Zoom-ing Around the Rules: Courts' Treatment of Remote Trial Testimony in a Virtual World

Mary Margaret Chalk*

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ABSTRACT

Federal Rule of Civil Procedure 43(a) states that federal courts may permit remote testimony by virtual means when they find "good cause in compelling circumstances." Rule 45(c) limits a court's jurisdictional reach over potential witnesses to individuals living in-state or within 100 miles of trial. Separately, these rules are not difficult to digest. What happens, though, when an individual over a thousand miles away from the physical courthouse hearing a trial is compelled to testify "at trial," but may do so virtually from the comfort of his or her home without traveling anywhere near the 100 miles Rule 45(c) mentions? Rule 43 and Rule 45(c) both seem to govern, at least in part, but it is not clear how they operate together. Courts do not agree on an answer; some would allow this remote testimony and others would not. As remote hearings have become more common, more courts and practitioners have noticed the divide, which suggests the time is ripe for clarification. This Note surveys how courts have handled this very question and why the Federal Rules Committee should care about split between courts. It then offers suggestions for how the drafters of the Federal Rules may best amend these two rules to achieve better predictability and uniformity.

* J.D. Candidate, Stanford Law School, 2024. I would like to express my deep gratitude to Professor Shirin Sinnar for her continued support during my research and writing process. Thanks also to the *Stanford Technology Law Review* editing staff for your thoughtful editing.

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INTRODUCTION

Since the start of the COVID-19 pandemic, remote means of communication pervade the professional world. As corporate offices move meetings online and adjust to employees' preferences for hybrid working styles, there is little question that remote communication has substantially changed how industries operate. In the legal world, however, courts have been slower to adapt to this rapid change, especially regarding trial testimony. The ceremony of trial remains an ingrained feature of the adversarial judicial system, and in the face of admonitions that "the importance of presenting live testimony in court cannot be forgotten," something about livestreams in the courtroom feels strange.[1] On the other hand, many lawyers have found online depositions convenient and cost-effective, so perhaps courts should be willing to adjust to technological trends more quickly.[2]

Several recent examples demonstrate the difficult decisions courts face when determining whether to permit or require remote communication at trial. Consider, for example, the ongoing multi-district litigation in the Eastern District

[1] FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

[2] *See, e.g.*, Gregg Wolfe, *The Rise of Remote Depositions & Why They Are Here To Stay*, KAPLAN LEAMAN & WOLFE CT. REPS. (Sept. 2, 2021), https://perma.cc/Q5YX-WU2S.

of Louisiana that involved twenty-five thousand consolidated cases regarding the drug Xarelto.[3] Thousands of plaintiffs filed complaints alleging that Bayer and Johnson & Johnson breached their duty of care in research and testing Xarelto, resulting in negative side effects.[4] Understandably, plaintiffs wanted testimony from those who worked closely with the drug, including one who "was at one time in charge of interfacing with the FDA with regards to Xarelto."[5] The problem, they would find, is that this official lived and worked in New Jersey while they pursued legal relief in Louisiana. Like all courts, the Louisiana court could not exercise its jurisdiction over a witness anywhere in the country. It may only compel witnesses to testify when they live within the area described by Rule 45. Given that this witness was outside the 100-mile zone of authority, what options remained to the court to secure his testimony.

The answer is remote testimony. Judge Fallon decided that the official could testify at trial—virtually—from his home in New Jersey without risking excessive burdens of trial and travel. Such a solution seems simple enough, but if this court is correct, it makes little sense that we have strict geographic limits on the jurisdictional reach of federal courts. After all, if all we care about is the burden of travel, remote testimony could "shorten the distance" between any court and any unwilling witness enough to compel testimony. Furthermore, many courts disagree with this one.

Judge Rankin of the District of Wyoming, for example, arrived at the opposite conclusion in a similar case. Here, Black Card sued Visa over a contract dispute.[6] The details may be less dramatic than drug side effects in a mass products liability suit, but the question regarding remote testimony is no easier. Black Card urged that testimony from Visa executives who took part in contract proposals would "illustrate Visa's bad faith" in their business dealings.[7]

When Visa made clear that it had no plans to willingly produce three of its executives at trial, Black Card sought to compel their remote testimony. Unlike

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[3] More than 25,000 federal cases have been consolidated in Louisiana into multidistrict litigation. *E.g.*, Elaine Silvestrini, *Xarelto Lawsuits*, DRUGWATCH, https://perma.cc/PHE5-DE78 (Sept. 5, 2023).

[4] *See, e.g.*, Complaint ¶¶ 21–24, 120, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. 2:15-CV-06656, 2015 WL 8488636 (E.D. La. Dec. 10, 2015).

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

[6] *See, e.g.*, Complaint ¶¶ 79–95, Black Card, LLC. v. Visa U.S.A. Inc., No. 15 CV 27-S, 2015 WL 1576735 (D. Wyo. Mar. 25, 2015).

[7] Black Card LLC v. Visa U.S.A. Inc., No. 15-CV-27-SWS, 2020 WL 9812009, at *1 (D. Wyo. Dec. 2, 2020).

Judge Fallon, Judge Rankin found he could not compel the executives through virtual means, so Black Card had to either obtain deposition of their testimony or proceed without it. Despite the relevance of their testimony to the trial, Judge Rankin found the geographic requirements conclusive. Technological innovation should not, in its eyes, change how we think of a court's geographic reach. Is this decision, though, too austere or archaic in light of today's technology-saturated world?

The split has spread beyond these two courts, and the implications are significant.[8] Subpoena power changes substantially depending on case law regarding remote testimony, and lawyers must navigate discordant jurisdictions. The Federal Rules—as written now—provide an inadequate guide. As this Note argues, clarifying the rules could solve the problem. First, though, the current text sets the stage for potential modification.

Rule 43(a) states:

> In Open Court. At 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. 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.[9]

Rule 45(c) states:

> (1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
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> (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
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> (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
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> (i) is a party or a party's officer; or

[9] FED. R. CIV. P. 43(a).

(ii) is commanded to attend a trial and would not incur substantial expense.[10]

The meaning of Rules 43 and 45 was clear in a world that relied less on remote communication than ours does today. Rule 43 ensures witnesses testify at trial in-person unless there exists a convincing reason to allow testimony by contemporaneous transmission. Typically, unexpected events are the most compelling reasons for virtual transmission. Perhaps, for example, a witness planned to testify in person, but suddenly grew ill or was injured near the trial date. Courts tend to be sympathetic in this scenario where Rule 43 most obviously applies.[11] While courts are allowed to find non-emergent reasons compelling enough to warrant virtual testimony, other justifications "must be approached cautiously," and should there be no finding of good cause, a litigant will need to use video depositions "as means of securing the testimony."[12] Despite Rule 43's guidance, courts differ in how readily they grant motions to allow online testimony.[13]

Concurrently, Rule 45(c) prevents a plaintiff from compelling witnesses to testify in court when those witnesses live too far away. Specifically, this Rule explains that "[a] subpoena may command a person to attend a trial, hearing, or deposition" only if it takes place "within 100 miles of where the

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[10] FED. R. CIV. P. 45(c).

