

How Rule 45 Update May Change Remote Trial Subpoenas

By **Timothy Cook and Gillian Farrell** (October 20, 2026)

The U.S. Bankruptcy Court for the Central District of California issued subpoenas to two witnesses to testify at trial by video. The witnesses lived in the U.S. Virgin Islands, and they moved to quash, arguing that they were beyond the California court's subpoena power. They prevailed.[1]

These are the facts from *In re: Kirkland*, a 2023 decision from the U.S. Court of Appeals for the Ninth Circuit holding that the geographic limits specified by Rule 45(c) of the Federal Rules of Civil Procedure apply even when the witness never leaves home.

The Ninth Circuit deemed the "place of compliance" for remote trial testimony to be the courthouse where the trial is taking place — not the place where the witness testifies. The panel was candid that this holding limited the value of remote testimony in cases with dispersed parties, but it reasoned that "any changes to Rule 45" present a question "for the Rules Committee and not for [a] court." [2]

The Committee on Rules of Practice and Procedure has answered.

On Oct. 20, it recommended an amendment to Rule 45(c) to the Supreme Court.[3] But the amendment is narrower than it first appears: It expands the reach of the trial subpoenas, but not the standard for authorizing remote testimony.

Trial lawyers should understand what it authorizes, what it does not and what it leaves unresolved. They should also carefully weigh when remote trial testimony is strategically desirable in the first place.

Two rules govern compelled remote trial testimony.

Two rules control when a party may compel a witness to provide remote trial testimony.

Rule 43(a) allows "testimony in open court by contemporaneous transmission from a different location" only for "good cause in compelling circumstances and with appropriate safeguards." The rules do not define "compelling circumstances," but an Advisory Committee note from 1996 gives the example of a witness who cannot attend trial for "unexpected reasons, such as accident or illness." A Rules Committee analysis from May this year found that judges usually require an "unforeseeable, last-minute" development preventing in-court testimony.[4]

Rule 45(c)(1) determines whether a court can compel trial testimony. It permits a subpoena to "command a person to attend a trial, hearing, or deposition only ... within 100 miles of where the person resides, is employed, or regularly transacts business in person," or within that person's state if additional criteria are met.

The Ninth Circuit's *Kirkland* ruling held that, for purposes of Rule 45(c)(1), a trial happens in the courthouse where it is held. If the witness is out of state and more than 100 miles away



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from the courthouse, they are outside of the court's trial subpoena power and cannot be compelled to testify, even remotely. The panel recognized that a rule change could undo that result.

The amendment expands the subpoena power, but not the standard for remote testimony.

The proposed amendment adds a new subsection to Rule 45: "Under Rule 45(c)(1), the place of attendance for remote testimony is the location where the person is commanded to appear in person." [5]

This amendment addresses the issue that Kirkland highlighted. By setting the place of compliance for remote testimony as the place where the witness — not the court — sits, it effectively gives the trial court nationwide trial subpoena power for remote testimony. Under the amendment, the witnesses based in the Virgin Islands from the Kirkland case could be compelled to testify in a California trial.

The amendment is also paired with a proposed amendment to Rule 26 that would require a party's trial disclosures to state, for each identified potential witness, "whether it expects the testimony to be in person or remote." [6] The purpose is to alert the parties to potential remote testimony issues well in advance of trial.

But, "[t]he amendment does not alter the standards for deciding whether to permit in-court remote trial testimony," according to a committee note. [7] It leaves Rule 43(a) untouched, so remote trial testimony will still require "good cause in compelling circumstances."

The subcommittee for Rules 43 and 45 is still considering proposals to change the remote testimony standard. It "is not in favor of 'fully remote' trials," but it has recognized possible reasons to allow remote testimony for specific witnesses more often. [8]

As noted, the Rules Committee's own research confirms that judges applying Rule 43(a) look for an unforeseeable, last-minute development before authorizing remote trial testimony. But once Rule 45 provides expanded trial subpoena power, disputes about the scope of Rule 43(a) will likely define the first disputes under the new rule.

Broader reach will not always make remote testimony the right call.

Even without expanding Rule 43(a), the proposed amendment expands parties' options to seek remote trial testimony. Trial lawyers should consider several factors when deciding whether to do so.

First, the amendment creates leverage for relevant witnesses that a party tries to keep outside an opposing party's subpoena power.

Today, a party has little recourse to bring an opposing-party witness outside Rule 45(c)(1)'s geographical bounds to trial if its opponent declines to call that witness. But under the amendment, that witness could be called adversely by remote testimony if allowed by the court.

And the reverse is equally true: A party may no longer be able to use Rule 45(c)(1) to shelter its own witnesses from testifying. If a party can show compelling circumstances, the witness's relevance and importance — not geography — will control.

Second, the amendment may affect disputes about whether a party's distant senior executives can be called to testify — i.e., apex witness disputes.

Corporate parties can present their own distant apex employees live, but opponents may have no comparable way to compel those witnesses. The amendment narrows that asymmetry. It therefore could increase requests for remote apex testimony, but it may also reduce the burden on apex witnesses by eliminating the need for travel. Apex-witness disputes may therefore become a more significant battleground if the amended rule goes into effect.

