

EFFECTIVE USE OF REMOTE TECHNOLOGY IN LITIGATION AND
ARBITRATION

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Introduction

The COVID-19 pandemic has wreaked havoc on all facets of our lives and has forced us to find alternative methods of getting our jobs done. The legal profession is an essential service and sustained operation of our legal system is crucial for our society and commerce, including the resolution of disputes by courts. When the pandemic began, many courts stayed matters and continued trial settings to protect the health and safety of participants in the judicial system with the assumption that operations would return to normal within a short period of time. But the false optimism faded into the harsh reality that the pandemic will be with us for a while and legal disputes still need to be resolved.

Many courts have begun using new technology to allow motions and evidentiary hearing to be presented remotely for the safety of the court personnel, attorneys, litigants and jurors. While technology has long been essential for conduct of trials in the courtroom, the use of technology for the conduct of a trial remotely without the use of a courtroom is a new phenomenon. Hence the pandemic has spawned issues of authority to conduct remote hearings as well as issues of fairness and prejudice relating to the conduct of remote hearings.

We address some of these issues below and how courts have dealt with these issues during the pandemic.

Authority for Remote Hearings and Testimony and Potential Problems

Federal Rule of Civil Procedure 43(a) provides that, “[a]t trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.” Fed. R. Civ. P. 43(a). Rule 43(a) further provides that, “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” *Id.* Rule 43(a)’s narrow exception to the underlying requirement that trial occur in open court typically applies to permit remote testimony from select witnesses who cannot attend trial due to “accident or illness,” “would be endangered or made uncomfortable by appearing in a courtroom,” or are located faraway. *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (collecting cases).

Courts have recognized that trial testimony taken by videoconference poses challenges in evaluating the credibility and persuasiveness of witnesses, as well as conducting cross-examination. *See, e.g., Rusu v. U.S. I.N.S.*, 296 F.3d 316, 322 (4th Cir. 2002) (“[V]ideo conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor.”); *Teller v. Helbrans*, No. 19-cv-3172, 2019 WL 3975555, at *2 (E.D.N.Y. Aug. 21, 2019) (Bulsara, M.J.) (“[C]onducting cross-examination at a trial via video of a party is near impossible, unless Petitioner is given full advance notice of all documents to be used during such an inquiry. That is highly unorthodox and threatens to prejudice Respondent.”). Thus, remote testimony is permitted only with “safeguards” that are

“appropriate” in light of the relevant witness’s testimony and evidence. *See, e.g., Niemeyer v. Ford Motor Co.*, No. 09-cv-2091, 2012 WL 5199145, at *3 (D. Nev. Oct. 18, 2012) (noting that “Rule 43(a) requires ‘appropriate safeguards’ and none have been provided,” where “testimony via video transmission will severely impede defendants’ ability to cross examine a medical witness using important documentary evidence and medical records”).

Remote trials also present issues of a court’s ability to assess witness testimony from afar and to evaluate complex evidence remotely. The parties’ ability to cross-examine witnesses, and the ability to discern who is credible and who is speculating, can be significantly affected when witness, questioner, and factfinder are only connected by a video feed. Many critically important physical and emotional cues can be lost from the lack of in-person interaction and the nature of the video feed, which is usually nothing more than video shot of a person’s head. *See* Fed. R. Civ. P. 43 advisory committee’s note (1996 amendment) (“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 truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.”); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (“[V]irtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”).

Remote testimony can also limit the ability to effectively cross-examine witnesses. A witness facing cross-examination typically does not know in advance which documents will be used by the cross-examining attorney. When tried remotely, documents to be used on cross must be sent to the witness and counsel in advance. But that early notice of documents provides a “road map” to the adverse witness, thereby diminishing the effectiveness of the cross-examination. *See Teller*, 2019 WL 3975555, at *2 (“[C]onducting cross-examination at a trial via video of a party is near impossible, unless Petitioner is given full advance notice of all documents to be used during such an inquiry. That is highly unorthodox and threatens to prejudice Respondent.”). The only safeguard that can remedy this potential prejudice is to require that only electronic versions of cross-examination exhibits be sent to the adverse witness one-by-one as introduced.

A trial conducted remotely, coupled with audio availability to the public, can also affect the ability to police the Rule of Sequestration, under Federal Rule of Evidence 615. When “the Rule” is invoked in a typical courtroom setting, witnesses are either present or not present in the Court, with counsel for both sides monitoring courtroom observers for compliance. A remote trial has no such adequate safeguard to protect the integrity of the process.

In addition, the quality of the video feed on Zoom, WebEx or any other videoconferencing platform can fluctuate depending on factors such as the strength and stability of the court’s, witnesses’ and parties’ internet connections (which can fluctuate outside of their control for any number of reasons, including the number of internet users in a geographic area at any given point in time). This is particularly true for witnesses appearing from their homes rather than more infrastructure-robust professional settings. Even with the highest quality internet services available for in-home use, internet bandwidth and related issues can occur in any given home during the trial day because of the household demands from family needing internet for remote schooling for their children, dual-income families who must also be working remotely

during the entire trial day, and the simple periodic glitches that are routine with daily Internet use across a provider's network. These potential problems are exacerbated with nearly the entire country working or learning remotely during the current pandemic.