[11] *See* FED. R. CIV. P. 43 advisory committee's note to 1996 amendment ("[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."). There are also non-emergent scenarios that present strong cases for good cause in compelling circumstances regarding sexual abuse or assault of minors, where a victim does not want to testify in person in the same room as the perpetrator. *See, e.g.*, Humbert v. O'Malley, 303 F.R.D. 461, 463 (D. Md. 2014) (finding good cause and compelling circumstances where an in-person requirement "may unnecessarily trigger" a victim's "PTSD symptoms" should she have to face her assailant in court); Parkhurst v. Belt, 567 F.3d 995, 1003 (8th Cir. 2009) (affirming a district court's decision to allow remote testimony where a victim would otherwise have to physically face her abuser and "to protect the welfare of an abused child qualified as a compelling circumstance").

[12] FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

[13] *Compare* Gulino v. Bd. of Educ., No. 96 Civ. 841 (CBM), 2002 WL 32068971, at *1 (S.D.N.Y Mar. 31, 2003) (declining to find the inconvenience of travel a reason to justify a witness testifying telephonically), *with* Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5862 (CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003) (finding the cost and inconvenience of international travel sufficient to meet the good cause standard). For an overview of courts' different applications of Rule 43(a) without discussion of Rule 45, see Christopher Fobes, Note, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change,* 24 LEWIS & CLARK L. REV. 299, 306 (2020) (arguing that "Rule 43(a)'s discretionary language affords judges broad authority when admitting remote testimony" and has "led to inconsistent decisions within the federal justice system).

person resides, is employed, or regularly transacts business in person."[14] Rule 45 adds flexibility to the 100-mile limit where the relevant witness is a party to trial or a party officer, resides, works, or conducts business within the state in which that person is compelled to testify, and travel would not impose "substantial expense."[15] For example, if a plaintiff sues in California and wants to compel witness testimony from someone who lives in Maine, she would likely have to proceed in-person and without the Maine witness's trial testimony because Maine is out of the 100-mile bound of Rule 45.[16]

The increasing omnipresence of virtual communication, however, complicates this once clear-cut scenario. For example, could the Californian plaintiff in the example above compel a Maine witness to testify from his computer if he has to travel only 10 feet to his at-home desk? This amount of "travel" is certainly less than the 100 miles Rule 45 mentions. If the purpose of Rule 45 is to prevent burdensome travel, then maybe virtual communication has rendered its geographical limitation unnecessary.[17]

On the other hand, one's gut reaction to this scenario may be that a court as distant as in California should not be able to reach across the country and exert its power over a distant Mainer.[18] This instinctual feeling reflects the sentiment that Rule 45 is not about the burden of travel, but about the distance between the physical courthouse and the physical witness.[19] Courts have reacted to this situation differently.

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[14] FED. R. CIV. P. 45(c)(1).

[15] *Id.* This Note typically mentions the "100-mile" limit without referring to an in-state witness who is over 100 miles away. To portray the implications of this geographic limit, I use hypothetical examples of parties is distant states for clarity, but there are instances in which a relevant witness may be compelled from outside this 100-mile range if he or she is an in-state witness who could travel without the imposition of substantial expense.

[16] The alternative to this witness's trial testimony would be deposition testimony. Here, the Californian plaintiff could travel to Maine (somewhere within a 100-mile radius of this witness) to compel deposition testimony, which the plaintiff could then use at trial. Doing so is within the confines of Rule 45 limitations. *See* FED. R. CIV. P. 45(c)(1).

[17] *See infra* Section I.B.1.

[18] This aversion to unlimited jurisdictional reach is somewhat analogous to debates surrounding the personal jurisdiction doctrine. Based on the premise that each state is its own sovereign and cannot infringe on the power of another state, some scholars argue that one state should not be able to exert its jurisdictional power over someone in another. For an explanation on competing theories of personal jurisdictions—specifically, the "convenience and fairness" justifications in contrast to those focused on "authority and sovereignty." *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1302, 1308–10 (2014). The difference in this Note, though, is that *federal* courts are the focus. Unlike state courts, federal courts all fall under the same, national sovereign.

[19] *See infra* Section I.A.

If, however, courts decide that Rule 45 is just about the burden of travel and will therefore be satisfied even if witnesses virtually deliver testimony from thousands of miles away as long as they traverse fewer than 100 miles, then how does Rule 43 apply? Perhaps parties can only compel this virtual testimony if there is good cause to do so. This good cause would not look like sudden illnesses or emergent situations, though. One would have to argue that because a potential witness is beyond the 100-mile reach of a court, the loss of their trial testimony altogether is good cause to allow their virtual testimony. Like in the first round of questions about Rule 45, courts have also responded to these arguments differently.

The wrinkles continue. What if, for example, a Californian plaintiff succeeds on a motion to compel live remote testimony from a Mainer in the California court where the case is pending, but that witness is also successful at quashing the subpoena in Maine, the court of his or her residence? It is not clear whether the witness from Maine would need to testify.[20]

This series of "what-ifs" comprises a puzzle currently facing the federal court system. When should they allow virtual testimony? And should virtual testimony make a difference in determining geographic limits to a court's reach? It's worth noting that courts tried to untangle this web before the COVID-19 pandemic prompted a sudden increase in the use of video-conferencing.[21] Today, however, consistent meaning of these two rules is more necessary given society's and the court system's increasing use of virtual communication platforms.

The use of virtual communication in several aspects of litigation has increased since the COVID-19 pandemic. Practitioners have commented about how depositions take place online more than before, and hearings and client-meetings similarly do not necessitate full in-person productions.[22] Case law

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[20] *See* Alaina Devine, *Out-of-State Witnesses: Are Zoom Trial Appearances a New Normal?*, DEF. COUNS. J., July 2022, at 9 (noting that "a comprehensive review of the case law reveals that no court has yet addressed whether a witness must give live remote testimony" in this scenario).

[21] *See, e.g.*, Ping-Kuo Lin v. Horan Cap. Mgmt., LLC, No. 14 CIV. 5202 LLS, 2014 WL 3974585, at *2 (S.D.N.Y. Aug. 13, 2014) (concluding that where a witness was unwilling to testify and beyond the court's 100-mile reach, live virtual testimony could not serve as a workaround).

[22] *E.g.*, Devine, *supra* note 20, at 4 ("With the modern developments and increased comfort with Zoom and Skype videoconferencing technology . . . federal courts, litigants, and jurors have become accustomed to remote proceedings like never before."); Wolfe, *supra* note 2; *see also In re* Univ. San Diego Tuition, No. 20-CV-1946-LAB-WVG, 2023 U.S. Dist. LEXIS 3035, at *3 (S.D. Cal. Jan. 3, 2023) (finding objections to in-person depositions "appropriate," and

reveals the same pattern.[23] Without consensus regarding the application of Rules 43 and 45, jurisdictional divides persist.

