in order to look at the witness through the monitor.

Second, witnesses may feel less pressure when testifying by video versus live in the courtroom. For instance, cross-examination via video may not seem as intimidating as it can be in person. Eye contact also is less effective through a screen.

Third, some courts have allowed defendant to conduct their direct examination via satellite immediately after the cross. This can be beneficial by allowing introduction of defense themes in plaintiff's case.

Finally, no matter how well the technology works, jurors prefer live witnesses. One of the easiest ways to lull jurors to sleep is to dim the lights and play a video. Testifying live by video can have a similar effect. Although plaintiff's counsel may view it as more effective than an edited videotape, ultimately it is not the same as live testimony in the courtroom.

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