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H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure

Dear Secretary Byron:

We respectfully submit the enclosed proposal to amend Rules 43(a) and 45(c) of the Federal Rules of Civil Procedure for the consideration of the Advisory Committee on Civil Rules.

The proposed changes (i) make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, and (ii) clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held.

The proposed amendments effectuate a long overdue modernization of civil trial practice and promote the just, speedy, and inexpensive determination of civil actions promised by Rule 1. They also resolve a growing split among federal district courts as to the applicability of Rule 45(c)'s 100-mile limit to testimony via live contemporaneous transmission under Rule 43(a)—a question first considered by a court of appeals last July in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). There, the Ninth Circuit concluded 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,” which is an issue “for the Rules Committee and not for [a] court.” *Id.* at 1046–47.

This proposal does not seek to change the preference for live, in-person trial testimony that is a longstanding value of our legal tradition. But there is little dispute among lawyers and judges

that testimony via contemporaneous live transmission better promotes the truth-seeking goal of trials than videotaped deposition testimony, particularly with recent advances in videoconferencing technology. But, contrary to these uncontroversial principles, courts continue to interpret Rules 43 and 45 and their Advisory Committee notes as requiring them to conduct trials in which juries are subjected to hours (if not days) of testimony presented in the form of spliced, disjointed video clips from depositions taken during the discovery phase. Replacing deposition testimony with testimony via live contemporaneous transmission (from a location remote from the trial court but otherwise within the limitations of Rule 45(c)) for witnesses whose physical presence at trial cannot be obtained will greatly enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

The proponents of these amendments are listed below. For the convenience of the Committee, all communications can be directed to the undersigned at tom@hbsslaw.com, copying racheld@hbsslaw.com.

Respectfully submitted,



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**PROPOSED AMENDMENTS TO RULES 43 AND 45 OF
THE FEDERAL RULES OF CIVIL PROCEDURE**

EXECUTIVE SUMMARY

This proposal seeks to modify Rules 43 and 45 of the Federal Rules of Civil Procedure to: (1) ensure that courts can require witnesses unable or unwilling to testify live in person at trial to testify live via contemporaneous transmission under Rule 43(a), and (2) clarify that the place of compliance for subpoenas for live trial testimony via contemporaneous transmission is the location from which the testimony is transmitted, not the courthouse where the trial is conducted. The specific proposed textual changes are set forth in the next section.

It is axiomatic that live witness testimony is essential to the truth-seeking mission of trial. There is no real debate that jurors' ability to evaluate witness demeanor and credibility is best served by the presentation of live witnesses in open court subject to real-time cross-examination in the physical presence of the jury. But courts and litigants also have long recognized that, when a witness cannot be physically present at trial, the next best option is for that witness to testify live via contemporaneous transmission. Indeed, some courts have questioned whether there is any meaningful difference between in-person and remote testimony, particularly in light of advancements in videoconferencing and courtroom technology necessitated by the COVID-19 pandemic. Testimony by deposition, in contrast, not only undermines juror interest and engagement, but it is often taken during the discovery phase of the case, when the litigants often have not yet narrowed the case to the triable issues. Yet Rule 43 and its accompanying Advisory Committee notes continue to favor the presentation of pre-recorded deposition video over live testimony via contemporaneous transmission.

The Advisory Committee sought to remedy this with the 2013 amendments to Rule 45 permitting nationwide service of subpoenas. Read in tandem with Rule 43(a), the amended version of Rule 45(c) was intended to empower courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location. However, since the 2013 amendments went into effect, federal courts have reached starkly different conclusions about the place of compliance for subpoenas for trial testimony via contemporaneous transmission, with a significant and growing minority of courts concluding that the 1996 amendments to Rule 43(a) preclude them from ordering remote trial testimony from witnesses outside Rule 45's 100-mile limit. The confusion has created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Federal Rules to shield inculpatory witnesses from trial. The proposed amendments, if implemented, would eliminate this confusion, enhance the truth-seeking mission of trials, and promote more efficient, cost-effective, and just civil litigation.