Trial attorneys across law firms and the government have called attention to the problem.[24] They caution colleagues to learn the differences between jurisdictions. Should an attorney assume, for instance, that opposing counsel cannot compel a client to testify in court because of physical distance between her and the courthouse, the attorney may be surprised if opposing counsel successfully argues in favor of virtual testimony, citing the lack of a travel burden and some compelling reason to do so. The reverse is also true; should an attorney assume she *can* compel a witness to testify online, she may find the relevant court reads Rule 45 strictly as to never allow online testimony when the witness physically sits beyond 100 miles. Furthermore, it is not always clear which camp a court has joined, and given the relatively novel importance of this question, not all districts have tackled the question, leaving attorneys and their clients under the heel of unpredictable standards.

Attorneys and their clients should be able to predict whether they are within the reach of the opposing counsel. Rather than wait years for courts to further develop case law showing how to apply Rules 43 and 45, the drafters of the Federal Rules of Civil Procedure should promptly offer clarity. The Rules Committee has multiple options. It could adopt the reasoning of one of the groups of courts this Note discusses below. The advantage of this strategy is that there already exists legal analysis on the subject, and at least some jurisdictions will not have to change their practices. Alternatively, the Rules Committee could amend one or both of the rules more extensively than adopting the interpretation of one group of courts would require. The second option would better allow the drafters to reshape these rules to fit today's technological landscape in the courtroom.

This Note proceeds in two parts. First, I will describe the legal landscape surrounding the interpretation and application of these two rules. In this

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more generally, that remote "depositions continue to be a prudent and effective way to conduct discovery").

[23] Some courts adapted the good cause standard for the realities of the COVID-19 era. *See, e.g.*, Shenzen Synergy Digital Co. v. Mingtel, Inc., No. 4:19-CV-00216, 2021 WL 6072565, at *4 (E.D. Tex. Dec. 23, 2021) (finding that the "continued impediments" resulting from travel restrictions, fear of catching or spreading the virus, and quarantine requirements justified the use of remote testimony).

[24] *See* Devine, *supra* note 20, at 9; *Do Remote Depositions from Home Violate Rule 45(c)'s 100-Mile Subpoena Limit?*, ESQUIRE DEPOSITION SOLS. (Aug. 17, 2022), https://perma.cc/9Z28-GD83.

section, I identity two groups of courts, the second of which has a sub-group. Second, I will recommend possible changes to the rules based on courts' decisions that could clarify the bounds in which litigants may compel witnesses, while providing the flexibility necessary to acknowledge recent technological change and the pervasiveness of remote communication.

I. THE CURRENT STATE OF THE LAW

District courts across the country have arrived at different interpretations in their application of Rules 43 and 45 to remote testimony. Some practitioners have tried to differentiate the jurisdictional splits, categorizing them into two big groups. One allows compelling distant remote testimony; the other has "declined to go that far."[25] Courts have similarly attempted to categorize jurisdictional differences.

In 2021, Judge Torresen of the District of Maine explained that courts that have considered the issue have split into three groups, each with their own interpretation.[26] The court explained that the first group reads the geographic bounds of Rule 45 strictly regardless whether virtual testimony is feasible.[27] The second group "held that a court can almost automatically compel a witness to testify from a remote location near her residence because such an order does not compel the witness to travel more than 100 miles."[28] The third group "held that a party may be able to use Rules 43(a) and 45(c) to compel a witness to testify remotely from a location within 100 miles of her residence but only upon a showing of good cause in compelling circumstances."[29] While Judge Torresen's categorization is functional, I instead propose dividing the current landscape into two groups, each applying Rule 45 differently. The second group, however, has two sub-groups each with a different reading of Rule 43. This grouping more accurately describes the current split among courts.

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[25] *Id.*

[26] Off. Comm. of Unsecured Creditors v. CalPERS Corp. Partners LLC, No. 1:18-CV-68-NT, 2021 WL 3081880, at *2 (D. Me. July 20, 2021). The Ninth Circuit also recently endorsed the District of Maine's categorization. *See In re Kirkland*, 75 F.4th 1030, 1038 n.1 (9th Cir. 2023).

[27] *Unsecured Creditors*, 2021 WL 3081880, at *2.

[28] *Id.*

[29] *Id.*

A. Group One: Rule 45 Is Strict and Leaves No Room for a Virtual Workaround

The first group of courts ("Group One") has interpreted Rule 45 to refer to the distance between a trial and a witness—not to the burden of travel. These courts have rejected parties' arguments to compel virtual testimony from witnesses otherwise beyond the reach of the court. Two arguments typically appear to support this position; the first relies on fairness concerns and the second on the text and structure of Rule 45.

Plaintiffs in a recent antitrust MDL regarding EpiPen sales practices focused on the fairness arguments in pursuit of remote testimony. They sought testimony from two executives of defendant pharmaceutical companies, but both officials worked and resided out of the state and beyond a 100-mile radius. The plaintiffs argued that the defendant's refusal to bring in these witnesses gave the defendants a "tactical advantage" by awarding them "complete control of whether the jury hears from [these witnesses] live," and asked the court to remedy this issue by compelling virtual testimony from the out-of-state witnesses.[30] Without equal access to essential witnesses, plaintiffs feared strategic maneuvering would cloud the full evidentiary picture. Compelling virtual testimony, they argued, offered a solution.

Eschewing the prospect of frequent remote testimony, the court rejected these fairness-focused arguments. As the Judge Crabtree noted, allowing courts to reach beyond a 100-mile radius to compel virtual testimony "would obviate the limitations that Rule 45 places on a court's subpoena power"[31] because Rule 45 "speaks not of how far a person would have to travel, but simply the location of the proceeding."[32] Judge Crabtree's reasoning seeks rejects nullification of the geographical limits of Rule 45, and avoids vesting in courts an "unbounded power to compel remote testimony" from anyone residing anywhere.[33]

Other courts have focused more on the text and structure of Rule 45 than on fairness.[34] The Ninth Circuit recently did so in reversing a bankruptcy court

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[30] *In re* EpiPen, Sales Pracs. & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2021 WL 2822535, at *2 (D. Kan. July 7, 2021).
[31] *Id.* at *4.
[32] *Id.* at *3 (quoting Broumand v. Joseph, 522 F. Supp. 3d 8, 24 (S.D.N.Y. 2021)).
[33] *Id.* at *3 (quoting *Broumand*, 522 F. Supp. 3d at 24).
[34] *E.g.*, *Broumand*, 522 F. Supp. 3d at 23 (quoting Roundtree v. Chase Bank USA, N.A., No. 13-239 MJP, 2014 WL 2480259 at *2 (W.D. Wash. June 3, 2014)) (rejecting plaintiff's argument that emphasized Rule 45's mention of "travel" because virtual testimony does not "somehow 'move[] a trial to the physical location of the testifying person'").

