

February 13, 2026

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, DC 20544  
[RulesCommittee\\_Secretary@ao.uscourts.gov](mailto:RulesCommittee_Secretary@ao.uscourts.gov)

**Re: Proposed Amendments to FRCP 45 & 26 (Subpoena for Remote Testimony)**

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice (“AAJ”) submits this comment regarding the amendments to FRCP 45(c) and 26(a) related to subpoenas for remote testimony proposed by the Advisory Committee on Civil Rules (“Advisory Committee”). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions in federal courts nationwide. AAJ supports the proposed amendments to Rules 45(c) and 26(a) and agrees that they adequately resolve the Ninth Circuit’s misinterpretation in *In re Kirkland* and restores nationwide subpoena authority. AAJ recommends modest clarifications to the rule text and Committee Note to eliminate ambiguity, preserve existing remote-testimony practices, and ensure that courts retain the flexibility necessary for meaningful, reliable fact-finding.

## **I. The Proposed Amendments Fix *Kirkland* and Modernize Subpoena Authority**

The proposed amendments address a pressing problem: correcting the Ninth Circuit’s misinterpretation in *In re Kirkland*, which threatened to exclude vital testimony solely because of geographic happenstance. The Committee’s proposal appropriately restores the nationwide subpoena authority that has existed since the 2013 amendments and provides clarity desperately needed by courts, litigants, and witnesses.

The 2013 amendments unambiguously authorized nationwide service of subpoenas, while preserving Rule 45(c)(1)’s longstanding 100-mile protection against compelled travel. *Kirkland* erroneously conflated “place of attendance” with physical presence in the courtroom and misconstrued the interaction between service and attendance requirements. The result was a rule that turned on geography rather than fairness, practicality, or the truth-seeking function of trial.

The proposed amendments clarify that courts may compel remote trial testimony from any witness nationwide so long as the witness is not required to travel beyond the 100-mile limitation.

This approach restores the balance intended by the 2013 amendments: robust nationwide subpoena authority paired with meaningful protection against undue travel burdens.

## **II. Remote Testimony Is Efficient, Cost-Effective, and Subject to Reasonable Safeguards**

Federal courts' experience since 2020 has demonstrated that remote proceedings are not only feasible but, in many circumstances, essential to the administration of justice. During the COVID-19 pandemic, virtually every federal district court conducted hearings, bench trials, and even complex jury trials through remote or hybrid means.<sup>1</sup> The Federal Judicial Center has similarly reported that federal judges' use of videoconferencing technology in court "increased dramatically in response to the COVID-19 pandemic."<sup>2</sup> The vast majority of judges who presided over those remote or hybrid court proceedings reported positive experiences with the technology and indicated that remote videoconferencing practices should extend beyond the pandemic where appropriate.<sup>3</sup>

This experience confirms what practitioners have long recognized: modern videoconferencing technology supports the adversarial process without diminishing fairness, reliability, or accuracy.<sup>4</sup> Trial courts already employ tried-and-true safeguards to protect the integrity of remote testimony, including standardized protocols governing who may be in the room with the witness, camera positioning and visibility, screen-sharing limitations, verification of witness identities, restrictions on the use of documents or notes off-camera, and backup procedures for connectivity interruptions.

The proposed amendments reflect this reality while preserving the longstanding presumption that testimony at trial should occur in person. Rule 43(a) continues to require live testimony "in open court," and courts retain full discretion to require in-person examination whenever circumstances warrant.<sup>5</sup> The amendments do not create an entitlement to remote testimony; they simply clarify that courts may order it when good cause exists and when doing so enables live, contemporaneous testimony that would otherwise be lost.

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<sup>1</sup> See, e.g., *infra* note 12.

<sup>2</sup> Carly Giffin & Rebecca Eyre, [Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings](#), FED. JUD. CTR. 1 (May 2022).

<sup>3</sup> *Id.* at 12; see also Karen Lisko, [Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony](#), 51 SW. L. REV. 63 (2021).

<sup>4</sup> See NAT'L CTR. FOR STATE CTS., [REMOTE PROCEEDING TOOLKIT](#) 8 (2024) ("[A]llowing remote participation supports due process, equal access, transparency, fairness, and safety. Remote proceedings reduce barriers to appearing in court, improve public access, and are responsive to the diverse needs and preferences of court users.").

<sup>5</sup> Although several defense-side commenters have urged the Advisory Committee to amend Rules 43 and 45 simultaneously, that proposal risks conflating two fundamentally distinct inquiries and would unnecessarily complicate the Committee's work. The discrete subpoena-authority issue highlighted by *In re Kirkland* concerns the geographic reach and compulsion of testimony under Rule 45, whereas Rule 43 governs a separate, case-specific judicial determination based on good cause and appropriate safeguards. AAJ therefore supports the Committee's decision to proceed incrementally and solicit focused public comment on the independent legal framework governing remote testimony.