PROPOSED TEXTUAL CHANGES

RULE 43

The proposed amendments to Rule 43(a) below maintain the gold standard of live, in-person trial testimony, but promote the use of live testimony via contemporaneous submission, rather than deposition testimony, as the default alternative.

(a) *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,~~ **In the event in-person testimony at trial cannot be obtained,** the court, **with appropriate safeguards,** ~~may~~ **must** ~~permit testimony~~ **require witnesses to testify** in open court by contemporaneous transmission from a different location **unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.**

RULE 45

The proposed amendments to Rule 45(c) below clarify that the "place of compliance" for subpoenas for testimony via contemporaneous transmission is the location from which that testimony is transmitted, not the location of the courthouse where the transmitted testimony will be received.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, 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; **or**

(C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with 45(c)(1)(A) or (B).

BACKGROUND & POINTS IN SUPPORT OF PROPOSED AMENDMENTS

A. Rule 43(a) should make live trial testimony by contemporaneous transmission, not prerecorded deposition video, the alternative to live, in-person trial testimony.

1. With modern videoconferencing technology, live testimony via contemporaneous transmission offers the same benefits as in-person testimony.

The “inherent goal of our system of justice established by our forefathers” is to ensure “the ‘powerful force of truth-telling.’”¹ It is universally recognized that this goal is best served through the presentation of live, in-person testimony.² As the Advisory Committee’s notes to the 1996 amendments to Rule 43(a) emphasize, “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.”

But courts and practitioners have long recognized that, when a witness cannot be physically present in the courtroom, testimony by contemporaneous video transmission satisfies many of the goals of in-person testimony, providing an opportunity for live cross-examination and enabling the factfinder to evaluate the witness’s demeanor and credibility in real time.³ And this is more true now than ever: the COVID-19 pandemic spurred dramatic improvements to videoconferencing technology and accelerated federal courts’ already

¹ *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-cv-64, 2014 WL 107153, at *6 (W.D. La. Jan. 8, 2014) (quoting Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment); *see also In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

² *See Actos*, 2014 WL 107153, at *5 (“Ideally, all witnesses would appear in Open Court and testify before the trier of fact . . .”); *Vioxx*, 439 F. Supp. 2d at 644 (“[L]ive, in-person testimony, is optimal for trial testimony.”); Fed. R. Civ. P. 43 advisory committee’s note to 1996 amendment (“The importance of presenting live testimony in court cannot be forgotten.”).

³ *See Warner v. Cate*, No. 12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) (“Because a witness testifying by video is observed directly with little, if any, delay in transmission, . . . courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings.”); *Actos*, 2014 WL 107153, at *8 (“[U]se of ‘live’ contemporaneous transmission grants the trier of fact—here, the jury—the added advantage inherent in observing testimony in open court that is *truly contemporaneous* and part of the whole trial experience, [and] thus better reflects the *fluid dynamic* of the trial they are experiencing, and, better serves the goal of ‘truth telling.’”); *Lopez v. NTL, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) (“The use of videoconferencing . . . will not prejudice Defendants. Each of the witnesses will testify in open court, under oath, and will face cross-examination. . . . With videoconferencing, a jury will also be able to observe the witness[’s] demeanor and evaluate his credibility in the same manner as traditional live testimony.”); *Sallenger v. City of Springfield*, No. 03-cv-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) (“Video conferencing allows the jury to view the witness as he testifies, and thus, it satisfies many of the goals of in person testimony . . .”); *Vioxx*, 439 F. Supp. 2d at 644 (“By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with his ‘hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,’ and, thus, satisfies the goals of live, in-person testimony . . .” (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

“consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices,”⁴ requiring them to become more adept at and comfortable with remote proceedings and improve the technological capacities of courtrooms. Numerous federal courts seamlessly conducted entire trials remotely during the pandemic.⁵ Indeed, technological advancements have led many courts to question whether there is any practical difference between live testimony and contemporaneous video transmission.⁶

2. Trial testimony via contemporaneous transmission unquestionably better serves the fact-finding mission of trial than pre-recorded deposition video.