decision that compelled testimony from the Virgin Islands to California by way of contemporaneous transmission, which the bankruptcy court deemed to satisfy Rule 45's 100-mile limit because no one had to travel to testify.[35] In its opinion, the Ninth Circuit reasoned in part that a Rule 45 analysis should precede a Rule 43 analysis because "logically, determining the limits of the court's power to compel testimony precedes any determination about the mechanics of how such testimony is presented."[36] It furthered that a remote workaround would render the requirement of Rule 45(d)(3)(A)(ii) "a nullity as related to remote testimony."[37] The court also added that technological changes have not—at least not yet—changed the common understanding of "place of trial" to mean something "other than the location of the court conducting the trial."[38] All of these arguments hone in on a common-sense, plain-text understanding of Rule 45 that comports with its pre-internet application. Several other courts agree with these conclusions, and their reasoning similarly characterizes attempts to invoke Rule 43 to compel testimony of distant witnesses as a workaround or evasion of the actual text of Rule 45.[39]

In addition to emphasis on the plain text of Rule 45, which delineates the 100-mile and in-state bounds, the Judicial Conference Advisory Committee notes to Rule 43 also influence these courts' reasoning.[40] Specifically, the committee's note to the 1996 Amendment focuses on witness testimony in open court, and emphasizes that "the importance of presenting live testimony in court cannot be forgotten."[41] Given "the strong preference for in-person

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[35] *In re* Kirkland, 75 F.4th 1030, 1044 (9th Cir. 2023).

[36] *Id.* at 1043.

[37] *Id.* at 1044.

[38] *Id.* at 1045.

[39] *See Roundtree*, 2014 WL 2480259, at *2 (denying Plaintiff's "attempts to avoid the geographic limits of FRCP 45(c) by arguing that trial testimony via live video link moves a trial to the physical location of the testifying person"); *Broumand*, 522 F. Supp. 3d at 23 ("in the Court's view, the site of the arbitration does not change simply because certain participants remotely access the proceedings from elsewhere"); Black Card LLC v. Visa U.S.A. Inc., No. 15-CV-27-SWS, 2020 WL 9812009, at *8 (D. Wyo. Dec. 2, 2020) (explaining that Rules 43 and 45 require subpoenas for live virtual testimony under Rule 43 be "subject to the same geographic limits as a trial subpoena under Rule 45").

[40] *See e.g.*, *Black Card*, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020) (emphasizing that the committee note for Rule 43 shows "live testimony in court should always be preferred, and '[t]ransmission cannot be justified merely by showing that is inconvenient for the witness to attend the trial'"); *In re* EpiPen, 2021 WL 2822535, at *2 (citing the advisory committee's note to Rule 43).

[41] FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

testimony" these courts have identified in the advisory notes, it makes little sense the rules would "impose fewer limits on a court's power to compel remote testimony than on its power to compel in-person testimony."[42] Rule 43 recognizes that zooming-in is not the convenient alternative it is in other professional settings.[43]

To be clear, this group of courts does not proclaim hope all lost when an essential witness resides too far from trial. In this scenario, the committee's notes recognize that "depositions, including video depositions, provide a superior means of securing testimony of a witness who is beyond the reach of a trial subpoena."[44] The party in California could depose a witness in Maine by traveling within 100 miles of him, conducting the deposition, and then showing that video recording in court. Doing so satisfies both Rule 45 and Rule 43. However, the deposition alternative is not wrinkle-free. In addition to the time and expense of traveling to a witness, should plaintiffs realize they desire the testimony after discovery, a court may not grant a request for trial depositions, in which case the plaintiff would lose access to that witness's testimony altogether.[45]

Collectively, Group One courts read these two rules, emphasizing logic and plain-meaning, to promote clarity, uniformity, and the integrity of trials. The cost, however, is in the lack of room these courts leave for the technological change.

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[42] *In re Kirkland*, 75 F.4th at 1044. For indications of the committee's preference for in-person testimony, the court cited to its emphasis on "[t]he very ceremony of trial and the presence of the factfinder" and "[t]he opportunity to judge the demeanor of a witness face-to-face." *Id.*

[43] *See, e.g.*, Grezegorz Kowalski & Katarzyna Slebarska, *Remote Working and Work Effectiveness: A Leader Perspective*, 19 INT'L. J. ENV'T. RSCH. PUB. HEALTH 15326, at 2 (2022) (noting among the benefits of remote work—in a non-legal context—are "reduced distraction, work-life balance and increased work flexibility," and "increased productivity").

[44] *In re EpiPen*, 2021 WL 2822535, at *4 (quoting FED. R. CIV. P. 43 advisory committee's note to 1996 amendment).

[45] *Compare, e.g.*, *In re EpiPen*, 2021 WL 2822535, at *7 (denying plaintiff's request for trial depositions because plaintiff had not suggested a plan to depose the relevant witness during the discovery phase) *with, e.g.*, Off. Comm. of Unsecured Creditors v. CalPERS Corp. Partners LLC, No. 1:18-CV-68-NT, 2021 WL 3081880, at *4 (D. Me. July 20, 2021) (recognizing that justification for virtual testimony "might also be 'likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness'") (quoting FED. R. CIV. P. 43 advisory committee's note to 1996 amendment).

B. Group Two: Reading Rules 43 and 45 in Tandem

The second group of courts ("Group Two") reads Rule 43 and 45 in conjunction and thus less strictly. Generally, Group Two courts allow a party to compel a witness outside of Rule 45's 100-mile radius and in-state exception to testify at trial via remote transmission when there is good cause in compelling circumstances. In other words, Group Two courts do not view Rule 43 as an evasive workaround as the Group One courts suggested. Instead, they focus on the purpose of Rule 45 and find that virtual, distant testimony fits comfortably within the framework of the Rule. Further, two subgroups within Group Two of courts define good cause in compelling circumstance differently. The first subgroup's standard is less stringent than the second's.

1. Subgroup One: Low Standard for Good Cause in Compelling Circumstances

This subgroup of courts ("Subgroup One") is most willing to compel virtual testimony from those far away. When Group One courts (who strictly read Rule 45 and do not liberally allow virtual testimony) mention the "other" districts who "read Rules 43 and 45 together to allow the court to serve a subpoena on a witness located *anywhere* in the United States and order the person to testify via remote transmission," this subgroup is to whom they refer.[46]

Ironically, Subgroup One courts use reasoning similar to that of some Group One courts to arrive at the opposite conclusion. Recall that Group One courts—who favored replayed deposition testimony as opposed to a virtual, distant witness—cautioned that judges should recognize Rule 43's emphasis on the importance of open court testimony.[47] Courts of this subgroup have been persuaded by arguments that emphasize "the very ceremony of trial" and assert that "the presence of the factfinder may exert a powerful force for truth telling."[48] In contrast to the first group, however, the ceremony of trial and the desire for factfinders' presence led these courts to conclude that "live

[46] Black Card LLC v. Visa U.S.A. Inc., No. 15-CV-27-SWS, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020) (emphasis added).

[47] *See e.g.*, *id.* (noting Rule 43's committee notes show "live testimony in court should always be preferred"); *In re* EpiPen, 2021 WL 2822535, at *2 (citing the advisory committee's note to Rule 43).

