# Why Widespread Use Of Live Video Testimony Is Not Justified

By **Geoffrey Wyatt, Jordan Schwartz and Zachary Martin** (June 4, 2018, 10:48 AM EDT)

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In 2013, the U.S. Supreme Court approved a change to Federal Rule of Civil Procedure 45. The amendment confirms that a district court may not compel any witness — whether a party or not — to attend a trial held more than 100 miles from, and outside the state of, their home or workplace.[1] As commentary to the amendment explains, the change was intended to resolve disagreement among district courts regarding the extent of their powers to compel witnesses to testify, expressly disagreeing with the broader view that some courts had taken, under which parties or their officers could be compelled to travel across the country even if they did not have any residential or employment connection to the forum.

Left unable to compel distant party witnesses to testify in-person at trial, courts have begun to require such witnesses to testify "at trial" through contemporaneous video transmission.[2] On a number of occasions, courts have employed this scheme at the request of the plaintiffs' counsel seeking testimony from the defendant's employees in mass tort cases, and especially in "bellwether" trials — trials in which a single case or small group of cases are tried in order to provide the parties more information with which to settle a large number of similar ones.[3] Although some courts embrace this novel procedure, others faced with similar circumstances continue to employ the traditional practice: inviting the parties to prepare a videotaped deposition for the express purpose of being later shown at trial. Absent guidance from the appellate courts, these contrasting approaches continue to prove a point of contention in bellwether trials. For example, last year, Judge Eldon Fallon required contemporaneous video testimony by a drug company's senior employee despite the defendant's objection in In re Xarelto.[4]

The preference of some courts for contemporaneous video apparently stems from the desire to mimic in-court testimony as nearly as possible. Though this may be a worthy goal, the tried-and-true video deposition should be preferred for at least four reasons. First, allowing a judge to compel live video testimony at trial from anyone anywhere in the country vitiates the carefully crafted geographic limits on the court's subpoena power. Second, even in situations where the court has the authority to compel live video testimony, notes by the Advisory Committee on Rules of Civil Procedure state explicitly that videotaped depositions are the "superior" option. Third, a prerecorded video

deposition spares the witness the burden of giving the same testimony time after time in multiple cases sharing similar facts. Fourth and finally, use of live video testimony provides the party calling the remote witness multiple unwarranted strategic advantages.

We elaborate on each of these points below.

First, the court simply lacks the authority to compel a witness located beyond its subpoena power to testify at trial, whether that testimony is by video or in person. Rule 45 provides that a "subpoena may command a person to attend trial ... only ... within 100 miles of where the person resides, is employed, or regularly transacts business; or" in certain circumstances anywhere "within the state where the person resides, is employed, or regularly transacts business."[5] As mentioned, the rule was revised in 2013 to make clear it applies to all witnesses — whether parties or nonparties.[6] Rule 43 does not provide a basis for the court to ignore the limitations and to extend its limited subpoena power through the "back door."[7] To the contrary, subpoenas for live video testimony under Rule 43 are subject to the same limits as any other trial subpoena.[8]

Second, even as to those witnesses who live or work within the territorial limits of the court's subpoena power, the advisory committee notes expressly direct courts to use videotaped depositions in place of live video testimony, whenever feasible. When Rule 43 was amended to provide for contemporaneous video in exceptional circumstances, the committee cautioned, "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who cannot attend trial."[9] This is not to say that live video testimony has no purpose, but that purpose is limited. As the committee explained, it is appropriate when the witness' inability to appear at trial could not have been predicted beforehand, and therefore no video deposition, or perhaps no deposition at all, has been taken. In such a case, contemporaneous video functions as a last resort; the best that can be said is that "it may be better than an attempt to reschedule the trial."[10]

The clear admonition in the advisory committee notes may not be lightly disregarded. The notes must be voted on and approved in the same manner as the rules themselves — first by the advisory committee, then by the standing committee, then by the Judicial Conference, and finally by the U.S. Supreme Court. Like the rules, the notes are subject to congressional veto.[11] As such, the notes "are nearly universally accorded great weight in interpreting the" rules.[12] Where, as here, they provide so clear an answer, there is simply no reason for a judge to substitute his or her judgment for the careful consideration of the rules' drafters.

Third, reflexive resort to contemporaneous transmission rather than depositions imposes significant burdens on witnesses. A videotaped deposition need only be taken once, and can be replayed at multiple trials. On the other hand, in complex mass tort cases, where many trials may require testimony from the same witnesses, use of contemporaneous video would require certain witnesses to provide essentially the same testimony time after time. Many would have time left to do little else. Thus, while courts sometimes contend that the complexity of a litigation justifies contemporaneous video,[13] in fact, the more complex the litigation, the more compelling the argument against live video testimony. Notably, the burdens of contemporaneous video will often be borne by the defendants alone, and in particular by senior executives whose schedules are least likely to be accommodating of busy trial schedules. In the mass tort context, with many cases alleging a single course of conduct by a defendant, it is likely to be the defendant — or its employees — that possesses the type of information equally pertinent to all cases.

