

**From:** Richard Hertling [REDACTED]  
**Sent:** Friday, July 23, 2021 9:56 AM  
**To:** Robert Dow [REDACTED]  
**Subject:** FRCP 63 comment

Good morning, Judge Dow. I write to you in your capacity as chair of the Civil Rules Advisory Committee to broach an issue regarding Rule 63. Although the Court of Federal Claims has its own set of procedural rules, they are based on and follow the Civil Rules unless a deviation is warranted due to the court's distinctive jurisdiction with the United States being the only defendant.

As you know, Rule 63 provides that "[i]f a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge *must*, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.:

In an appeal interpreting the parallel and identical Rule 63 of the Rules of the Court of Federal Claims, the Court of Appeals for the Federal Circuit held yesterday in a non-precedential opinion that "must" in Rule 63 means "must." *Union Telecom, LLC v. United States*, No. 20-1052 (Fed. Cir. July 22, 2021). The case involved a trial conducted by a former judge of the Court of Federal Claims. Upon her retirement, the case was reassigned to another judge of the court, who was able to review a videotape of the trial and, as a result, declined the plaintiff's request to recall witnesses after finding he could make the necessary findings and evaluate credibility based on the videotape. The Court of Appeals found the successor judge's decision to be incompatible with the plain language of Rule 63. The Court of Appeals affirmed, however, finding the error to have been harmless.

I wish to raise for possible consideration by the Civil Rules Advisory Committee whether, in the wake of the increased reliance during the course of the pandemic on virtual proceedings that have been videotaped, Rule 63 might be ripe for an amendment by which the current "must" is softened to allow the successor judge some discretion when video is available and the successor judge makes appropriate findings on the record that's/he is able to reach an appropriate decision based on the videotape and without need to recall any witnesses.

The current rule made sense in a world without videotaped proceedings, but the increased availability and use of technology, such as video, has rendered the current mandatory nature of Rule 63 overbroad in some instances. There are now circumstances in which judges ought to be allowed to exercise discretion over the recall of witnesses, even when a party requests recall, when the witness's testimony has been preserved on video.

I am a relatively new judge (two years on the Court of Federal Claims), and have no direct experience with Rule 63. To be clear, I am not advocating that Rule 63 be changed, but I am proposing that the Civil Rules Advisory Committee review the mandatory nature of the current Rule 63 and consider whether it ought to be revised to allow discretion in appropriate cases in light of the broader use of technology that has been accelerated by the pandemic and the remote proceedings we have all had to undertake to keep our dockets moving. The members of the Committee you chair have far more experience and expertise than me and can make solicit broader input on the proposition.

I serve on my Court's Rules Advisory Committee and I consulted with the Chair of that Committee. He advised that our Court will not consider revising our own Rule 63 in the absence of a revision to the FRCP version, so I thought I would broach the topic with you.

I would be pleased to discuss the matter further if you would like.

With best regards,

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