[48] *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. MDL 2592, 2017 WL 2311719, at *3 (E.D. La. May 26, 2017) (quoting FED. R. CIV. P. 43 advisory committee's note to 1996 amendment).

testimony is preferable to deposition" *even if* virtual.[49] Thus, Rule 43 and its advisory notes offer little guarantee of consistency.

Furthermore, courts in this subgroup apply a broadly sweeping version of the good cause and compelling circumstances requirement that Rule 43 outlines. Judge Fallon, for example, cited and applied the *Vioxx* factors, which courts sometimes use for Rule 43 analyses in other circumstances.[50] *Vioxx* includes five factors to consider in deciding whether a party's reason for compelling virtual testimony is sufficient to grant its motion. The five factors are: "(1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation."[51] In his analysis, Judge Fallon ultimately accepted plaintiffs' argument that, because of the relevant witness's "importance" in the events leading to the lawsuit, the "significant control" exerted by certain parties over others, the complexity of managing an MDL, and the desire for "comprehensiveness and coherency," the court should allow virtual testimony.[52]

In accepting this argument, the court rejected defendant's concerns that plaintiffs already had extensive deposition testimony to use, and that dividing their trial team between two locations would make trial "burdensome and prejudicial."[53] The court further added that the long period that had passed since the relevant witnesses' deposition bent in favor of allowing virtual

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[49] *Id.* at *3.

[50] *Id.*; *see also In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 U.S. Dist. LEXIS 30070, at *22 (N.D. Fla. Feb. 18, 2022) (applying the *Vioxx* factors to determine a Rule 43 motion). Some courts have observed that the *Vioxx* factors are reserved for multidistrict litigation only and not for other less complex disputes. *Compare* Blue Cross v. Davita Inc., No. 3:19-CV-574-BJD-MCR, 2022 U.S. Dist. LEXIS 237003, at *9, *14 (M.D. Fla. May 27, 2022) (refusing to apply the *Vioxx* factors where plaintiffs "elected to litigate this case in its home court," but still allowing plaintiffs to compel two witnesses to testify remotely because of an unforeseen need for their testimony), *with In re* DePuy Orthopaedics, No. 3:11-MD-2244-K, 2016 WL 9776572, at *1 (N.D. Tex. Sept. 20, 2016) (noting "[c]ourts generally consider five [*Vioxx*] factors to determine when testimony by contemporaneous transmission is appropriate," without confining their application to multi-district litigation alone).

[51] *In re* Vioxx Prods. Liab. Litig., 439 F. Supp. 2d 640, 643 (E.D. La. 2006).

[52] *In re Xarelto*, 2017 WL 2311719, at *3.

[53] *Id.*

testimony.[54] None of this logic rests on the quintessential reasons—like sudden illness or injury—courts easily find good cause and compelling circumstances. Instead, trial logistics and location of key evidence met the mark.

Other courts have followed suit. The Northern District of Texas, for example, similarly found a witness's out-of-range status alone sufficient good cause to compel virtual testimony.[55] The court explained that the *Vioxx* factors lean this way, and that this request "serves the inherent goal of Rule 43, which is to provide the jury with a more truthful witness" as opposed to using "less reliable depositions and video."[56] Under the current rules, this seemingly loose construction of Rule 43 is well-within courts' menu of options.

Should more courts—or the federal rules committee—follow Subgroup One's line of thinking, practitioners should prepare to compel witnesses, and for witnesses to be compelled, to testify virtually even if they live well outside Rule 45's 100-mile range.[57]

2. Subgroup Two: High Standard for Good Cause in Compelling Circumstances

The second subgroup of courts ("Subgroup Two") likewise interprets Rule 45 to allow virtual testimony from areas outside of a 100-mile radius. The difference, however, is that these courts apply a more limited version of the Rule 43 good cause and compelling circumstance standard. As Judge Torresen explained, Rule 43(a) should not "function as an automatic run-around to Rule 45(c)," yet "the Rules also suggest that, where there is good cause in compelling circumstances, a court can authorize a witness to testify via contemporaneous video transmission and can then subsequently compel the witness to give the [virtual] testimony from a location within 100 miles of her residence."[58] This means that—unlike Subgroup One—a witness's importance

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[54] *See id.* at *4 (noting that the deposition "was taken over a year ago").

[55] *In re DePuy Orthopaedics*, 2016 WL 9776572, at *2.

[56] *Id.*

[57] It is also possible that courts conclude that when a party merely *learns* that a witness will not be made available at trial, this could qualify as the "unforeseen" event triggering Rule 43 virtual testimony in the face of Rule 45 limits. *See* Blue Cross v. Davita Inc., No. 3:19-CV-574-BJD-MCR, 2022 U.S. Dist. LEXIS 237003, at *14 (M.D. Fla. May 27, 2022) (concluding that "though the content of [witnesses'] testimony is not a 'new issue,' the fact that plaintiffs will not be able to call each witness as anticipated" after defendant made known that it would not produce any witnesses outside of that state "is an unforeseen need" that allows the court to grant the Rule 43 motion).

[58] Off. Comm. of Unsecured Creditors v. CalPERS Corp. Partners LLC, No. 1:18-CV-68-NT, 2021 WL 3081880, at *3 (D. Me. July 20, 2021).

to a case will *not* be sufficient reason to compel his or her out-of-bound virtual testimony. Reasons that would be persuasive are those "unexpected reasons, such as accident or illness."[59] The court went on to deny the request for virtual testimony because the relevant witness was "not unavailable for unexpected reasons."[60]

Based on this reasoning, one could theoretically imagine the situation in Subgroup Two courts would allow remote testimony by a distant witness, but the series of events required to create this scenario is unusual and not useful for most litigants. For instance, if a witness from Maine had initially *agreed* to testify in California (in which case Rule 45's geographical limitations would not apply because the witnesses voluntarily chose to testify), then suddenly grew ill *and* was no longer a willing witness, a party could then invoke the District of Maine's logic and compel that witness to testify remotely. Otherwise, though, even if a witness suddenly grew ill but remained willing to testify, it is not clear that Rule 45's bounds are relevant as the Maine District Court opinion suggests. This scenario sounds much more like a simple Rule 43 case that is not concerned with *compelling* witnesses but rather *allowing* them to testify online.

It is also worth noting that neither of the two cases which the Maine District Court cites as agreeing with it really do. The first of these cases is *In re 3M Earplugs*, which falls under Subgroup One. Here, the Northern District of Florida allowed remote testimony for one witness beyond the geographic range of the court, finding that "he is a key witness," the *Vioxx* factors militate in favor of compelling his testimony, and live testimony would be better than depositions.[61] The second case Judge Torresen cited was *DePuy*, which applies a similarly flexible Rule 43 standard and therefore falls under the same category as *In re 3M Earplugs*.[62]

The Maine District Court, therefore, may have mischaracterized the current state of the remote testimony issue by finding three distinct ways courts read Rules 43 and 45 and asserting it joins the third group. One can hardly criticize this court for doing so, though, because the tangled web of Rule 43, Rule 45, and virtual testimony in a post-COVID era provides anything but clarity.

