

Litigating in the Age of COVID-19

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In the wake of the COVID-19 pandemic, courts and litigants have been forced to quickly adapt to unprecedented and ever-changing circumstances. One of the primary difficulties associated with the COVID-19 pandemic and faced by all sectors of society is the prohibition of large gatherings and person-to-person contact. Because traditional court proceedings require in-person gatherings—particularly jury trials where the public and the press are generally entitled to attend—many cases have suffered delays since the implementation of mandatory shelter in place orders and declarations of judicial emergencies across the country. In response, courts are implementing measures that will enable those cases to move forward. One of those measures is the use of remote video testimony. While the need to utilize remote video testimony in lieu of in-person testimony is paramount now, that need may persist as the long-term effects of the COVID-19 pandemic remain uncertain. Even when widespread shelter-in-place orders or judicial emergency orders are lifted and states begin to re-open, sensitive segments of the population will likely be unable to risk exposure by participating in public events or gatherings, such as court proceedings. Litigants should develop strategies now to prepare for the possibility of remote video testimony in their upcoming trials or even remote trials themselves.

While the COVID-19 pandemic has highlighted the need for alternatives to in-court testimony, the concept of remote video testimony is not new. In fact, legal mechanisms were put in place well prior to the pandemic that permit federal courts—and many state courts—to implement such solutions when the need arises. Technological advancements have made that endeavor easier than ever. In spite of, or perhaps because of, the COVID-19 pandemic, courts and litigants have an opportunity to simplify the presentation of in-court testimony while maintaining the momentum of their active caseloads and reaching timely resolution of their disputes. Nonetheless, that opportunity comes with risks as well as advantages, and potential constitutional analysis, which litigants must be prepared to evaluate when deciding whether to petition the court for permission to present virtual testimony or conduct remote trials.

In federal court, the use of remote video testimony at trial is governed by Federal Rule of Civil Procedure 43(a) (“Rule 43(a)”). Under Rule 43(a), “witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, [the Federal Rules of Civil Procedure], or other rules adopted by the Supreme Court provide otherwise. 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.” As evidenced by the language of the rule, the general presumption is that witnesses will present their testimony in-person in the courtroom. And after all, that is one of the hallmarks of the American justice system. As set forth by Rule 43(a), in order to justify the presentation of testimony via remote means such as video, the proponent of the video testimony must establish “good cause” and “compelling circumstances” and show that “appropriate safeguards” will be taken to preserve the veracity of the witness’ testimony.

The drafters of Rule 43(a) explained that remote video testimony “cannot be justified merely by showing that it is inconvenient for the witness to attend the trial” and advised 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.” *Fed. R. Civ. Pro. 43(a), Advisory Committee Note*. However, the drafters cautioned that “[a] party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.” *Id.* As to safeguards, the drafters cautioned that “[s]afeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness” and that “[a]ccurate transmission likewise must be assured.” *Id.*

Federal courts generally adhere to the drafters’ guidance when deciding whether to permit remote video testimony in lieu of live, in-court testimony. In *Mendoza v. Pascual*, No. CV 615-40, 2015 WL 13650770, at *1 (S.D. Ga. May 5, 2015), the United States District Court for the Southern District of Georgia permitted the petitioner, a resident of Mexico, to attend by videoconference all future hearings concerning the return of her minor child. In support of her request, the petitioner showed that she applied for and received a passport for the purpose of attending hearings but was denied a border crossing card and a visa. *Id.* The Court held that petitioner’s demonstrated efforts and proven inability to obtain a visa or other official permission to enter the United States satisfied the “good cause” standard. *Id.* at *2. The Court further held that petitioner had shown that “compelling circumstances” exist because she would be unable to vindicate a fundamental right—her parental rights—without testifying before the Court by videoconference. *Id.* However, per the advisory committee’s notes, the Court also required that petitioner provide assurances of appropriate safeguards by supplementing the record with information regarding the videoconferencing method she planned to use and the location from which she planned to testify; by providing any exhibits to which she planned to refer in advance; and by securing the services of a person authorized to administer an oath prior to her testimony. *Id.* See also *Fuentes-Rangel v. Woodman*, No. 2:14-CV-00005-WCO, 2014 WL 12656211, at *1 (N.D. Ga. May 6, 2014) (permitting petitioner to testify in a child custody hearing via video when she was unable to obtain a visa prior to the date of the hearing). By contrast, the United States District Court for the Northern District of Georgia denied a petitioner’s Rule 43(a) request to admit telephonic or video testimony from witnesses located in Ethiopia who were unable to obtain visas when the petitioner made the request on the day of the hearing and provided no appropriate safeguards to assure the veracity of the testimony. *Ahmed v. Kifle*, No. 1:12-CV-02697-SCJ, 2015 WL 11182483, at *2 (N.D. Ga. June 16, 2015). Accordingly, litigants should provide advance notice of their intention to present remote video testimony and should be prepared to provide assurances of appropriate safeguards.

