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The Zoom Paradox: Schrodinger's Witness

Christopher J. Vidrine

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INTRODUCTION

In the fall of 2019, a new law student begins to study the foundational stories of *International Shoe*,[1] *World-Wide Volkswagen*,[2] and *Piper Aircraft*.[3] That student learns on the first day of Civil Procedure class that the Federal Rules of Civil Procedure are to be "construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."[4] Fast-forward to 2022—that student survived the COVID-19 pandemic, law school, and the bar exam.

An issue presents itself in this burgeoning young lawyer's very first case. A key witness lives across the country and does not want to attend trial in person because the inconvenient travel would cost time and money. The witness asks if there is any way to testify via Zoom or some other videoconferencing technology to lessen the burden the witness would have to bear. "This shouldn't be an issue," the naïve lawyer thinks. For instance, while working as a clerk for a firm during the summer of 2020, the lawyer had sat in on status conferences, depositions, and appellate oral arguments held over Cisco Webex.[5] The lawyer had attended birthdays, weddings, and even funerals by videoconference during the pandemic. If a court was willing to have the witness testify via a recorded video trial deposition, a practice that was utilized commonly and without much effort even before the pandemic, then surely the court would allow that witness to present testimony live via videoconference. After all, the purpose of the Federal Rules of Civil Procedure is to ensure that litigation is as convenient and as just as possible.[6] However, the young lawyer is surprised to find that the system of rules he has studied and relied upon has failed to fulfill its

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* J.D./D.C.L., 2022. Paul M. Hebert Law Center, Louisiana State University.

1. *See* Int'l Shoe Co. v. Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310 (1945).
2. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
3. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
4. FED. R. CIV. P. 1.
5. Cisco Webex is a company that sells videoconferencing software.
6. *See* FED. R. CIV. P. 1.

purpose. The judge promptly denies the request to allow the witness to testify via videoconference, saying, "The pandemic is over, kid. We don't do that anymore. Just request a *de bene esse*[7] deposition."

Rule 43(a) of the Federal Rules of Civil Procedure provides courts with a standard for permitting witness testimony at trial via remote transmission.[8] Courts prefer witnesses to provide testimony live and in person;[9] however, when that method is unavailable, courts may permit parties to use trial depositions[10] or remote-transmission technology to present witness testimony at trial.[11] Under Rule 32(a)(4), a court may permit the use of a deposition to serve as testimony at trial when that witness is deemed unavailable to provide live testimony due to the proponent's inability to secure the witness's attendance by subpoena or due to the witness's death, illness, or distance from the proceeding.[12] Under the second clause of Rule 43(a), judges may use their discretion to permit live remote testimony only if the litigant requesting permission has shown both that it is for "good cause in compelling circumstances" and that "appropriate safeguards" are in place.[13] The limitations set forth in this clause are often interpreted in a manner that prevents witnesses from testifying live via videoconferencing in preference to the use of trial depositions.[14] However, the first clause of Rule 43(a) implies that live testimony in open court is strongly preferred, and this preference should only be overcome in specific circumstances outlined by other federal rules or statutes.[15] This conservative approach to acceptance of testimony at trial

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7. A *de bene esse* deposition is one that will be used to preserve witness testimony for trial. These are colloquially called "trial depositions." *See* Coface Collections N. Am., Inc. v. Newton, No. 11-52, 2012 WL 6738391, at *1 n.1 (D. Del. Dec. 28, 2012).

8. FED. R. CIV. P. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.").

9. 1 STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 43 (2020).

10. *See* FED. R. CIV. P. 32(a)(4).

11. *See* FED. R. CIV. P. 43(a).

12. FED. R. CIV. P. 32(a)(4)(A)–(D).

13. FED. R. CIV. P. 43(a).

14. FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment; *see also* FED. R. CIV. P. 32(a)(4)(E).

15. *See* FED. R. CIV. P. 43(a) ("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."); 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 2414 (4th ed. 2020).

via remote transmission pursuant to Rule 43(a) functions as a quasi-prohibition on the use of videoconferencing in judicial proceedings.[16] Rule 43(a) serves as an obstacle to parties' ability to conveniently obtain the speedy and inexpensive access to justice in civil litigation promised by Rule 1 of the Federal Rules of Civil Procedure.[17]

Moreover, this conservative interpretation of Rule 43(a) creates a paradox in which a witness is procedurally available under Rule 32(a)(4), but Rule 43(a) renders that same witness factually unavailable.[18] In other words, the court cannot compel the witness to testify live and in person because, for example, the witness is outside of the court's traditional subpoena power, but can compel the witness to testify live via remote transmission pursuant to Rule 45(c)(1).[19] Because the court is able to procure the witness by a subpoena pursuant to Rule 45(c)(1), the witness does not meet any of the criteria that would cause the court to deem him or her unavailable for live testimony pursuant to Rule 32(a)(4).[20] Therefore, the use of a trial deposition in lieu of live testimony is not an option for the court.[21] However, the witness also cannot testify remotely