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[59] *Id.* at *4.
[60] *Id.*
[61] *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 U.S. Dist. LEXIS 30070, at *19–30 (N.D. Fla. Feb. 18, 2022).
[62] *See In re* DePuy Orthopaedics, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 20, 2016).

II. WHERE TO GO FROM HERE?

This hodgepodge of legal reasoning found in these various cases renders the time ripe for clarification of Rules 43 and 45. Regarding Rule 45, Part I described both courts that believe this Rule refers to a travel burden and those that read it to refer to physical location and nothing more. Readings of Rule 43 similarly diverged, as some courts stuck to unexpected events as the only true good cause and compelling circumstance that justifies remote testimony, while others found that something as simple as witness's status as a key witness may be sufficient to meet Rule 43. Some courts have addressed these issues in depth before the pandemic, and others face them for the first time. In every case, though, it is unclear where courts and litigators should look to predict geographic limits. What is clear is that "[w]hile technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed."[63] It is time, therefore, for the drafters to step in and provide litigants with an update.

There are several options before the rules committee. It could, for instance, clarify Rule 45 and leave Rule 43 in place. Currently, courts look to the text of Rule 45(c), which does not use the word "travel" and instructs that subpoenas command a person to attend trial "within 100 miles of where" that person lives.[64] They also look to its 2013 amendment, which repeatedly uses "travel more than 100 miles" as the relevant descriptor.[65] If the rules committee instead referred to "more than 100 miles *from the location of trial*" in an amendment or explicitly outlined that "travel refers to an individual's trip to the physical courthouse," then we would likely see a uniform court system that reads this boundary strictly and looks like the Group One courts.[66] While this option has the appeal of a bright line rule and uniformity, Group One's interpretation of these two rules precludes more flexible options, which litigators and courts may find desirable.

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[63] *In re* Kirkland, 75 F.4th 1030, 1046 (9th Cir. 2023).

[64] FED. R. CIV. P. 45(c).

[65] *See* FED. R. CIV. P. 45(c) advisory committee's note to 2013 amendment.

[66] This choice could satisfy those who have called for the federal rules drafters to specifically address Rule 45(c) alone. *See* ESQUIRE DEPOSITION SOLS., *supra* note 24 ("Perhaps someday federal rules drafters will see the need for amendments to Rule 45(c) to dispel the uncertainty now hovering over a trial court's authority to compel virtual testimony from far-flung witnesses.").

In contrast, the drafters would guarantee flexibility by adopting Group Two's reading of Rule 45 and thus leave plenty of room for courts to apply Rule 43 how they see fit. This strategy, however, still lacks clarity. Instead of adopting either camp's exact reading, therefore, the rules drafters should opt for a middle ground to clarify its preferred parameters regarding both of these rules. The drafters should do this by refining Rule 45(c) through its text or amendment and offering a degree of interpretive wiggle-room through Rule 43. A combination of both would strike a palatable balance between uniformity and predictability on one side and flexibility on the other.

A. Editing Rule 45's Text to Distinguish Depositions from Trials

With regard to the text of the Rule itself, an updated Rule 45 should first distinguish trials and hearings from depositions. Right now, Rule 45(c) lumps together a "trial, hearing, or deposition" as having the same 100-mile geographic limitation.[67] It may no longer make sense to include these together, as courts and litigators have continued to use online depositions for cost and efficiency reasons even since pandemic-related concerns have subsided.[68]

Additionally, depositions are different from trials in this context. If a party is set on deposing an unwilling witness outside of the 100-mile range, it may do so by traveling to the witness. The same is not true for trials. If a witness is too far away, unwilling to testify at trial, and the presiding court does not allow a Rule 43 workaround, no one can move the location of the courthouse within the witness's range and compel him or her to appear. Because time and travel expenses present the only roadblocks between a litigant and an out-of-state witness's deposition, and Rule 45 does not actually stop a deposition for geographic distance but instead forces travel, it makes less sense to think of this 100-mile limit as the same for both depositions and trial testimony.[69]

After separating the two, drafters could decide to further detail rules surrounding depositions by adding "travel" to the text to make it clear that the 100-mile radius refers to the maximum distance a witness can be compelled to

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[67] FED. R. CIV. P. 45(c)(1).

[68] *See, e.g.*, Chris Henry, *Love Them or Hate Them, Remote Depositions Are Here to Stay*, 66 BOS. BAR J. 4 (Nov. 7, 2022); Fahi Takesh Hallin, *Embracing and Preparing for Remote Depositions*, AM. BAR ASS'N (Feb. 11, 2022), https://perma.cc/A3ES-8X9V.

[69] Rule 43(a) is not relevant to depositions. Under Rule 30(b)(4), "parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means." FED. R. CIV. P. 30(b)(4). So without the good cause standard, there is even less reason to restrict depositions geographically to the same extent we do trial testimony.

physically move for a deposition (although this may be unnecessary because a deposition does not have a fixed location as a trial does). Furthermore, because Rule 30(b)(4) outlines the requirements for remote depositions, alterations to this standard—either to make online depositions more or less common—may have to come through this Rule. But for the purposes of this Note, which is not principally concerned with depositions, separating depositions from trials in Rule 45 is the key step to pave the way for a clearer description of limitations to compelling trial testimony.

B. Amending the Rules to Clarify Scope of Online Trial Testimony

The rules committee has a more difficult task when it comes to trial testimony. I propose the drafters should alter Rule 45's text or add an amendment to reflect the stricter read of the geographic limit. Additionally, it should provide specific carve-outs in Rule 43 to provide flexibility.

Rule 45 is the best place to begin. The 2013 amendment to Rule 45 refers to the burdens of travel multiple times and has paved the way for loose readings of Rule 45 that focus on inconveniences felt by individuals testifying, not the location of trial.[70] Furthermore, the 2013 amendment's lone reference to Rule 43(a) lacks further guidance, merely reasserting that "when 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)."[71]

The best course of action is to explain that the text of Rule 45 refers to the physical location of the courthouse, not the burden of travel. The drafters could accomplish this goal with an amendment similar to the 2013 one that provides more specificity, or it could alter the text of Rule itself by adding something to the effect of: "if the location of trial is" to precede the inconclusive language from 45(c)(1)(A) which states "within 100 miles of where the person resides."[72] Rule 45(c)(1)(A) would then read: "if the location of trial is within 100 miles of where the person resides." Such language would dispel uncertainty and make clear that Rule 45 is about the physical location of a courthouse. Without this specification, Rule 45 risks obsolescence because Rule 43 reigns as the workaround courts above noticed.[73]

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[70] *See supra* Section I.B.

[71] FED. R. CIV. P. 45(c) advisory committee's note to 2013 amendment.

[72] *See* FED. R. CIV. P. 45(c)(1)(A).

[73] *E.g.*, Ping-Kuo Lin v. Horan Cap. Mgmt., LLC, No. 14 CIV. 5202 LLS, 2014 WL 3974585, at *2 (S.D.N.Y. Aug. 13, 2014); *see supra* Section I.A.

