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No, That Witness is Not Going to Appear for Trial

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INTRODUCTION

The return to courtroom trials brings excitement and the persuasion of in-person testimony. However, the excitement disappears when your opponent tries to compel the appearance of a witness that you do not want anywhere near the witness stand. With the advent of videoconference testimony and the use of Federal Civil Rules 43 and 45, plaintiffs are attempting to extend the federal subpoena power to cyberspace to obtain jurisdiction over undesirable witnesses whose unavailability is preferred. Can you successfully combat these efforts to ruin your best-laid plans?

THE RULES

Federal Rule 45 controls the court's subpoena power to compel a person to attend a trial and testify, often against his/her will. In a balance of the court's power to compel attendance at trial, there is a limit on the scope of the subpoena power. Rule 45 sets forth that a person can be compelled to attend a trial only: "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or "within the state where the person resides, is employed, or regularly transacts business, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense." *FRCP 45(c)(1)(A) and (B)(i), (ii)*. Be aware of arguments that the geographic limitations relate to the location of the witness in relation to where he/she is physically compelled to sit for testimony as opposed to where the trial is taking place. More on this below.

Federal Rule 43 governs the mode of testimony. The rule sets forth that at trial, "the witnesses' testimony must be taken in open court" unless the rules state otherwise. *FRCP 43(a)* [emphasis added]. Like every rule, there is an exception. The rule further provides that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." *Id.* [emphasis added]. There are two initial considerations based on this language: 1) what is "good cause"; and 2) what constitutes "compelling circumstances"? On top of that, there need to be "appropriate safeguards" if the court is going to permit this remote testimony. With these elements, the burden is high, but there will be a fair amount of discretion afforded to the court in deciding "good cause" and "compelling circumstances."

FIGHTING A REQUEST FOR REMOTE TRIAL TESTIMONY

To compel remote trial testimony, there must be more than mere desire to escape the constraints of Rule 45. A party seeking to compel live, remote, videoconference testimony at trial is essentially asking the court to circumvent Rule 45's clear and intentional geographic constraints. The advent of videoconferencing is not new but merely more commonplace than before the COVID-19 pandemic. Indeed, as discussed below, (and cited by many district courts in their decisions on this issue), the Advisory Committee notes for Rule 43 from 1996 contemplated this scenario. In 2022, some may argue that this Rule is ripe for clarification given the ubiquity of Zoom and Teams in any active litigation practice, but taken on its face, the Rule is quite clear, and its history informed.

The Advisory Committee notes on Rule 43 will prove helpful at dissuading a court to extend the reach of Rule 45's geographic definition. In fact, many courts have been turning to these commentaries as a basis to refuse to expand trial subpoena power. In 1996, the Advisory Committee wrote:

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

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While this comment demonstrates that the Committee examined the “convenience of the witness” angle, what about when a witness is simply not within the parameters as defined by Rule 45? The 1996 Committee went further to provide guidance on what is “good cause” and “compelling circumstances” by providing the following:

The 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. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly 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.

A compelling argument to make is that plaintiff waived this testimony as they had ample opportunity to preserve testimony at a deposition and chose not to videotape that deposition testimony for presentation at trial.

Since March of 2020, as one can imagine, efforts to use both Rule 43 and Rule 45 to compel trial testimony by contemporaneous videoconference have increased. Some courts have held that Rule 43(a) cannot serve as a run-around to Rule 45(c)'s geographical limitations; (see *In re EpiPen*, 2021 U.S. Dist. LEXIS 125939, 2021 WL 2822535, at *4 (“If the rule functioned as plaintiffs propose, the court would obviate the limitations that Rule 45 places on a court's subpoena power.”); *Broumand v. Joseph*, No. 20-cv-9137 (JSR), 522 F. Supp. 3d 8, 2021 U.S. Dist. LEXIS 37533, 2021 WL 771387, at *10 (S.D.N.Y. Feb. 27, 2021) (“[A]ny other reading would render Rule 45(c) geographical limitations a nullity and bestow upon any arbitrator sitting anywhere in the country the unbounded power to compel remote testimony from any person residing anywhere in the country”). These decisions take a plain reading approach to Rule 45, concluding that trial testimony via videoconference is inconsistent with the Rule and would render its geographic limitations meaningless.

Other courts have taken an opposite stance and ordered that testimony from a remote location proceed almost automatically; (see *United States v. \$110,000 in U.S. Currency*, Case No. 21 C 981, 2021 U.S. Dist. LEXIS 108951, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *Int'l Seaway Trading Corp. v. Target Corp.*, 2021 U.S. Dist. LEXIS 31755, 2021 WL 672990, at *5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F.Supp.3d 807, 816 (D.Md. 2020). These courts apply the geographic limitations of Rule 45 as governing the distance that the witness must travel to offer testimony—be it remote or in person—and not that the witness must be within 100 miles of or within the state where the trial is taking place. However, it should be noted that these decisions relate to deposition testimony, which certainly differs from live remote trial testimony.

A third group of courts have taken a blended approach and applied the Vioxx test to determine whether there has been a showing of good cause and compelling circumstances; (see *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, Case No. 3:19-md-2885, 2021 U.S. Dist. LEXIS 121444, 2021 WL 2605957, at *3-4 (N.D. Fla. May 28, 2021); *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL Docket No. 3:11-MD-2244-K,

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*2016 U.S. Dist. LEXIS 195409, 2016 WL 9776572, at *1-2 (N.D. Tex. Sept. 20, 2016)*. In the *Vioxx MDL* litigation, the Eastern District of Louisiana employed a five-prong test to determine the existence of good cause and compelling circumstances under Rule 43 when deciding whether to permit a company president to testify by contemporaneous videoconferencing at trial in which his company was named defendant. The five factors were: (1) control exerted over witness by defendant; (2) complex, multi-party, multi-state nature of litigation; (3) apparent tactical advantage, as opposed to any real inconvenience to witness, that defendant was seeking by not producing witness voluntarily; (4) lack of any true prejudice to defendant; and (5) flexibility needed to manage complex multi-district litigation. *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 2006 U.S. Dist. LEXIS 71078 (E.D. La. 2006). However, not every Federal Circuit has adopted the test. Furthermore, the test by design only applies to “complex, multi-party, multi-state litigation.”

An analysis of *In re Epipen* is succinct and should be modeled in any case where one is looking to quash a subpoena to compel the live remote contemporaneous video trial testimony of a witness outside the confines of Rule 45. Courts that have extended the reach of subpoenas under Rule 45 have gone beyond the plain reading of the Rule. Furthermore, the decisions analyze the Rule in the context of deposition subpoenas, and in the COVID-19 era and the common use of remote videoconferencing to depose witnesses, these decisions seem less harsh. When applying the same analysis to trial subpoenas, the stakes are higher and the issue is different. One need look no further than the Advisory Committee notes to find persuasive language to support your argument that the subpoena power of the federal courts should not be extended to allow for remote videoconference trial testimony.