## A. Remote testimony is materially superior to prerecorded depositions

In practice, litigants rarely face a choice between in-person testimony and live remote testimony. Rather, the true choice is between live testimony and a prerecorded deposition—often taken months or years before trial and without the benefit of contemporaneous cross-examination or impeachment. Deposition testimony is often stale, dry, and uninteresting. While in-person testimony remains the gold standard, live remote testimony is the closest functional equivalent and far superior to written or prerecorded substitutes. Courts have long recognized that remote testimony does not undermine confrontation principles in civil cases and can enhance accuracy by enabling real-time questioning in ways that deposition video cannot.

Live testimony—whether delivered in person or through remote means—preserves a factfinder’s ability to evaluate demeanor, tone, responsiveness, hesitation, and other nonverbal cues that are flattened or lost in prerecorded depositions.<sup>6</sup> But given the speed and clarity of modern videoconference technology, live remote testimony “satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony,” by enabling the factfinder “to see the live witness along with ‘his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration.’”<sup>7</sup>

Empirical research reinforces this point. Controlled mock-trial experiments repeatedly show that contemporaneous live testimony is perceived as more credible, engaging, and informative than prerecorded video or transcript formats.<sup>8</sup> In short, real-time testimony supports the fact-finding function in ways that prerecorded depositions do not. Remote testimony, therefore, directly advances the truth-seeking mission embedded in Rule 43(a) and throughout the Federal Rules. Used flexibly and with judicial oversight, it ensures that the factfinder receives reliable, probative, and real-time evidence that would otherwise be unavailable, thereby promoting fairness and efficiency.

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<sup>6</sup> Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) (“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.”); *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Learned Hand, J.) (stating the deposition is “a substitute, a second-best, not to be used when the original is at hand”).

<sup>7</sup> *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (2006) (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

<sup>8</sup> In the classic BYU studies, jurors who heard live testimony reported higher interest, better recall of evidence, and more favorable impressions of witnesses than those who viewed videotaped presentations of the same testimony. See Gerald R. Miller et al., [The Effects of Videotape Testimony in Jury Trials](#), 1975(2) BYU L. Rev. 331 (finding that jurors who heard live testimony showed greater information retention, higher interest, and more positive assessments of attorneys and witnesses compared to jurors who viewed videotaped presentations); Gerald R. Williams et al., [Juror Perceptions of Trial Testimony as a Function of the Method of Presentation](#), 1975(2) BYU L. Rev. 375 (finding that survey participants rated live testimony more favorably across multiple credibility-related dimensions than videotaped, audio-only, or transcript formats). More recent evidence reviews—such as the Scottish Government’s synthesis of live-link and prerecorded-evidence studies—likewise conclude that prerecorded video often reduces jurors’ perception of a witness’s immediacy, emotional clarity, and overall credibility, even when verdicts ultimately converge. VANESSA MUNRO, [THE IMPACT OF THE USE OF PRE-RECORDED EVIDENCE ON JUROR DECISION-MAKING: AN EVIDENCE REVIEW](#) (2018).

## **B. Remote testimony increases geographic access to the courthouse**

Modern federal litigation regularly involves witnesses spread across the country, particularly in class actions or MDLs. However, geographic disparities in access to federal courthouses significantly affect litigants and non-party witnesses. Physical attendance may impose severe burdens on witnesses who live far from federal courthouses, particularly in large states, rural regions, or districts with sparse courthouse coverage. Moreover, even the most well-planned in-person testimony may be thwarted by travel disruptions,<sup>9</sup> weather emergencies, caregiving responsibilities, medical issues, or shifting trial schedules. Courts have recognized that compelling physical attendance under such conditions can constitute undue burden or expense under Rule 45(d).<sup>10</sup>

Excluding testimony in these nationwide cases because a witness lives 101 miles away from the courthouse is out of step with modern litigation realities.<sup>11</sup> Indeed, *Kirkland* itself involved witnesses who were outside the 100-mile radius but who could have testified remotely without hardship or prejudice. Rigid geographic limits on the subpoena power, therefore, risk excluding essential testimony solely because a witness falls on the wrong side of an arbitrary mile marker. The proposed amendments appropriately respond to this problem by ensuring that geography does not dictate whether a jury may hear material testimony. The judiciary's experience during and after the COVID pandemic demonstrates that remote testimony is a practical, reliable solution to disruptions and ensures that trials proceed efficiently rather than grinding to a halt.

## **III. Modest Textual Changes Would Avoid Ambiguity and Protect Existing Remote Practices**

AAJ supports the proposed amendments and appreciates the Committee's effort to correct *Kirkland* while reaffirming the protections embedded in Rule 45(c)(1). To ensure that courts and litigants apply the rule consistently—and to avoid unintended consequences for the robust remote-testimony practices courts have already adopted—AAJ recommends modest clarifications to the rule text and Committee Note. These refinements would preserve the Committee's intent, promote uniform application across circuits, and prevent misreadings rooted in syntax or terminology.