To those courts and practitioners who may object, desiring a more flexible standard (such as those described previously for Group Two courts), Rule 43(a) offers solutions. The drafters could refine the "good cause in compelling circumstances" standard to ensure a degree of flexibility.[74] This language created a schism among Group Two courts, who find litigants meet this standard more easily in some jurisdictions than others. Guidance from Rule 43 will end the confusion while leaving room for discretion.

First, to leave room for Rule 43 flexibility, the last change Rule 45 needs is to amend the part of the 2013 Amendment that reads: "When 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)."[75] Something effective could be: "While 45(c)(1) creates a 100 mile radius around the courthouse, a court may compel remote testimony from an otherwise out-of-reach witness where one of Rule 43's specifically listed factors justifies doing so." The distinction allows courts to use remote testimony when it makes practical sense and is in the best interest of a fair trial without ignoring Rule 45's core.

The drafters then need to refine the good cause standard. They could—but should not—explain that the "good cause" standard refers *only* to things mentioned in the note to the 1996 amendment like "unexpected reasons, such as accident or illness."[76] Doing so would suggest all courts should follow Group One and read these rules strictly to almost always prohibit compelled, distant remote testimony in a world that increasingly operates online. This reading would ignore the preferences of some practitioners and the reasonably developed law of several jurisdictions that favor remote testimony. Instead, the drafters should consider creating carve-outs to Rule 43 based on how courts have addressed Rule 43.

The Group Two courts above highlight instances where it may be fair to allow remote testimony from distant witnesses. Reasons courts have found compelling enough include when an out-of-reach witness is especially important to a case, when the testimony is part of multi-district litigation, or

[74] *See* FED. R. CIV. P. 43(a).
[75] *See* FED. R. CIV. P. 45(c) advisory committee's note to 2013 amendment.
[76] *See* FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

when a party realized much later in the litigation process they need a certain witness that, had they known of earlier, would have affected choice of venue.[77]

The drafters must weigh whether, in a given circumstance, they prefer live remote testimony or replayed deposition material. Right now, the 1996 Amendment suggests that depositions "provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena."[78] But nearly thirty years later, in a court system more accustomed to electronic processes, this may no longer be the case, and courts may prefer live, high-quality video testimony over a replayed deposition.[79] Once the drafters determine which carve-outs best serve the judiciaries' interests, they should add an additional amendment to update the 1996 amendment and clarify when Rule 43 leaves breathing room regarding Rule 45's geographic boundary.

The new amendment could explain that while non-emergent "justifications for remote transmission must [still] be approached cautiously" (as stated in 1996),[80] courts have found a variety of factors that have met the good cause standard. The amendment should continue to explain that, with regard to witnesses beyond Rule 45(c)(1)'s boundaries, there are specific instances where courts may find good cause in compelling circumstances so great as to justify subpoena power to secure the virtual testimony of an otherwise out-of-reach witness. Factors that may guide a court in this inquiry include those that persuaded Group Two courts. For example, how essential the relevant witness is to a case and when the litigant knew he would need this witness.[81] Further, the complexity of the matter, including its status as multi-district litigation, could affect this judgment. Finally, the amendment should caution courts from unnecessary or imprudent findings of justification for remote, distant testimony to ensure Rule 43 does not serve as an automatic workaround to Rule 45.

Collectively, these changes will strike a better balance between clarity and flexibility. Now, litigators and courts will know that, in general, Rule 45 refers to

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[77] *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 U.S. Dist. LEXIS 30070, at *22 (N.D. Fla. Feb. 18, 2022) (applying the *Vioxx* factors to determine a Rule 43 motion); *In re* Xarelto (Rivaroxaban) Prod. Liab. Litig., No. MDL 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (noting that the long period of time which had passed since key witnesses were deposed weighed in favor of virtual testimony).

[78] *Id.*

[79] *See supra* Section I.B.

[80] FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

[81] *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2022 U.S. Dist. LEXIS 30070, at *19–20 (justifying remote testimony from a "key witness" whose "testimony has evolved" since the case's proceedings began).

the physical location of trial, not a travel burden. This language creates a default standard that confirms Rules 45's purpose and ensures its integrity, assuaging fears that someone could compel out-of-reach witnesses whenever he desired by invoking Rule 43. At the same time, Rule 43 acknowledges that there are instances where, in the best interest of a fair trial, courts should be able to compel remote testimony from distant witness. This is especially true in today's post-pandemic, video-acclimated world that relies on virtual means of connection more than ever.

III. NORMATIVE GOALS FOR THE RULES DRAFTERS TO CONSIDER

Flexibility and predictability are important regardless of what rule the drafters create, but determining the desired content of those rules is a separate question. This Note has proposed that the content of the rules should largely follow concerns courts have raised when ruling on this issue.[82] The rules committee could, however, act more sweepingly to allow (or disallow) distant remote testimony in more circumstances where Rule 43 or 45 would traditionally not. Should they do so, the question the drafters face is: What amount of remote testimony assigns courts an acceptable amount of power over distant litigants and simultaneously ensures a trial's integrity?

Literature surrounding Rule 45 is insubstantial, and thus not especially useful to answer this question. Sources on Rule 45 typically explain that the purpose of its geographic limit is "to minimize travel burdens on subpoena recipients."[83] These findings are harmonious with the notes to Rule 45's 2013 amendment, but run into trouble when litigants begin to argue that travel is all that matters and not the physical courthouse.[84] If the drafters carry forward this principle, they should clarify that Rule 45 is about physical distance between a courtroom and a witness, not just travel burdens.[85]

In contrast to Rule 45, Rule 43 has prompted substantial discussion on the merits of virtual testimony for the drafters to consider. For instance, in his note, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change*, Christopher Fobes extensively reviews courts' treatment of Rule 43(a).[86] Fobes

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[82] *See supra* Section II.B.

[83] *Recent Changes to F.R.C.P. 45 Affect the Use of Subpoenas in Civil Litigation*, MORRIS, MANNING & MARTIN, LLP (Jan. 24, 2014), https://perma.cc/6JHJ-U7ZL.

[84] *See* FED. R. CIV. P. 45(c) advisory committee's note to 2013 amendment; *supra* Section I.A.

[85] *See supra* Section I.A.

[86] *See* Fobes, *supra* note 13.

argues that remote testimony's benefits "far outweigh the dangers," and courts should therefore more liberally grant requests for remote testimony.[87] Among the benefits he lists are lower cost, less travel time, fewer visa issues for international witnesses, less environmental damage from travel, less reason to forum shop, and ease for disabled witnesses.[88] The theme among his list is logistical ease and convenience.

Online testimony's convenience arguments are strong and find support in others areas of law such as justifications for personal jurisdiction limitations.[89] As the Supreme Court asserted of its minimum contacts analysis in the specific personal jurisdiction context, one could argue Rule 43's purpose similarly strives to protect a "defendant against the burdens of litigating in a distant or inconvenient forum."[90] That being said, personal jurisdiction and its justifications principally concern individual state sovereigns, not a single, federal jurisdiction, so its application to this context has limits.[91] Furthermore, to the extent personal jurisdiction theories may be used as a guide, "convenience isn't everything."[92]

As skeptics of remote testimony assert, there is "significant research highlighting the shortcomings of remote proceedings" even if some benefits exist.[93] For this camp, "[t]he idea that a witness's credibility could be evaluated as effectively by video in comparison to the courtroom setting pushes against logic."[94] Several studies validate the skeptics' intuition. Studies in the criminal

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[87] *Id.* at 316.