16. *See, e.g.*, United States v. Kivanc, 714 F.3d 782, 791 (4th Cir. 2013) (denying request for a witness to present live testimony when the witness was in poor health and the cost of traveling from Turkey to the United States for trial would be burdensome); Humbert v. O'Malley, No. 11-0440, 2015 WL 1256458, at *2 (D. Md. Mar. 17, 2015) (denying request for a witness to present live testimony when a witness would have to travel from California to Maryland); *In re* Mikolajczyk, No. 15-90015, 2015 WL 3505135, at *1 (Bankr. W.D. Mich. June 3, 2015) ("Despite the obvious inconvenience of traveling two hundred miles to testify, the circumstances do not rebut the presumption favoring live testimony in open court that Rule 43 raises.").

17. FED. R. CIV. P. 1.

18. *See generally* FED. R. CIV. P. 45(c), 32(a)(4), 43(a).

19. *See* FED. R. CIV. P. 45(c)(1) ("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.").

20. *See generally* FED. R. CIV. P. 32(a)(4). A witness is deemed unavailable when he is dead; more than 100 miles from the place of hearing or trial; unable to testify due to age, illness, infirmity, or imprisonment; or unable to be procured by subpoena. *See* FED. R. CIV. P. 32(a)(4)(A)–(D).

21. A party may only use the deposition of a witness as testimony at trial if deemed unavailable pursuant to Rule 32(a)(4). *See* FED. R. CIV. P. 32(a)(4).

because of the restrictions of Rule 43(a).[22] Thus, although the witness does not meet any of the criteria for unavailability under Rule 32(a)(4), the witness is rendered unavailable because Rule 43(a)'s restrictions preclude testifying via live remote testimony. This paradox has existed for some time, but the need to resolve it has rapidly become much more pressing.[23]

In 2020, the COVID-19 pandemic paralyzed many facets of society.[24] The federal court system found itself conducting most hearings and even full-fledged jury trials via videoconferencing software, as quarantine mandates confined judges, juries, attorneys, and litigants to their homes.[25] Courts have found that the mandatory restrictions brought about by COVID-19 provided litigants with Rule 43(a)'s "good cause in compelling circumstances" and thus have permitted witnesses to testify remotely via videoconferencing during the pandemic.[26] However, after the COVID-19 pandemic, litigants will no longer be able to use the pandemic to show "good cause in compelling circumstances." Nevertheless, the widespread use of videoconferencing is unlikely to go away. Therefore, the Judicial Conference[27] should recommend that the Supreme Court amend Rule 43(a) of the Federal Rules of Civil Procedure to provide a more lenient

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22. *See generally* FED. R. CIV. P. 43(a) (providing that the use of testimony via remote transmission in judicial proceedings must be justified by "good cause in compelling circumstances" to be permitted).

23. *See generally* discussion *infra* Section I.D.3.

24. *See generally* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/H5UZ-FV5Q].

25. *See* Angela Morris, *Lessons Learned, 'History Made' in First Zoom Jury Trial in a Criminal Case*, LAW.COM TEXAS LAWYER (Aug. 11, 2020, 9:31 PM), https://www.law.com/texaslawyer/2020/08/11/lessons-learned-history-made-in-nations-first-zoom-trial/ [https://perma.cc/6C3H-QQPK].

26. *E.g.*, *In re* RFC & Rescap Liquidation Tr. Action, 444 F. Supp. 3d 967 (D. Minn. Mar. 13, 2020).

27. Proposed amendments to the Federal Rules of Civil Procedure are first evaluated by the Advisory Committee on Rules of Civil Procedure, which then drafts the proposed amendment and transmits it to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee). The Standing Committee reviews the findings of the Advisory Committee and may recommend it to the Judicial Conference. The Judicial Conference then recommends the proposed amendment to the Supreme Court who may issue an order to revise the rules before May 1 of the year in which it is to become effective. Finally, Congress is given until December 1 of that year to modify or reject the amendment promulgated by the Supreme Court or that amendment will become part of the Federal Rules of Civil Procedure. *See* 28 U.S.C. §§ 2071–2077.

standard, based on judicial discretion that gives deference to the consent of the parties. This would benefit civil litigants and the federal court system in its entirety by providing a more accessible, efficient, and convenient means of obtaining justice, better serving the purpose of the Federal Rules of Civil Procedure.[28]

Part I of this Comment will provide background by discussing the evolution of the concept of "convenience" in federal civil procedure. Specifically, it will discuss how the common law and statutory rules of federal civil procedure have adapted over time to the introduction of new technology. This Part will also introduce the issues created by the sudden introduction of widespread videoconferencing to the court system. Part II will provide a rose-colored analysis of the current balancing test for convenience in *forum non conveniens* and § 1404(a) venue transfers, and how courts may apply the test in the context of the widespread use of videoconferencing. This Part will then demonstrate how Rule 43(a) creates the Zoom paradox. Part III will analyze the rationale behind Rule 43(a) and identify its faults. Part IV will analyze how Canadian courts approach the use of videoconferencing. Part V will introduce a proposed amendment to Rule 43(a). The proposed amendment provides a standard based on the overarching concept of convenience found throughout the Federal Rules of Civil Procedure. The proposed amendment will place the determination of whether to permit testimony via videoconferencing solely in the hands of the judge, who should, in turn, defer to the consent of the parties.