At minimum, “there is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition.”⁷ In 1939, Judge Learned Hand remarked that “[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand,” and that to hold otherwise “is not to help the reform of procedure, but to introduce an irrational and unfair exception, until deposition become competent regardless of the accessibility of the deponents at trial.”⁸ Federal

⁴ Charles A. Wright et al., 9A *Federal Practice and Procedure* § 2414 (4th ed. 2008 & 2022 Supp.).

⁵ See Christopher Robertson, *The Jury Trial Reinvented*, 9 Tex. A&M L. Rev. 109, 120–21 (2021).

⁶ See *Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) (“[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses’ ‘live’ versus ‘livestreamed’ testimony”); *Lopez*, 748 F. Supp. 2d at 480 (“With videoconferencing, a jury will . . . be able to observe the witness’s demeanor and evaluate his credibility in the same manner as traditional live testimony.”); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (“[T]o 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.”); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 (“*Kirkland* Mandamus Pet. Resp.”) (“Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference.”). Interestingly, in one study of remote jury trials, some mock jurors “felt it was easier to judge witness credibility” when the witness testified remotely “because they had a closer view of the witness rather than looking across a courtroom.” Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

⁷ *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021); see also *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video “preferable to a year-old video deposition”); *Actos*, 2014 WL 107153, at *8 (concluding that live witness testimony via contemporaneous transmission “more fully and better satisfy the goals of live, in-person testimony” than deposition video); *Swedish Match*, 197 F.R.D. at 2 (“The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . 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 . . . preferable to reading his deposition into evidence.”); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) (“Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions.”); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a “viable, and even refreshing, alternative” to the “droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone”).

⁸ *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, L.).

courts have echoed this sentiment for decades.⁹ Witness testimony presented in the form “spliced, edited, and recompiled clips of deposition that took place over multiple days”¹⁰ results in an “unavoidable esthetic distance”¹¹ that reduces jurors’ comprehension, engagement, and interest and impairs their ability to evaluate witness credibility. As one court aptly commented:

To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, the deposition, whether read into the record or played by video has the opposite effect. It is a sedative prone to slowly erode the jury’s consciousness until truth takes a back seat to apathy and boredom.¹²

Parties forced to present testimony from key witnesses through dated and immutable depositions may also be prejudiced. Depositions are usually taken during the discovery phase and thus may not address what are ultimately the critical factual issues for trial. And trials are “dynamic, ever evolving process[es]” with “inevitable, unexpected developments and shifts”¹³ to which static deposition testimony is ill-suited to respond.

B. Rule 45(c) should unambiguously empower trial courts to issue subpoenas for trial testimony via contemporaneous transmission from any place within 100 miles of the witness’s location.

1. The 2013 amendments to Rule 45 sought to allow nationwide service of subpoenas, including for Rule 43 live trial testimony via contemporaneous transmission.

The 2013 amendments removed the geographics limits of Rule 45(b)(2) to allow service of subpoenas “at any place within the United States.”¹⁴ Accordingly, trial courts may issue a nationwide subpoena commanding “a person to attend a trial, hearing, or deposition” within

⁹ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) (“Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.”); *Mazloum v. D.C. Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C. 2008) (urging the parties to reach an arrangement allowing for a key witness to testify live at trial because “tediously reading deposition excerpts into the record” would be “highly unsatisfactory”); *Paul v. Int’l Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) (finding videotaped deposition “particularly unappealing” and an inadequate substitute for the live testimony of a key witness); *Kolb v. Suffolk Cnty.*, 109 F.R.D. 125, 129 (E.D.N.Y. 1985) (“Clearly, testimony by deposition is less desirable than oral testimony and should be used as a substitute only under very limited circumstances.”); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977) (“A party should not be forced to rely on ‘trial by deposition’ rather than live witnesses.”).

