COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
REMOTE TESTIMONY SUBCOMMITTEE

July 25, 2024

DON'T TOUCH THE REMOTE: THE FRCP ARE PROVIDING APPROPRIATE GUIDANCE FOR REMOTE TESTIMONY AND SHOULD NOT BE AMENDED

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee") and its Remote Testimony Subcommittee ("Subcommittee").

INTRODUCTION

Rules 43 and 45 of the Federal Rules of Civil Procedure ("FRCP") provide appropriate guidance for handling the issues inherent in using remote testimony in trials. In 1996, the Advisory Committee expressly adopted a preference for in-person testimony when it amended Rule 43, and the reasons for that preference still exist today. In 2020, the Advisory Committee took a fresh look at the rules governing remote proceedings in light of the COVID-19 pandemic, and it concluded that the rules worked well. Now, a group of plaintiff-side lawyers is urging the Advisory Committee to make radical changes to the rules so judges "must require" remote testimony "unless precluded by good cause."[2] The Sobol proposal would essentially allow remote participation in all cases and abolish the well-established 100-mile jurisdictional limit for subpoenas, replacing it with what amounts to nationwide subpoena power for testimony. Enabling such unfettered remote participation in trials would undermine the right of parties to

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 38 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Letter from Thomas M. Sobol, et. al, to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure, Feb. 13, 2024, ("Sobol proposal") https://www.uscourts.gov/sites/default/files/24-cv-b_suggestion_from_hagens_berman_-_rules_43_and_45.pdf.

confront witnesses in the physical presence of fact finders and interfere with the ceremony of trial, which the Advisory Committee warned decades ago "cannot be forgotten."[3] Moreover, the Sobol proposal could also engage the Advisory Committee in a widespread, divisive dispute about forcing top corporate executives – "apex" witnesses − to testify in tort cases and would embroil federal courts in more satellite litigation about the topic. FRCP amendments are unnecessary, and re-inventing the rules governing remote testimony would disrupt a balance that is working well now, upset long-held notions of the importance and sanctity of trial, and create unintended negative consequences.

I. THE CURRENT RULES PROVIDE THE RIGHT BALANCE FOR COURTS HANDLING DISPUTES OVER REMOTE TESTIMONY

A. The Historic Preference for In-Court Testimony Should Remain in Place

In-person testimony provides the court, the jury, and the parties with the best opportunity to evaluate testimony. The Committee Note to the 1996 amendment of Rule 43(a) reflects this understanding:

> 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 truthtelling. 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.[4]

Neither the advances in remote technology, nor the increased voluntary use of that technology as a consequence of the COVID-19 pandemic, have altered this rationale.[5] Any suggestions to change the status quo should, at a minimum, await the advent of academic studies to assess how remote participation has impacted the administration of justice in our court systems. But no study is necessary to know that the prospect of trials conducted materially or entirely via video is a dramatic departure from the well-formed traditions of American litigation.

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[3] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.

[4] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.

[5] Only last month the MDL judge in *In re Chrysler Pacifica Fire Recall Prods. Liab. Litig.*, ___ F. Supp.3d ___, 2024 WL 3048495 (E.D. Mich. June 18, 2024), rejected a blanket remote deposition request, recognizing that "the defendant aptly raises concerns that remote depositions, despite being a more widely used tool in the post-pandemic era, pose unique disadvantages that examining counsel may struggle to overcome in order to achieve an effective examination. Federal courts have recognized such concerns as legitimate. *Id.* at *5. *See Radiant Global Logistics, Inc. v. BTX Air Express of Detroit, LLC*, 2020 WL 1933818, at *4 (E.D. Mich. Apr. 22, 2020) (for depositions of "corporate officers," "it would approach legal malpractice for . . . counsel to conduct those depositions remotely").

B. The Advisory Committee's CARES Act Subcommittee Concluded that the Current Rules on Remote Testimony Worked Well During the Pandemic

Only three years ago, the Judicial Conference authorized the use of video and teleconference systems for certain proceedings.[6] After the exigent circumstances of the COVID-19 pandemic abated, the Advisory Committee's CARES Act Subcommittee examined how the courts handled remote testimony in civil proceedings and considered whether rules changes were needed. The Subcommittee concluded that Rule 43(a) is sufficiently flexible to allow courts to handle the issue in the future. The Advisory Committee's report to the Standing Committee stated, "Experience during the COVID-19 pandemic suggests that the present rules are well designed to meet needs for remote proceedings."[7] The Advisory Committee further explained:

> [T]he inherent discretion and flexibility of the Civil Rules, coupled with existing provisions for relying on remote technology, have served the courts and parties well during the COVID-19 pandemic.[8]

No new facts have arisen since the Advisory Committee's report that change this conclusion or warrant a radical revision of the FRCP.