Fourth, the option to use live video testimony provides at least two unwarranted strategic advantages to the calling party — usually the plaintiff. Most obviously, it provides that party with two bites at the apple. If counsel decides that a prerecorded deposition proved persuasive, he or she can decline to subpoena a witness to appear for an additional round

of contemporaneous testimony. On the other hand, if the witness did not testify as counsel was hoping at the deposition, the lawyer can take a mulligan. By allowing a party repeatedly to cherry-pick the most favorable version of witness testimony, the fact-finder is left with a systematically biased look at the true state of the evidence.

In addition, contemporaneous video testimony physically separates counsel from the witness and therefore prevents counsel from handling the witness documents — often the most relevant evidence in a complex civil case. This is no mere logistical hiccup; again it systematically favors the calling party. The witness will have prepared for direct examination, probably with examining counsel, and can have the relevant documents at the ready when he or she needs them. As to cross-examination, on the other hand, neither the cross-examining counsel nor the witness "will ... know in advance which documents or records are relevant" "[d]ue to the dynamic nature of trial."[14] Cross-examining counsel will, at best, be left to provide the witness with every conceivably relevant document, and ask him or her to rummage through them all in responding to each question.

Despite the clear command of the rules, and the numerous disadvantages of contemporaneous video testimony, well-meaning courts regularly order such testimony, believing that it "most closely approximates live testimony."[15] But the rules do not prefer live testimony in whatever form; rather, they expressly prefer live in-person testimony specifically. Specifically, the drafters believed that the "ceremony of trial" would make a witness more likely to tell the truth, and believed that the fact-finder could better "judge the demeanor of the witness face-to-face."[16] A witness sitting in front of a video camera hundreds of miles from judge or jury is unlikely to be any more impressed by the "ceremony" of the occasion merely because the video is played contemporaneously rather than at some later date. And the fact-finder's ability to judge demeanor from a video screen does not depend on whether the video is live or recorded.

In short, despite the partiality some courts have shown to live video, it provides no advantages — and several disadvantages — over the tried-and-true method of video depositions. More importantly, requiring live video testimony at trial aggrandizes the court's subpoena power beyond the limits prescribed by Rule 45, and it flies in the face of the advisory committee's express preferences as articulated in the notes to Rule 43. Except where unforeseen circumstances render it the only option, courts should avoid relying on it.

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***Disclosure: The authors are counsel for the defendants in the ongoing DePuy Pinnacle litigation cited in this article.***



[1] Fed R. Civ. P. 45(c)(1).

[2] See Fed. R. Civ. P. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.").

[3] See, e.g., In re DePuy Orthopaedics Inc. Pinnacle Hip Implant Prods. Liab. Litig., No. 3:11-MD-2244K, 2016 WL 9776572 (N.D. Tex. Sept. 20, 2016); In re Actos (Pioglitazone)

Prods. Liab. Litig., MDL No. 6:11-md-2299, 2014 WL 107153 (W.D. La. Jan. 8, 2014).

[4] In re Xarelto (Rivaroxaban Prod. Liab. Litig., No. MDL 2592, 2017 WL 2311719 (E.D. La. May, 26, 2017).

[5] Fed. R. Civ. P. 45(c)(1).

[6] See id. advisory committee's note to 2013 amendment.

[7] Rheumatology Diagnostics Lab. Inc. v. Aetna, Inc., No. 12-cv-058470-WHO, 2015 U.S. Dist. LEXIS 92776, at *20-21 (N.D. Cal. July 26, 2015).

[8] See Fed. R. Civ. P. 43 advisory committee's notes to 2013 amendment (Rule 43 subpoenas limited to testimony given in a "place described in Rule 45(c)(1)").

[9] Fed. R. Civ. P. 43 advisory committee's notes to 1996 amendments.

[10] Id.

[11] See Catherine T. Struve, The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure, 150 U. Pa. L. Rev. 1099, 1113-14 (2002).

[12] Lizarazo v. Miami-Dade Corrections and Rehabilitation Dep't, 878 F.3d 1008, 1011 (11th Cir. 2017).

[13] See, e.g., DePuy Pinnacle, 2016 WL 9776572, at *1; In re Vioxx Prods. Liab. Litig., 439 F. Supp. 2d 640, 643 (E.D. La. 2006) (one of five factors).

[14] Niemeyer v. Ford Motor Co., No. 2:09-CV-2091 JCM (PAL), 2012 WL 5199145, at *3 (D. Nev. Oct. 18, 2012) (denying motion for contemporaneous video testimony in part due to inability to cross-examine with documents).

[15] See, e.g., In re Actos, 2014 WL 107153, at *6.

[16] Fed. R. Civ. P. 43 advisory committee's note to 1996 amendments.