¹⁰ *Mullins v. Ethicon, Inc.*, No. 12-cv-2952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015).

¹¹ *Actos*, 2014 WL 107153, at *8.

¹² *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

¹³ *Actos*, 2014 WL 107153, at *8.

¹⁴ Fed. R. Civ. P. 45 & advisory committee’s note to 2013 amendment.

“100 miles of the person of where the person resides, is employed, or regularly transacts business in person.”¹⁵

The Advisory Committee intended the amended version of Rule 45 to be read with Rule 43(a) to allow courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any location within 100 miles of the witness’s location. It squarely addressed this issue in its responses to public comments to the proposed 2013 amendments. One of the comments, from a lawyer in Hawaii, observed the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses with a “transient presence in paradise” to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a).¹⁶ The Discovery Subcommittee agreed that a Rule 45 subpoena “is properly issued for this [very] purpose” —to compel a witness outside the trial court’s subpoena power to testify at trial via Rule 43 contemporaneous transmission from “a place within the limits imposed by Rule 45,” i.e., within 100 miles of the witness’s location.¹⁷ The Advisory Committee concurred and determined that its note to the 2013 amendment should “confirm this plain reading of the revised Rule 45 text.”¹⁸ The note was therefore revised to state, “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).”¹⁹ The note also makes clear that Rule 45(c)’s geographic limits were intended to protect witnesses from the burden of *traveling* more than 100 miles²⁰—a concern not implicated by testimony remotely transmitted under Rule 43(a).

In recommending adoption of the 2013 amendments in full, the Committee on Rules of Practice and Procedure “concurred” with all the Advisory Committee’s Rule 45 recommendations, including its “clarify[ing]” note “confirm[ing] that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the *distant* witness to attend and testify within the geographical limits of Rule 45(c).”²¹

¹⁵ Fed. R. Civ. P. 45(c)(1).

¹⁶ Paul Alston, Comment to Committee on Rules of Practice and Proc. Regarding Revisions to Fed. R. Civ. P. 45 (Jan. 25, 2012), <https://www.uscourts.gov/file/16846/download>.

¹⁷ Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), <https://www.uscourts.gov/file/15074/download>.

¹⁸ *Id.*

¹⁹ Fed. R. Civ. P. 45 advisory committee’s note to 2013 amendment.

²⁰ *Id.* (“Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer *to travel* more than 100 miles . . .” (emphasis added)); *id.* (“Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required *to travel* more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur ‘substantial expense.’” (emphasis added)).

²¹ Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure at 21, 23 (Sept. 2012), <https://www.uscourts.gov/file/14521/download> (emphasis added).

2. Since the 2013 amendments, federal courts have split on whether Rule 45 permits them to issue subpoenas for trial testimony via contemporaneous transmission to witnesses located more than 100 miles from the trial court.

Since the 2013 amendments, a majority of federal courts have—as the Advisory Committee intended—interpreted Rule 45(c)’s 100-mile limit to apply to the place from which remote testimony is transmitted.²² For example, in *Walsh*, the District of Massachusetts observed that the 100-mile limit of Rule 45(c), as amended, “restricts the place of *compliance* with the subpoena, not the location of the court from which the subpoena issues.”²³ The court concluded, based on “the plain language of Rules 43 and 45 and their accompanying Advisory Committee notes,” that it could “issue a subpoena under Rule 45, upon a finding of good cause and compelling circumstances, for a witness to provide remote testimony from any place within 100 miles of her residence, place of employment, or place where she regularly conducts business.”²⁴ Similarly, in *3M Combat Arms Earplug Products Liability Litigation*, the Northern District of Florida held that Rules 43(a) and 45 were to be read in “tandem” to permit a party to “use a Rule 45 subpoena to compel remote testimony by a witness from anywhere so long as the place of compliance (where the testimony will be given by the witness and not where the trial will take place) is within the geographic limitations of Rule 45(c).”²⁵

However, a growing minority of courts have held that Rule 45(c)’s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court.²⁶ In so holding, these courts have often relied exclusively on the Advisory Committee’s notes to Rule 43 without considering its notes to