C. The FRCP's Existing Remedy for Unavailable Witnesses Is Well Accepted

Rule 43 provides a remedy for situations where a witness is unavailable at trial: deposition testimony. Although the use of depositions is not a perfect substitute for in-person testimony, it is widely used and well accepted. The Committee Note to the 1996 amendment to Rule 43 states:

> 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.[9]

Nothing, including the availability of new technologies, has changed this conclusion. The remedy of remote testimony is available either by agreement or upon good cause shown.[10] This should heighten the Subcommittee's caution to avoid creating unintended consequences that are worse than the status quo. Creating a rules-based presumption that remote testimony is always superior to using deposition testimony for all witnesses in all trials would up-end over a century

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[6] *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, available at: https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.
[7] Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 176, https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.
[8] Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 165, https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.
[9] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.
[10] *E.g.*, *Mayfield v. City of Madison*, 2020 WL 13252053, at *2 (S.D. Miss. Dec. 9, 2020) ("find[ing] good cause to order that the depositions of [third-parties] be taken by remote means").

of established precedent and would cause many foreseeable problems for judges, parties, lawyers, and witnesses. A rule specifically stating that deposition testimony "shall not satisfy the good cause requirement," as the Sobol proposal urges,[11] is a particularly heavy-handed limitation on judicial discretion.

D. The *In Re Kirkland* Decision Is Correct and Should Not Be "Reversed" by Rulemaking

The Ninth Circuit's *Kirkland* decision correctly held that Rule 43 does not allow a district court in California to require a witness in the Virgin Islands to testify in a California trial. The contested subpoena in *Kirkland* was served in the Virgin Islands on a witness who "undisputed[ly] . . . no longer live[d], work[ed], or regularly conduct[ed] in-person business" in California, and therefore violated Rule 45(c)'s 100-mile geographic limitation.[12] The prior trial testimony of the witness was available.[13]

Kirkland follows the majority rule. "[D]espite changes in technology and professional norms, the rule governing the court's subpoena power has not changed and does not except remote appearances from the geographical limitations on the power to compel a witness to appear and testify at trial."[14] Most courts agree.[15] In *Coblin v. DePuy Orthopaedics, Inc.,*[16] the Eastern District of Kentucky relied on the decisions of "several courts" that had "agreed that any textual reading reaches this mandatory conclusion."[17] Any other construction would "compel[] actions by a witness well beyond its jurisdictional limits simply because technology has eased the practical burdens."[18] "Federal courts remain one of limited jurisdiction and practical concerns cannot drive the Court to ignore such fundamental principles."[19]

In Broumand v. Joseph,[20], cited in *Coblin*, the court agreed that the current reading of Rules 43 and 45 is appropriate, concluding that a *requirement* for remote testimony would exempt federal district courts from all "geographical limitations."[21] That result – the same being urged to the Advisory Committee – would "bestow upon any [district court] sitting anywhere in the country

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[11] Sobol proposal, *supra* n. 2.
[12] *In re Kirkland*, 75 F.4th 1030, 1042 (9th Cir. 2023).
[13] *Id.* at 1038.
[14] *Id.* at 1051-52.
[15] Those that do not are primarily MDL courts that, with respect to this issue (and others), have failed to follow the FRCP. In the *Pinnacle Hip* MDL, for example, while the remote deposition order survived mandamus review, one of the panel members specifically noted that "the district court misapplied Rules 43(a) and 45(c)." *In re Depuy Orthopaedics, Inc.*, No. 16-11419, order at 1 (5th Cir. Sept. 27, 2016) (Jolly, J. concurring).
[16] *Coblin v. DePuy Orthopaedics, Inc.,* 2024 WL 1357571 (E.D. Ky. Mar. 29, 2024).
[17] *Id.* at *2 (citing *Bioconvergence LLC v. Attariwala*, 2023 WL 4494020, at *2 (S.D. Ind. June 29, 2023); *Rochester Drug Cooperative, Inc. v. Campanelli*, 2023 WL 2945879, at *2 (S.D.N.Y. Apr. 14, 2023); *Broumand v. Joseph*, 522 F. Supp.3d 8, 10 (S.D.N.Y. 2021); *In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litigation*, 2021 WL 2822535, at *4-6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, 2020 WL 9812009, at *4 (D. Wyo. Dec. 2, 2020)).
[18] *Coblin*, 2024 WL 1357571, at *3.
[19] *Id.* at *5 (citation omitted).
[20] *Broumand v. Joseph*, 522 F. Supp.3d 8, 10 (S.D.N.Y. 2021).
[21] 522 F. Supp.3d at 23-24.