Rule 43(a) also requires "compelling circumstances" to permit a remote witness's testimony at trial. The COVID-19 pandemic may establish such compelling circumstances, since virtually all of the attorneys and witnesses involved in a case will likely be under stay-at-home orders and thus unable to meet in person. Although videoconferencing technology can facilitate communication between attorneys and witnesses, however, it is not a substitute for intensive, face-to-face preparation required for trial, especially a highly-complex case. *Cf. United States v. Davis*, No. ELH-20-09, 2020 WL 1529158, at *7 (D. Md. Mar. 30, 2020) (noting that Zoom "is no substitute for a face-to-face, in person, contact meeting between an attorney and his client").

How Courts have Addressed Potential Problems with Remote Trials

The following cases demonstrate how courts have addressed requests for and objections to remote trials.

***Argonaut Ins. Co. v. Manetta Enters.*, 2020 U.S. Dist. LEXIS 103625; 2020 WL 3104033 (E.D. N.Y. June 11, 2020)**

In *Argonaut* the court allowed a bench trial for damages in a breach of contract matter to proceed under Rule 43(a), finding "good cause and compelling circumstances" because of COVID-19. The court determined that using contemporaneous remote testimony was preferable to rescheduling the trial because of a potential backlog of criminal cases once courthouses reopened. The court rejected arguments relating to technology needs and potential glitches because of advancements in the software used. The court also rejected arguments that the lawyers would not be able to properly meet with their witnesses to prepare them for trial or properly cross-examine other witnesses at trial and concluded that technology allowed for sufficient interaction. The court noted that the format would not favor one party over the other.

***Guardant Health, Inc. v. Found. Med., Inc.*, 2020 U.S. Dist. LEXIS 192477; 2020 WL 6120186 (D. Del. October 16, 2020)**

In *Guardant*, the court set forth procedures for a jury trial in a patent infringement case where all witness would testify remotely. The court found good cause for the remote testimony under Rule 43(a) because of COVID-19 and concluded that skilled counsel for each party would be able adequately cross-examine witnesses. The court limited the number of attorneys and other participants at trial for each party and also allowed attorney participation remotely. The court determined that it would be able to seat a fair jury from a cross-section of the community and expressed confidence that the jury would be able to observe the witnesses to assess their credibility.

***Vasquez v. City of Idaho Falls*, 2020 U.S. LEXIS 65735 (D. Idaho April 13, 2020)**

In *Vasquez*, the court allowed a witness to testify remotely in a race discrimination case. Although the trial was scheduled to be conducted in-person, the court cited Rule 43(a) as authority to allow a 73-year old diabetic man from Florida to testify remotely rather than travel

to Idaho to testify live. The court concluded that his vulnerability to COVID-19 constituted good cause to allow him to testify remotely. The court allowed the parties to decide whether the witness would testify live remotely or by video deposition.

***ResCap Liquidating Trust v. Primary Residential Mortg., Inc.*, 444 F. Supp. 3d 967 (D. Minn. 2020)**

In *ResCap*, the court conducted the final two days of a bench trial remotely after one of the trial counsel contracted COVID-19. One of the parties objected to the remote testimony as unfair, arguing that their witness would be hindered in his ability to convey his testimony in a videoconference. The court recognized that in-person live testimony is preferable but noted that advances in technology minimized the difference between remote testimony and in-person testimony. The court found that remote testimony was in the best interests of the witnesses and parties and concluded that the benefits of the contemporaneous remote testimony outweighed an attempt to reschedule the trial.

***Gould Elecs. Inc. v. Livingston Cty. Rd. Comm’n*, 2020 U.S. Dist. LEXIS 118236 (E.D. Mich. June 30, 2020)**

In *Gould*, in an environmental law bench trial, the court rejected arguments that allowing contemporaneous remote testimony would violate due process where the party could not meaningfully cross-examine witnesses at trial. The court found that Rule 43(a) allowed remote testimony and noted that depositions can be used in lieu of live testimony in certain circumstances. The court rejected arguments that remote testimony would impair the ability to convey complex testimony and that glitches in technology could occur. The court also noted that even if the trial were being conducted in-person, it was likely that several of the witnesses would have to testify remotely because of health concerns and COVID-19 travel restrictions.

***Auritt v. Auritt*, 2020 U.S. Dist LEXIS 152582 (D. Maine August 24, 2020)**

In *Auritt*, the court declined to conduct a trademark infringement bench trial where the defendant was proceeding pro se. The court concluded the matter was not appropriate for a remote trial noting it had not yet conducted a remote trial and citing potential difficulty in conducting a remote trial where the defendant was proceeding pro se, would be a witness, and had demonstrated difficulty understanding court rules.

Conclusion

Most courts have embraced the use of contemporaneous remote testimony in civil bench trials and some courts have proceeded with civil jury trials with all of the testimony presented remotely. Once the pandemic has subsided, most proceedings will be handled in-person in a courtroom. But because of the pandemic we have learned that trials and other proceedings can be handled remotely. We anticipate that even with in-person trials there will be more contemporaneous remote testimony in trials for the convenience of witnesses and to reduce costs for the litigants.