²² See, e.g., *Walsh v. Tara Constr., Inc.*, No. 19-cv-10369, 2022 WL 1913340, at *2 (D. Mass. June 3, 2022); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 16-17039, 2021 WL 6202422, at *3 (E.D. La. July 26, 2021); *Off. Comm. of Unsecured Creditors v. Calpers Corporate Partners LLC*, No. 18-cv-68, 2021 WL 3081880, at *3 (D. Me. July 20, 2021); *United States v. \$110,000 in U.S. Currency*, No. 21-cv-981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *3–4 (N.D. Fla. May 28, 2021); *Int’l Seaway Trading Corp. v. Target Corp.*, No. 20-mc-00086, 2021 WL 672990, at *4–5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020), *vacated on other grounds by* 31 F.4th 889 (4th Cir. 2021); *Redding v. Coloplast Corp.*, No. 19-cv-1857, slip op. at 3 (M.D. Fla. Aug. 28, 2020); *Diener v. Malewitz*, No. 18-cv-85, 2019 WL 13223871, at *7 (D. Wyo. Oct. 18, 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541, slip op. at 5–6 (N.D. Cal. Aug. 31, 2018); *Xarelto*, 2017 WL 2311719, at *4–5; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 11-2244, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 9, 2016); *Actos*, 2014 WL 107153, at *8–10.

²³ 2022 WL 1913340, at *2.

²⁴ *Id.*

²⁵ 2021 WL 2605957, at *3–4.

²⁶ See, e.g., *Moreno v. Specialized Bicycle Components, Inc.*, No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022); *Singh v. Vanderbilt Univ. Med. Ctr.*, No. 17-cv-400, 2021 WL 3710442, at *2 (M.D. Tenn. Aug. 19, 2021); *Ashton Woods Holdings LLC v. USG Corp.*, No. 15-cv-1247, 2021 WL 8084334, at *1 (N.D. Cal. Apr. 5, 2021); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2021 WL 2822535, at *4–6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020); *Roundtree v. Chase Bank USA, N.A.*, No. 13-cv-239, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014); *Lin v. Horan Cap. Mgmt., LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014).

the 2013 amendments to Rule 45. In *Black Card*, for instance, the District of Wyoming concluded that “a full reading of Rule 43 and the committee notes” —including their instructions that the “good cause” standard “is anticipated for witnesses who are already expected to attend the trial” and “[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena” — demonstrated that “subpoenas for live video testimony under Rule 43 are subject to the same geographic limits as a trial subpoena under Rule 45.”²⁷ The *Moreno* and *EpiPen* decisions, similarly, were predicated only on the notes to the 1996 amendments to Rule 43.²⁸

3. The Ninth Circuit’s 2023 *Kirkland* decision underscores the urgent need for clarification of Rules 43 and 45.

The need for clarifying amendments has grown more critical in the wake of the recent *In re Kirkland* decision,²⁹ the first from a United States Court of Appeals to address the interplay between Rule 45(c)’s 100-mile limit and subpoenas for trial testimony via contemporaneous transmission under Rule 43(a).

In *Kirkland*, the Ninth Circuit considered a petition from John and Poshow Ann Kirkland for a writ of mandamus directing the United States Bankruptcy Court for the Central District of California to quash trial subpoenas directing them to testify via contemporaneous submission from their homes in the U.S. Virgin Islands. The Ninth Circuit found that the petition “present[ed] a novel issue involving the interplay between two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted,” but one that was “likely to evade direct appellate review.”³⁰

In its response to the petition, the bankruptcy court agreed that mandamus jurisdiction was necessary to resolve two “conflicting lines of authority” with “equally plausible interpretations” of Rules 43 and 45 and urged the Ninth Circuit to side with the majority of courts concluding that Rule 45(c)’s 100-mile limit does not apply to witnesses ordered to testify by means of contemporaneous transmission under Rule 43.³¹ Citing its own experience conducting trials with testimony taken exclusively by remote video transmission, the bankruptcy court argued that “[t]echnology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference” and that remote video testimony allows juries “to assess the demeanor and credibility of the [remote] witnesses to the same extent as would have possible had [they] been

²⁷ 2020 WL 9812009, at *2–3.