the unbounded power to compel remote testimony from any person residing anywhere in the country."[22]

The *EpiPen* decision, likewise followed in *Coblin*, discussed the clear drawbacks of universal remote subpoena power at some length, making the following points:

- That a party has a "tactical advantage" because they control their witnesses' testimony is no basis to stretch judicial jurisdiction, since "this circumstance occurs all the time and does not present a 'compelling circumstance.'"[23] "[I]f defendants later call the witness to testify live during their case, then plaintiff will enjoy the opportunity to "cross-examine these individuals live in front of the jury."[24] Thus, this "tactical advantage," to the extent it exists, is available to "both parties" with respect to their own witnesses.[25]
- "[W]hile live testimony is generally preferable to videotaped testimony, the absence of such testimony, even from a key witness, is only minimally prejudicial when that witness is adverse and when there is a videotaped deposition that can be introduced in lieu of live testimony."[26]
- Plaintiffs choose where to litigate. Thus, in the *EpiPen* case, they "made the strategic decision to file their lawsuits in our court" and then to seek MDL centralization. Thus, the lack of jurisdiction over the witnesses was of plaintiffs' own making.[27]

The Sobol proposal's approach would effectively abolish judicial districts in connection with trial testimony:

> If this provision is construed to mean that a person residing anywhere (at least anywhere within the United States) can be compelled to provide testimony by videoconference from a spot (with videoconferencing capabilities) within 100 miles of their home, that would mean virtually everyone in the United States could be compelled to 'attend' trial in this manner.[28]

Numerous additional courts agree that the existing rule guidance on remote trial testimony recognized in *Kirkland* is both the majority rule and is based on sound practical reasons.[29]

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[22] *Id.* at 24.
[23] *Id.* at 5 (citation and quotation marks omitted).
[24] *Id.* (citation and quotation marks omitted).
[25] *Id.* at *6 (citation and quotation marks omitted).
[26] *Id.*
[27] *Id.*
[28] *Singh v. Vanderbilt University Medical Center*, 2021 WL 3710442, at *3 (M.D. Tenn. Aug. 19, 2021).
[29] *Hightower v. Ingerman Management Co.*, 2022 WL 19266260, at *3 n.2 (D.N.J. May 26, 2022) ("allowing a party to compel the attendance of a witness for remote testimony via Rule 43 would eviscerate . . . geographical limitations); *Moreno v. Specialized Bicycle Components, Inc.*, 2022 WL 1211582, at *2 (D. Colo. Apr. 25, 2022) ("nothing . . . permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power"; following advisory committee notes to the 1996 amendment to Rule 43); *Orbital Engineering, Inc. v. Buchko*, 2022 WL 170043, at *2 (W.D. Pa. Jan. 19, 2022) (that a witness' "employer is based in [the forumstate] is not sufficient to compel their appearance"; following "plain language" of Rule 45(c)); *Official Comm.*

II. RULE 43 SHOULD NOT BE AMENDED TO REVERSE THE PRESUMPTION IN FAVOR OF LIVE, IN-COURT TESTIMONY OR TO REDUCE JUDICIAL DISCRETION

Rule 43 requires that only for good cause and under compelling circumstances should a trial witness's testimony be permitted via contemporaneous transmission from a different location.[30] The rule reflects, among other things, the fundamental principle of Federal Rule of Evidence 801 that testimony of a witness who is not sitting in the witness chair is considered hearsay (absent specific exceptions).[31] The 1975 Advisory Committee Notes to FRE 801(c)(1) explain: "Testimony given by a witness in the course of court proceedings is excluded [from hearsay] since there is compliance with all the *ideal conditions* for testifying."[32] Those ideal conditions include the factfinder's ability to see and perceive the witness to judge the veracity of the testimony. Reversing Rule 43's presumption by permitting (or requiring judges to permit) remote testimony regardless of the importance of any particular witness, including whether substitute witnesses are available, or factoring in other unique circumstances of a particular case,[33] would have significant unintended consequences. A fundamental reason why judges need discretion over when to permit (or require) remote testimony is that not all witnesses are equally important to the case, let alone "necessary" or "essential," as defined by Federal Rule of Evidence 403. Eliminating that discretion would reduce judges' control over their courtrooms, interfere with parties' litigation strategies, force some people to testify who otherwise would not, and substitute some witnesses who expect to testify for someone else. The merits of such decisions cannot be contemplated in advance or otherwise mandated by a blanket rule such as the one proposed.