Despite the guidance provided by the drafters of Rule 43(a), some federal courts have liberally found that “good cause” and “compelling circumstances” exist, while others tend to reject the notion of virtual testimony. For instance, the United States District Court for the District of Columbia has permitted video testimony based on the Court’s reasoning that “there is no material difference between the live testimony that defendants seek and the live video testimony sought by the plaintiffs” *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 1 (D.D.C. 2000). While acknowledging that the Advisory Committee Notes were more “hostile” to the admission of video testimony, that Court ultimately granted the plaintiff’s request for video testimony, finding that such testimony was functionally equivalent to in-court testimony and much more convenient. See *id.* at 2. (“I am mystified as to why anyone would think that forcing a person to travel across the continent is

reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence. To prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other.”). Other courts have reached the opposite conclusion, adhering closely to the guidance of the rule drafters against permitting remote video testimony without demonstrable good cause. *See, e.g., Humbert v. O'Malley*, No. 11-0440, 2015 WL 1256458, at *2 (D. Md. Mar. 17, 2015) (finding that work and family obligations and the financial burden of traveling from California to Maryland did not establish compelling circumstances), and *Flame S.A. v. Indus. Carriers, Inc.*, No. 2:13-CV-658, 2014 WL 4181958, at *1 (E.D. Va. Aug. 21, 2014) (denying motion for remote testimony based upon witness's “central role” in the dispute and the potential prejudice to the opposing party absent live testimony).

Citation to circumstances created by the COVID-19 pandemic will likely satisfy Rule 43(a)'s “good cause” and “compelling circumstances” standard—even in jurisdictions where courts have interpreted Rule 43(a) narrowly. Virtually every government body, including state and federal judiciaries, have acknowledged the risk of allowing in-person gatherings by issuing shelter-in-place orders and closing government buildings and public gathering places, such as parks and museums. Courts have postponed jury trials and in-person hearings and are proceeding with other matters virtually, as practicable. Based on the present state of the health crisis and the courts' active participation in mitigating the spread of disease, litigants can easily show that “compelling circumstances” exist and that the protection of public health represents “good cause.” Further, even as some states re-open and certain courts revert to business as usual, lingering effects of the COVID-19 pandemic may represent “compelling circumstances” and “good cause,” even after shelter in place orders and judicial emergency declarations subside. For instance, some witnesses may reside in locations where shelter-in-place orders remain, or courts, like many businesses, may be forced to place strict limitations on the number of persons who can occupy a building (or courtroom) during a period of time. Likewise, the impact of the COVID-19 pandemic on future air travel is uncertain, as is crossing state lines by vehicular means, creating uncertainty in witness availability. Further, the risk to some witnesses, such as the elderly and immunocompromised, may be too great to justify in-court appearances even after states and courts re-open under limited circumstances. *See, e.g., Sallenger v. City of Springfield*, 2008 WL 2705422 (C.D. Ill. 2008) (allowing remote testimony because of a medical condition). Although each case will be highly individual and fact-specific, the unprecedented nature of the COVID-19 pandemic will buttress parties' arguments that “good cause” and “compelling circumstances” exist as the effects of the pandemic reverberate. As to “appropriate safeguards,” litigants can meet this standard by thoroughly exploring available video-conferencing technologies, establishing procedures to test them prior to trial, pre-loading documents that may be required, and assuring that witnesses can be properly sworn in prior to providing testimony and their testimony not influenced by unknown or undisclosed bystanders.