²⁸ See *Moreno*, 2022 WL 1211582, at *1–2; *EpiPen*, 2021 WL 2822535, at *4.

²⁹ 75 F.4th 1030, 1051–52 (9th Cir. 2023).

³⁰ *Id.* at 1036.

³¹ *Kirkland* Mandamus Pet. Resp. at 2–3.

physically present in the courtroom.”³²

The Ninth Circuit disagreed, concluding that “neither the text of the rules nor the advisory committee’s notes establish that the 100-mile limitation is inapplicable to remote testimony or that the ‘place of compliance’ under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely.”³³ The Ninth Circuit dismissed the Advisory Committee’s notes to the 2013 amendments to Rule 45 because “it is the text of the rules that control, and ‘the [n]otes cannot . . . change the meaning that the Rules would otherwise bear’”³⁴ and reasoned that the term “trial” as used in Rule 45 necessarily meant “a specific event that occurs in a specific place: where the court is located,” regardless of where or how the witness may “appear.”³⁵ While the Ninth Circuit acknowledged that “technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted,” it concluded that “the rules defining the federal subpoena power have not materially changed” and it was “bound by the text of the rules.”³⁶ The issue, therefore, was “one ‘for the Rules Committee and not for [a] court.’”³⁷

C. The proposed amendments ensure more efficient, cost-effective, and fair civil trials.

1. The proposed amendments maximize access to evidence in multidistrict litigation, which is rarely confined to the jurisdiction of a single federal district court.

The need for trial testimony via contemporaneous transmission is arguably most acute in multidistrict litigation, which has become the primary vehicle for the resolution of complex civil cases and is designed for the efficient management of large numbers of similar claims that often involve multiple parties and evidence dispersed nationwide. In such cases, witnesses

³² *Id.* at 4-5. The bankruptcy court also cited a 2022 survey it conducted on “hearings or trials conducted by videoconference,” in which 65% of respondents stated they had not experienced “any problems with remote hearings or trials in the past” and only 1 of 287 reported encountering any issues with remote cross-examination. *Id.* at 5.

³³ *Kirkland*, 75 F.4th at 1044.

³⁴ *Id.* at 1043 (alterations in original) (quoting *Tome v. United States*, 513 U.S. 150, 168, (1995) (Scalia, J., concurring)).

³⁵ *Id.* at 1043-44; *see also id.* at 1045 (“[T]here is no indication that Rule 45’s reference to attending ‘a trial’ was intended to refer to anything other than the location of the court conducting the trial.”). In reaching this conclusion, the Ninth Circuit did not consider the body of cases concluding that Rule 77(b) expressly permits a fully virtual civil jury trial with no fixed location. *See, e.g., Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, 524 F. Supp. 3d 1113, 1115 (W.D. Wash. 2021) (construing Rule 77 as allowing a fully virtual civil jury trial with no fixed location because “Rule 77(b) sets forth the caveat ‘so far as convenient,’ which is in stark contrast to the imperative ‘must,’ used in connection with ‘open court’” and therefore “offers the flexibility to conduct trials in ‘non-traditional ways’” (quoting *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm’n*, 470 F. Supp. 735, 738 (E.D. Mich. 2020))); *see also id.* at 1116 (“Nothing about a virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b).”).

³⁶ *Kirkland*, 75 F. 4th at 1046.

³⁷ *Id.* at 1047 (quoting *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003)).

relevant to all parties' claims and defenses are unlikely to be confined to a single federal district. Geographic limitations on MDL courts' ability to subpoena testimony via contemporaneous transmission can therefore unfairly handicap plaintiffs, who must make a no-win forum selection choice at the outset when the identities and locations of key trial witnesses are unknown. Such limits also undermine the purpose of bellwether trials, which are intended to present the best evidence to juries to obtain outcomes representative for all underlying actions. Without access to critical witness testimony, verdicts in bellwether trials are inaccurate predictors of the merits of the remaining claims, undermining their ability to facilitate productive settlement discussions and global resolutions of claims.