But trial lawyers should continue to rely on the possibility of remote testimony sparingly. As the Rules Committee explained in its May memo, the choice "is not typically between in-person and remote testimony so much as between remote live testimony and deposition testimony." [9]

The committee viewed that comparison as favoring live remote testimony, because relying on deposition designations carries its own costs. The practical question is therefore whether remote testimony beats the deposition video that is the realistic alternative, not whether it matches in-person testimony that may not be available at all.

Counsel should consider the subject matter of the testimony and weigh whether its impact would diminish if offered remotely, to the point that calling the witness becomes ineffective, inefficient or even detrimental. That is especially true of highly technical testimony, which may be more accessible in person or augmented by demonstratives.

Counsel should also consider how a witness will present remotely and whether that presentation affects credibility. Jury and bench trials may call for different calculations, and post-trial briefing may reduce concerns about screen presence. As always, counsel should weigh whether it is safer not to call a witness than to invite adverse examination.

Similarly, counsel should weigh the value of live remote testimony against the existing deposition record. Live testimony gives witnesses who appeared uncredible or unlikeable in their depositions an opportunity to improve their presentation. But deposition videos might sometimes be sufficiently compelling without live testimony.

In short, the proposed amendment opens the door to more remote testimony, and counsel should consider how that affects their case strategy. But just because counsel can use remote trial testimony in more circumstances does not mean that they should.

The amendment prompts unresolved questions for foreign witnesses.

Strategy aside, the amendment leaves open questions about application. Foreign witnesses present one.

Consider this scenario: A foreign nonparty travels to the U.S. and is properly served with a subpoena to appear at trial in a distant district months later. The subpoena calls for remote trial testimony from the witness's home abroad. Is this subpoena valid?

These facts would appear to check Rule 45's boxes if the amendment is ultimately adopted. Courts routinely hold that foreign nationals transiently in the U.S. may be served with Rule 45 subpoenas. [10] Before the amendment, such service was helpful only in limited circumstances because Rule 45(c)(1)(A) likely would not permit compliance more than 100 miles from the witness's residence. But if the subpoena requires remote testimony from the

witness's home abroad, it would appear to comply with the proposed amended Rule 45 because the place of compliance would be the witness's home.

It is unclear whether this subpoena would be enforceable. Practically, there might be no way to enforce it: Rule 45(g) vests contempt power in "[t]he court for the district where compliance is required," and no such district exists if the designated place of compliance is the witness's home abroad.[11]

And even if the subpoena could be enforced, international comity would likely counsel against it. But untethering the place of compliance from the trial courthouse makes novel scenarios like this possible, and the amendment does not address how they should be resolved.[12] Courts and counsel seeking remote trial testimony will face challenging scenarios like this as such testimony becomes more common.

Counsel should prepare before the rule takes effect.

The Rules Committee has proposed the amendment to the U.S. Supreme Court with a recommendation for its adoption. If the court agrees, it will be transmitted to Congress by May 1, 2027, and take effect on Dec. 1, 2027.[13]

Counsel should reconsider witness lists for trials occurring after the amendment's effective date for third parties previously written off as unreachable. Some of those witnesses may now be within reach, and their own witnesses may be too. If counsel intends to seek remote trial testimony, they should build the Rule 43(a) record early.

Finally, the Rules Committee's ongoing consideration of amendments to Rule 43(a) bears watching. If the Rules Committee lowers the bar for authorizing remote trial testimony, it may become a more common part of trial practice.

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[1] In re: Kirkland, 75 F.4th 1030 (9th Cir. 2023).

[2] Id. at 1047 (citation modified).

[3] Memo from Hon. James C. Dever III, Chair, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, to Scott S. Harris, Clerk, Supreme Court of the United States (Oct. 20, 2026), available at https://www.uscourts.gov/sites/default/files/document/2026_scotus_package.pdf ("Oct. 2027 Transmittal Package").

[4] Memo from Hon. Sarah S. Vance, Chair, Advisory Committee on Civil Rules, to Hon. James C. Dever III, Chair, Committee on Rules of Practice and Procedure at 9 (May 6, 2026) ("May 2026 Advisory Committee Report").

[5] Oct. 2027 Transmittal Package at 00082.

[6] Id. at 00072-73.

[7] Id. at 00086 (Committee Note).

[8] May 2026 Advisory Committee Report at 9.

[9] Id.

[10] See, e.g., *Probulk Carriers Ltd. v. Marvel Int'l Mgmt. & Transp.*, 180 F. Supp. 3d 290, 292 (S.D.N.Y. 2016).

[11] Such testimony may also face challenges because of foreign blocking statutes that might make it unlawful for the witness to testify in a U.S. proceeding.

[12] Rule 43(a) could be a safety valve to block attempted enforcement of a subpoena like this, but as the Rules Committee explained, a request for leave to present remote trial testimony can come after a subpoena for remote trial testimony is served. See, e.g., Draft Minutes, Civil Rules Advisory Committee at 4 (Apr. 14, 2026) ("There were also recommendations that the rule itself require advance approval by the court as a precondition for serving a subpoena for remote trial testimony. But that seems unnecessary; remote trial testimony is always subject to the court's approval under Rule 43(a).").

[13] 28 U.S.C. § 2074(a).