[88] *See id.* at 316–18; *see also* Ashley Jones, Does Convenience Come with a Price? The Impact of Remote Testimony on Expert Credibility and Decision-Making, (Aug. 2023) (Ph.D. dissertation, University of Southern Mississippi) (Aquila) (noting remote testimony can be more convenient for some witnesses such as "forensic psychiatrists, who frequently testify in court" due to "the time and cost dedicated to traveling").

[89] *See supra* text of note 18. For similar justifications in venue doctrine, *see* Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1161 (2015) (noting that venue traditionally "served to make justice accessible to litigants and to protect litigants" from "an opposing party who sought to gain a tactical advantage by selecting an inconvenient location for trial").

[90] World-Wide Volkswagen Corp. v Woodson, 444 U.S. 286, 292 (1980).

[91] *See supra* text of note 18; *see also* A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENVER L. REV. 325, 327 (2010) (explaining that "[a]s courts of a common sovereign, it makes little sense for the courts of our national government to have varying jurisdictional reach."

[92] *See* Sachs, *supra* note 18, at 1309.

[93] Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://perma.cc/L92U-F96F.

[94] Karen Lisko, *Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 SW. L. REV. 63, 64 (2021).

context, for example, have revealed that defendants whose bail hearings occurred over video may result in "substantially higher bond amounts set than their in-person counterparts," while studies of online testimony given by minors demonstrate that minors may be "perceived as less accurate, believable, consistent and confident when appearing over video."[95]

Other evidence, though, challenges the skeptics' assumptions. For instance, some COVID-era studies (where jurors *and* witnesses were remote) suggest that large digital screens displaying witnesses better ensure juror consensus because "they could readily see [the witness's] emotion and assess her credibility."[96] Others likewise urge that data indicates experts may be able to "use remote testimony and expect their credibility and effectiveness on the stand to remain largely intact, with minimal risk that the method of testimony will influence ultimate legal decisions."[97] This Note does not attempt to decide once and for all whether virtual testimony is a virtue or vice. In the most likely scenario, the answer is that "more than one thing can be true," and remote testimony sometimes betters and sometimes worsens trials.[98] The range of evidence and unclear answers, though, is even more reason for the rules committee to prevent individual courts from deciding the compelled remote testimony question without further guidance.

CONCLUSION

Technological advancement brings with it change to the judiciary. Zoom and its peer platforms threw courts a curveball by redefining the means of professional communication at a rapid pace. While the rules committee may be able to address calls for clarity and predictability as this Note outlined, questions stemming from remote technology will remain a central fixture in legal discussion for years to come.

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[95] Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://perma.cc/96YD-K62L; *see also* Zara Abrams, *Can Justice Be Served Online?*, MONITOR ON PSYCH., Sept. 2022, at 75–76 (discussing the rapid increase in use of online platforms for court proceedings and presenting a variety of findings, including, for example, that "observers may perceive witness testimony differently in person than they would in virtual settings"); *see also* Gail S. Goodman et. al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & HUM. BEHAV. 165, 199 (1998) (study finding that testimony through "closed-circuit technology was associated with a negative bias).

[96] Lisko, *supra* note 94, at 66.

[97] Jones, *supra* note 88, at 40.

[98] Lisko, *supra* note 94, at 68.

Remote testimony has already had center-stage moments, for example, in constitutional law. In the Sixth Amendment context, constitutional trouble looms large. Justice Scalia was among the skeptics when he explained in 2002 that "a purpose of the confrontation clause is ordinarily to compel accusers to make their accusations *in the defendant's presence* — which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image."[99] Recently, litigants dissatisfied with remote criminal proceedings and nervous about the prospect of more Zoom in court have breathed new life into this question.[100] Professor Jeffrey Fisher sums up the general sentiment among challengers that "Zoom is a very good piece of technology that can save a lot of time and expense," but "not a substitute for in-person interactions."[101]

One such litigant recently filed a petition for certiorari asking the Supreme Court to determine whether the use of online witness testimony—where a court finds that exceptional circumstances justify its use—violates the Sixth Amendment's Confrontation Clause, which "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[102] Petitioners urged that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution."[103] Practical concerns also abounded; "technical glitches" like screen freezes marred the testimony, and no juror could remotely observe mannerisms like a "fidgeting foot or refusal to look at certain parts of the courtroom."[104]

For this petitioner, remote testimony meant that a virtually-appearing witness could "exploit technological glitches and limitations to thwart effective

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[99] Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

[100] *See, e.g.*, Lindsay Whitehurst & Michael Tarm, *Ruling Raises New Questions About Remote Testimony in Court*, AP NEWS (Jan. 13, 2022, 3:02 PM PST), https://perma.cc/6ANE-UQHF (noting that questions remain regarding remote testimony after Missouri's highest court reversed a conviction "finding that an investigator's video testimony violated the defendant's Sixth Amendment right to confront witnesses against him"); *see also* BENNINGER ET AL., STAN. CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 112–15 (2021) (discussing constitutional concerns raised by several respondents in various jurisdictions that may "eventually be constitutional claims brought on behalf of defendants and [decided] by the courts").

[101] *Justices Asked to Decide If Zoom Testimony Is OK in Criminal Case*, NAT'L CRIM. JUST. ASS'N, (Mar. 20, 2023), https://perma.cc/J6L7-RTN3.

[102] Petition for Writ of Certiorari, Akhavan v. United States, No. 22-844 (Mar. 6, 2023), *cert. denied*, 143 S. Ct. 2639 (2023).

[103] *Id.* at 1 (quoting Coy v. Iowa, 487 U.S. 1012, 1019 (1988)).

[104] *Id.* at 3.

cross-examination."[105] Without "the hostile glares of the defendants, the perceptive eyes of the jurors, and the solemnity of the courtroom environment," the witness provided "crucial evidence that led to the criminal convictions of both Petitioners."[106] This petition makes clear the high stakes surrounding the ostensibly narrow, technical remote-testimony question. An issue of such consequence should not proceed without further resolution.

The Court denied this petition, but the online testimony question—in this context and the civil context—is going nowhere. Future litigants, frustrated by computer glitches or struck with a desire to face adverse witnesses in-person, will be prepared to challenge the legality of online proceedings. And even though the Confrontation Clause does not govern civil proceedings, which lack stakes as significant as incarceration, online testimony in any trial context should be handled with similar care. Ultimately, both the Confrontation Clause and the Federal Rules strive to secure fairness, predictability, and integrity. Addressing the remote communication issue head-on, rather than by waiting for courts to decide on their own, is essential to guaranteeing this remains the case.

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[105] *Id.* at 34.
[106] *Id.*