Nor should these decisions be made by judges in the first instance. The current Federal Rules of Civil Procedure appropriately allow and/or put the onus on the parties to work out agreements for remote testimony. For example, Rule 30(b)(4) allows parties to stipulate, or courts to order, that a deposition be taken by remote means. This is appropriate because there are often numerous factors that go into the equation of whether remote testimony is appropriate for a

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of Unsecured Creditors v. Calpers Corp. Partners LLC, 2021 WL 3081880, at *3-4 (D. Me. July 20, 2021) (movant failed to establish "good cause" to justify a remote trial deposition); *Lin v. Horan Capital Management LLC*, 2014 WL 3974585, at *23 (S.D.N.Y. Aug. 13, 2014) ("Rule 43(a)'s thrust concerns the reception of evidence in a trial court, and does not operate to extend the range or requirements of a subpoena"); *Roundtree v. Chase Bank USA, N.A.*, 2014 WL 2480259, at *2 (W.D. Wash. June 3, 2014) (remote depositions "presuppose[] a witness willing or compelled to testify at trial" rejecting argument that remote testimony "transport[s]" the courthouse to the site of the deposition); *Lea v. Wyeth LLC*, 2011 WL 13195950, at *1 (E.D. Tex. Nov. 22, 2011) (remote witnesses "are under no obligation to cooperate"; "nothing in the language of Rule 43(a) that permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power").

[30] Fed. R. Civ. P. 43.

[31] Fed. R. Ev. 801(c)(1) emphasis added.

[32] Fed. R. Ev. Advisory Committee Notes to Rule 801(c), 1975.

[33] *See Chrysler Pacifica*, 2024 WL 3048495 at *5 (particular witnesses demonstrated "good cause" for a remote deposition order, after rejecting demand for across-the-board remote depositions).

particular witness; consistent with usual meet-and-confer practices for discovery issues in federal court, parties should attempt to agree before turning to the judge.[34]

III. RULE 45 SHOULD NOT BE AMENDED TO ALLOW NATIONWIDE SUBPOENA POWER

Rule 45(c)(1) appropriately limits subpoenas for trials, hearings, and depositions to "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or, if the person is a party or a party's officer or would not incur a substantial expense, "within the state where the person where the person resides, is employed, or regularly transacts business in person."[35] These limitations remains sensible, not only because of the strong reasons that favor live, in-person testimony, but also to protect witnesses from the burdens and disruptions inherent in appearing as a witness at a trial. The Advisory Committee is being urged to amend Rule 45(c)(1) by measuring the distance from the witness to the location of a virtual transmission rather than the location of the trial.[36] That is no limitation at all. It would allow parties to subpoena witnesses virtually anywhere within the United States and would effectively eliminate any geographic limitations and create nationwide subpoena power in all federal litigation. The potential for abuse and gamesmanship with such an approach is very high. Jurisdictional limitations for judicial districts provide a logical, fair, and predictable playing field for all parties when it comes to planning for and participating in trials, and it has worked without serious problems for decades.

Several practical questions would arise with nationwide subpoena power. For example, who would 'issue' these subpoenas, and how are such subpoenas to be enforced? Remote enforcement of non-party subpoenas could entail far-away trial judges needing the assistance of local judiciary and court personnel. Remote depositions or testimony could also be extremely burdensome in terms of costs and allocation of resources, as witnesses must be entitled to the availability of counsel with them when they testify.

The proposed amendment would have wide-ranging ramifications on the judiciary, parties, and especially witnesses. The Subcommittee must contemplate that any new rule will become the new default routine practice rather than assuming it will be employed only rarely. The suggested rule change could cause most if not all future trials to feature remote testimony, and people will be forever subject to the subpoena power of every federal district judge in the country. Imposing this novel regime on every trial, on every witness, in every civil case, is a vastly over-expansive action out of proportion to any problem.