Nonetheless, federal courts still retain discretion to reject such requests, particularly when the need for remote testimony was foreseeable and the proponent did not provide advance notice. Litigants who desire to present testimony remotely should therefore present their request to the court as soon as possible. This is particularly important given that parties and their counsel will have been aware of the impacts of COVID-19 on gatherings and person-to-person contact when and if they petition the court to admit remote video testimony.

Mechanisms similar to Rule 43(a) are also available in many state courts. For instance, the Georgia Supreme Court has promulgated rules permitting both telephonic and video testimony in a plethora of proceedings. *See* Ga. Unif. Super. Ct. R. 9; Unif. Juv. Ct. R. 2.7; Unif. Prob. Ct. R. 11; Unif. Mag. Ct. R. 15. Uniform Superior Court Rule 9.2 establishes that a witness may testify via video conference in any pending matter. To do so, the proponent of remote video testimony must file a

notice of intention to present testimony by video conference at least thirty (30) days before the testimony will be given. Taking this rule a step further, and directly due to the impact of the COVID-19 pandemic, the Georgia Supreme Court has also proposed an amendment to Rule 9.2, which would permit non-jury trials to proceed entirely by remote testimony.

Justification of remote video testimony in criminal cases will likely prove more challenging and controversial. Under the Sixth Amendment, a criminal defendant has the constitutional right to confront the witnesses against him at trial. This right has traditionally required the witness to appear and testify in court. In *Maryland v. Craig*, 497 U.S. 836 (1990), the United States Supreme Court relaxed this requirement by holding that a defendant's rights under the Confrontation Clause are not violated despite the absence of an in-person confrontation at trial where denial of such confrontation is necessary to further an important public policy and where the reliability of the testimony is otherwise assured. Under the *Craig* test, in order to admit remote video testimony against a criminal defendant, a court must find that a COVID-19 related health risk to the testifying witness outweighs the defendant's right to in-person confrontation. The result of this analysis will be particularly uncertain if witnesses are not yet sick and merely risk becoming sick if they provide in-court testimony, and the incorporation of such rulings raises the risk of later appeals and embedded error due to the discretion involved.

In addition to constitutional objections in criminal cases, litigants in both criminal and civil cases may also object to the use of remote video testimony under Federal Rule of Evidence 403 ("Rule 403"). Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." A party may argue that it will suffer unfair prejudice if the court permits remote video testimony because the jury or factfinder will be unable to appropriately evaluate the witnesses' demeanor and may find virtual testimony less compelling than in-court testimony. Likewise, parties may argue that potential technical difficulties will distract the jury, create unnecessary delays, and waste time. Although at least one federal court has denied such a challenge to the introduction of testimony, see *In re Xarelto (Rivaroxaban) Prod. Liab. Litig.*, No. MDL 2592, 2017 WL 2311719, at *3 (E.D. La. May 26, 2017) (rejecting defendants' argument that admission of live video testimony would be unduly prejudicial and burdensome due, in part, to potential technical difficulties), parties are certain to mount similar challenges as courts navigate the issue in the coming months, especially as to problematic witnesses.

Despite the availability of remote video testimony and its potential justification in light of the COVID-19 pandemic, litigants must consider the benefits and risks of relying on remote video testimony. As the drafters of Rule 43(a) noted, "[t]he 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." *Fed. R. Civ. Pro. 43(a), Advisory Committee Note*. Clearly, technological difficulties can reduce the efficacy or efficiency of testimony. Even under the best circumstances and with the best equipment, remote video testimony may simply be less compelling than the presentation of live, in-person testimony—particularly when the testimony is given by a key witness and is vital to the case. Seasoned litigators will already be familiar with the distinctions between live testimony and videotaped deposition testimony played at trial. Even with the advent of high-definition video conferencing software, participants may be less likely to detect the nuances of body language and facial expressions when testimony is transmitted remotely. Accordingly, a litigant may wish to delay resolution of its dispute if the benefit of having the witness testify in-person outweighs the benefit of a speedy resolution of the case. These considerations will be particularly important for developing an appropriate trial strategy as courts begin to re-open in the coming months. No perfect answers exist in an unprecedented global pandemic for a justice system built upon court

appearances and live testimony. However, jurists and litigants need not suffer the adage that “justice delayed is justice denied.” Creativity, planning, technology, and flexibility present ample opportunity to propel dispute resolution forward despite the many challenges.

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