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<sup>9</sup> See Alessandro Bombelli & Jose Maria Sallan, [Analysis of the Effect of Extreme Weather on the US Domestic Air Network](#), 107 J. TRANSP. GEOGRAPHY, no. 103541, Feb. 2023, at 2 (“[I]n the last decades there has been a staggering rise in extreme weather events, with their number almost doubling between the period 1980-1999 and 2000-2019. As such, the impact of extreme weather on air transport is expected to increase in significance. . . .”).

<sup>10</sup> E.g., *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (“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 a) equivalent to his presence in court and b) preferable to reading his deposition into evidence.”); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) (suggesting that geographical limitation is sufficient cause for contemporaneous video testimony).

<sup>11</sup> See Transcript of Proceedings, *Hearing on Proposed Amendments to Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules (Jan. 27, 2026) (statement of Rachel Downey, Hagens Berman) (forthcoming).

### A. Recommended clarification to the rule text

To avoid ambiguity arising from inconsistent usage of the terms “place” and “location,” AAJ recommends the following additions to proposed Rule 45(c)(1):

For Remote Testimony. Under Rule 45(c)(1), the place of attendance for remote testimony is the location from where the person is commanded to provide the remote testimony.

This revision makes explicit what the proposed amendment already implies: when a witness provides testimony remotely, the “place of attendance” under Rule 45(c)(1) is the witness’s physical location. The distinction between “place of testimony” and “place of attendance” became a source of confusion in *Kirkland*, where the Ninth Circuit implicitly treated “attendance” as synonymous with being physically present in the same courtroom as the judge. That reading conflicted with both the 2013 amendments and longstanding Rule 43 jurisprudence, which recognize that testimony may occur in open court even when delivered by contemporaneous transmission from a remote location. Clarifying that “place of attendance” refers to the witness’s location also ensures the rule cannot be misconstrued in future cases, maintains internal consistency within the rule and Committee Note, and reduces the risk of interpretive divergence among district courts.

### B. Recommended revision to Committee Note

To avoid confusion about whether remote testimony occurs at the witness’s physical location or in the courtroom and prevents unintended collateral consequences, AAJ recommends the following revision to the third paragraph of the draft Committee Note:

For purposes of Rule 43 and Rule 77(b), such remote testimony should be considered as occurring in the court where the trial or hearing is conducted.

Clarity in the Committee Note is equally important. As drafted, the Note could be mistakenly read to suggest that remote testimony “occurs” at the witness’s location, potentially affecting venue, jurisdictional questions, courtroom management, and even the public’s right of access. Courts have long held that remote testimony is deemed to occur in the courtroom for purposes of Rule 43(a)’s “open court” requirement, even when the witness appears from a distant location.<sup>12</sup>

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<sup>12</sup> Under Rule 43(a), courts routinely treat live remote testimony as “testimony taken in open court”—the same purpose served by in-person testimony—when contemporaneous transmission is employed and appropriate safeguards are in place. Courts have long interpreted Rule 43(a)’s “open court” requirement to encompass contemporaneous remote testimony, even when the witness appears from a distant location. *See, e.g., Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262 (W.D. Wash. 2020) (holding that Rule 43(a)’s open-court purposes of cross-examination and demeanor assessment are fully satisfied by videoconference testimony and directing a jury trial to proceed remotely); *In re RFC*, 444 F. Supp. 3d at 971 (“Given the speed and clarity of modern

#### IV. Conclusion

AAJ greatly appreciates the Advisory Committee's careful attention to this issue and strongly supports the proposed amendments to Rules 45(c) and 26(a). These reforms restore clarity to nationwide subpoena authority, correct *In re Kirkland*, and ensure that federal courts remain accessible to witnesses, litigants, and jurors in a national system of justice. By facilitating live testimony regardless of geography, the amendments promote fairness, accuracy, and the ability of parties and witnesses to meaningfully participate in the judicial process, even when courts sit far from where they live or work. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at [susan.steinman@justice.org](mailto:susan.steinman@justice.org) or Kaiya Lyons, Associate General Counsel, at [kaiya.lyons@justice.org](mailto:kaiya.lyons@justice.org).

Respectfully submitted,



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videoconference technology, where good cause and compelling circumstances are shown, such testimony satisfies the goals of live, in-person testimony and avoids the short-comings of deposition testimony.”); *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm’n*, 470 F. Supp. 3d 735, 742–44 (E.D. Mich. 2020) (bench trial by videoconference does not violate due process; Rule 43(a) satisfied); *Aoki v. Gilbert*, No. 2:11-cv-02797, 2019 WL 1243719, at \*1 (E.D. Cal. Mar. 18, 2019) (finding that appropriate safeguards existed to allow witnesses to appear by videoconference because the witnesses “will testify under oath, and will be subject to cross-examination”); *Warner v. Cate*, 2015 WL 465019, at \*2 (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.”); *In re Vioxx*, 439 F. Supp. 2d at 644 (holding contemporaneous video testimony permits the factfinder to observe the witness’s demeanor and thus “satisfies the goals of live, in-person testimony”); *Swedish Match N. Am., Inc.*, 197 F.R.D. at 2 (finding “no practical difference between live testimony and contemporaneous video transmission”).