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[34] *Id.* ("that depositions by remote means may be an economical and appropriate tool in some instances, at least where the parties agree on the means . . ., does not mean that good cause has been shown to compel the taking of depositions by remote means across the board").
[35] Fed. R. Civ. P. 45(c)(1).
[36] Sobol proposal, *supra* n. 2.

IV. THE PROMULGATION OF FRCP AMENDMENTS RELATING TO REMOTE TESTIMONY WILL EMBROIL THE COMMITTEE IN A HEATED DISPUTE ABOUT APEX WITNESSES

Any rule changes relating to remote testimony would have broad effect on many witnesses and have significant impact on fights over so-called apex witnesses—high-ranking corporate or organizational leaders who could conceivably, but usually do not, have any first-hand knowledge of the facts and circumstances of a particular dispute. Satellite litigation over the appropriateness of apex witnesses is as contentious as it is common.[37] As the cases cited above in footnote 37 demonstrate, most states restrict apex witness depositions to a greater or lesser extent, however the standards vary markedly by state. The suggestion to change the rules so judges "must require" remote testimony—without respect to the witness' importance to the case, the existence of deposition testimony, or the availability of other witnesses with similar or greater knowledge—and to create nationwide service of subpoenas is a very thinly veiled attempt to put apex witnesses on the stand in every federal trial, thus embroiling the federal courts even more deeply in disputes over the propriety of such testimony, starting with the knotty question of whether state or federal law applies in the absence of any federal rule directly on point.

V. THE SUBCOMMITTEE SHOULD MONITOR THE RESPONSE TO THE PROPOSED BANKRUPTCY RULES AMENDMENTS RELATING TO REMOTE TESTIMONY BEFORE TAKING ACTION TO MODIFY THE FRCP

The Advisory Committee on Bankruptcy Rules will hear public comment this year on its proposed changes to the rules governing remote testimony in Bankruptcy proceedings.[38] The public comment will be germane to the Subcommittee's work because the Bankruptcy proposals include adopting FRCP 43 as written for adversary proceedings while adopting the rule minus the "compelling circumstances" test for contested proceedings. The experience and views expressed during the public comment period are highly likely to inform the Subcommittee's work, so proceeding to develop FRCP amendments without the benefit of those comments is likely to deprive the Subcommittee of important information. Therefore, the Subcommittee

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[37] Most state appellate courts have restricted depositions of "apex" corporate officers. *See*, *e.g.*, *National Collegiate Athletic Association v. Finnerty*, 191 N.E.3d 211, 221-23 (Ind. 2022) (order allowing apex deposition reversed and remanded); *General Motors, LLC v. Buchanan*, 874 S.E.2d 52, 64-66 (Ga. 2022) (same); *In re Amendments to Florida. Rule of Civ. Procedure 280*, 324 So.3d 459, 461-63 (Fla. 2021) (codifying apex deposition doctrine); *State ex rel. Massachusetts Mutual Life Insurance Co. v. Sanders*, 228 W. Va. 749, 760, 724 S.E.2d 353, 363-64 (2012) (order allowing apex deposition reversed and remanded); *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1004-05 (Okla. 2007) (same); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607-09 (Mo. 2002) (same); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (adopting apex deposition doctrine); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494 (Mich. App. 2010) (same); *Liberty Mutual Insurance Co. v. Superior Court*, 13 Cal. Rptr.2d 363, 367 (Cal. App. 1992) (same); *but see Stratford v. Umpqua Bank*, 534 P.3d 1195, 1201-03 (Wash. 2023) (declining to adopt apex deposition doctrine).

[38] Agenda Book, Committee on Rules of Practice and Procedure, June 4, 2024, 656, https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf.

should consider the public comment on the Bankruptcy proposals before drafting or advancing any FRCP amendments on this topic.

CONCLUSION

The current FRCP provisions regarding remote testimony are working well and strike the appropriate balance for courts and parties, including the presumption in favor of in-person testimony and the ability to use deposition testimony when witnesses are unavailable for trial or for "good cause" shown. Changing those rules would indisputably reduce courts' discretion and change litigation strategies. The proposal before the Advisory Committee threatens to alter the nature of trials by creating a new presumption that witnesses will participate by remote means. Because there is no need to change the rules, and the risks of doing so are high, the Advisory Committee should not amend the FRCP provisions governing remote testimony.