2. The proposed amendments minimize, if not eliminate, litigants' ability to exploit the Rules to unfairly immunize adverse witnesses and evidence from jury consideration.

Rule 45's 100-mile limit can be exploited by litigants to unfairly shield adverse evidence from trial in several ways. Defendants may take advantage of plaintiffs' lack of knowledge regarding the identity and location of essential witnesses by urging the JPML to centralize the litigation in a jurisdiction outside the 100-mile range of those witnesses. Litigants can also hand-pick the witnesses within their control whose testimony will be most favorable to their claims or defenses, forcing the opposing party to rely on inferior deposition testimony for witnesses outside the 100-mile limit at trial, thereby hindering that party's ability to effectively present its best evidence to the jury.³⁸ Litigants can even intentionally relocate critical witnesses outside the subpoena reach of the trial court. The proposed amendments would minimize, if not eliminate, such gaming tactics.³⁹

3. The proposed amendments will save time and money for both litigants and courts.

Resolving disputes over deposition designations is time consuming and a wasteful drain of judicial resources. As explained in the *Manual on Complex Litigation*, "[u]nless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury,

³⁸ See, e.g., *3m Combat Arms Earplug*, 2021 WL 6327374, at *5 (concluding that defendants sought a tactical advantage by preventing two witnesses essential to the case from testifying live at trial just after one of them made statements contradicting his prior testimony); *Vioxx*, 439 F. Supp. 2d at 643 (finding that the defendant's refusal to produce a witness "possess[ing] information highly relevant to the plaintiff's claims" and "damaging to [the defendant's] position" for trial was "for a purely tactical advantage," namely, "to eliminate any unpredictability and limit [the witness's] trial testimony to his 'canned' deposition testimony"); *Wash. Pub. Power Supply*, 1998 WL 525314, at *2 ("Defendants do not claim they cannot get witnesses to appear voluntarily [at trial] for 'live' testimony. They rely instead on the tactical advantage they have in not being required to do so, while at the same time indicating that they intend to call the same witnesses in person [in] their own case.").

³⁹ Litigants faced with an order requiring witnesses to testify via contemporaneous transmission have also been known to thereafter produce the at-issue witness in person for trial. See *Wash. Pub. Power Supply*, 1998 WL 525314, at *2; accord Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990).

the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court.”⁴⁰ Live testimony by contemporaneous transmission, on the other hand, “ensure[s] efficient use of judicial resources” because it relieves the court “of the burden of reviewing voluminous transcripts of multi-day depositions, analyzing hours of edited videos submitted for trial, and then ruling on objections to those videos.”⁴¹

Promoting the use of testimony by contemporaneous transmission would also provide courts with greater precision and flexibility in trial scheduling, avoiding the constraints of individual witness availabilities and travel schedules. Litigants would benefit from the reduced costs of witness travel. And assurance that witnesses outside the 100-mile limit could be compelled to testify remotely at trial, if necessary, would likely reduce the number and attendant costs of depositions taken during discovery.

⁴⁰ *Manual for Complex Litigation (Fourth)* § 12.333.

⁴¹ *Mullins*, 2015 WL 8275744, at *2; *see also Actos*, 2014 WL 107153, at *6 (criticizing the defendants’ inability to secure the in-person attendance of important witnesses at trial, which “result[ed] in the parties still taking discovery depositions” and “a large number of motions” needing resolution on the eve of trial and “the parties’ continu[ing] to present disputed video depositions for evidentiary resolution” and declaring that “this Court simply will not be able to rule on the very large number of additional video transcripts and objections that would be required if the Plaintiffs were not permitted to use the procedures established in Rules 43 and 45 to present live testimony at trial via contemporaneous transmission”).