

US Law Week
July 24, 2023, 3:00 AM

Attorneys Should Be Aware of Rules for Remote Trial Testimony

Sidley's Michelle Ramirez, Amanda Steger, and Hadiya Williams explore recent case trends post-pandemic where videoconferencing has become commonplace, and share tips for attorneys representing corporate clients facing remote trial testimony.

In an evolving trend, a few federal courts, including in multi-district litigation, have applied an exception to the Federal Rules of Civil Procedure allowing live remote trial testimony from far-flung witnesses.

In a post-pandemic age of increased use and familiarity with remote testimony, courts appear increasingly willing to allow remote testimony. If this trend continues, virtually every person would be potentially subject to a trial subpoena from anywhere in the country.

The rule is clear: Federal Rule of Civil Procedure 45 limits trial subpoena power to non-party witnesses located within a 100-mile radius of their courts. Specifically, under Rule 45(c)(1)(A), a "subpoena may command a person to attend a trial" if the trial court is "within 100 miles of ... where the person resides, is employed, or regularly transacts business in person."

And if a witness is outside the trial court's subpoena power, a party may use the deposition testimony of a witness instead. Separately, Rule 43(a) provides an exception to the preference for open court trial testimony, and permits remote testimony provided there is "good cause shown in compelling circumstances."

It is imperative parties are familiar with the rule and its narrow exception to mitigate the risk of surprise remote trial subpoenas. To best position your client, here are three key takeaways from recent caselaw that should be kept top of mind.

A Rule 45 Trial Subpoena Must Issue From the Trial Court

Rule 45 mandates that a trial subpoena must issue from the court where the action is pending. Rule 45(a)(2). In *In re Zetia (Ezetimibe) Antitrust Litigation*, the plaintiff asked the MDL court to allow remote trial testimony for several witnesses outside of the Rule 45 boundaries under the "good cause" exception to Rule 43.

While the court granted the Rule 43 order, the court expressly declined to compel any witness outside of the Rule 45 subpoena reach. Plaintiffs then served trial subpoenas in the witnesses' local courts, and sought orders to enforce their appearance.

Each court held that the subpoena was invalid under Rule 45(a)(2). Specifically, the courts held that while Rule 43(a) can authorize testimony from a remote location, a witness can only be commanded to testify from a place described in Rule 45(c)(1), and only the court where the action is pending can issue a valid trial subpoenas.

Videotape Company Witness Depositions

While there is no bright line rule defining “good cause in compelling circumstances,” videotaping a deposition may mitigate against a finding of “good cause.”

In *Star Mountain Plan Tr. v. Titan Mining (US) Corp.*, the court declined to allow video teleconference testimony for lack of good cause when depositions were taken but the party was dissatisfied with the depositions.

And, as an alternative to a remote trial subpoena, some courts are willing to accept a second, more limited deposition in advance of trial.

Identify the Issue Early

Consider alerting opposing counsel early that a witness is not local, and ensure all witness disclosures are fulsome and accurate. In *Off. Comm. Of Unsecured Creditors v. Calpers Corp. Partners LLC*, the court found that failure to secure testimony from an out-of-range witness *before* trial foreclosed a good cause showing because the issue was foreseeable and preventable.

In *Walsh v. Tara Constr., Inc.*, the court allowed remote testimony where the plaintiff frustrated the defendant’s ability to mitigate need for remote testimony by failing to properly disclose witness details.

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