I. CONVENIENCE IN CIVIL PROCEDURE

Since the dawn of the American judicial system, the convenience of litigation has been a concern.[29] The most fundamental goal of American federal civil procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[30] It logically follows that all rules and concepts should be created, interpreted, and administered to further this stated goal.[31] Congress and the judiciary, in service of this goal, have developed statutes and common law doctrines that incorporate

28. *See* FED R. CIV. P. 1.

29. *See generally* Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73 (allowing courts to take the deposition of a person whose testimony is necessary for a civil trial if the witness lives more than 100 miles from the place of trial); Judiciary Act of 1793, ch. 22, § 6, 1 Stat. 333 (prohibiting courts from issuing subpoenas to compel witness testimony if the witness lives more than 100 miles from the place of trial and outside of the district in which the court sits).

30. FED. R. CIV. P. 1.

31. *Id.*

concerns over the convenience of litigation.[32] These statutes and doctrinal principles extend to many of the most fundamental concepts in civil procedure, including personal jurisdiction.

A. Personal Jurisdiction

For a plaintiff to properly file a lawsuit in a federal district court, the district court must have personal jurisdiction over the defendant[33] and subject matter jurisdiction over the particular type of case.[34] The personal jurisdiction requirement is rooted in "traditional notions of fair play and substantial justice" found to be implicit in due process afforded to citizens of the United States by the Fourteenth Amendment.[35] Courts have found that two of these "traditional notions" are: (1) the defendant's interest in not being burdened by litigating in a distant or inconvenient forum and (2) the plaintiff's interest in obtaining convenient and effective relief.[36] In determining whether to exercise personal jurisdiction over a defendant, courts must perform an "estimate of the inconveniences"[37] that a defendant would suffer from attending a trial in a distant jurisdiction.[38]

B. Transfer of Venue

In addition to the personal and subject matter jurisdiction requirements, the court in which the plaintiff brings the lawsuit must also be the "proper venue" for the lawsuit.[39] In contrast to the constitutional roots of personal jurisdiction, the concept of venue finds its roots in statutory law.[40] A district court is a proper venue if a substantial part of the

32. *See generally* Int'l Shoe Co. v. Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310 (1945); Norwood v. Kirkpatrick, 349 U.S. 29 (1955); 28 U.S.C. § 1404(a).

33. *See* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 23 (7th ed. 2016); *see also* Pennoyer v. Neff, 95 U.S. 714, 722 (1887).

34. *See* FREER & PERDUE, *supra* note 33, at 181.

35. *Int'l Shoe*, 326 U.S. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also* U.S. CONST. amend. XIV § 1.

36. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citing Kulko v. Cal. Superior Court, 436 U.S. 84, 91 (1978)).

37. To "estimate" inconveniences is to consider the inconvenience a defendant would suffer from a trial away from its home or principal place of business in determining whether it is reasonable to subject that defendant to suit in a state where it is doing business.

38. *Int'l Shoe*, 326 U.S. at 317.

39. *See* FREER & PERDUE, *supra* note 33, at 247.

40. *See id.*

events that gave rise to the action occurred in, or the defendant resides in, the judicial district in which the court sits.[41] Also, venue is proper if the court has personal jurisdiction over the defendant and no other venue is proper.[42] The statutory requirement that a district court be a proper venue attempts to ensure convenience for the litigants and witnesses.[43]

In pursuit of the goal of ensuring convenient litigation, a district court, under 28 U.S.C. § 1404, may transfer a case to any other judicial district where the case could have been brought originally.[44] The district court may only do this if it determines that the transfer is necessary "[f]or the convenience of parties and witnesses" and doing so is "in the interest of justice."[45] Courts have discretion in determining whether to transfer the case to a different court, with the primary consideration being whether the proposed venue is more convenient than the original venue.[46] When deciding which venue provides greater convenience in a motion to transfer venue, federal judges weigh private- and public-interest factors taken from the common law doctrine of *forum non conveniens*.[47]

C. Forum Non Conveniens

Federal courts have developed the common law doctrine of *forum non conveniens*, which provides district courts with the authority to dismiss a case in specific circumstances.[48] Dismissal based on *forum non conveniens* rests solely on the court's determination that the chosen court is an inconvenient forum and no convenient alternate forum within the federal

41. 28 U.S.C. § 1391(b).
42. *Id.*
43. *See* FREER & PERDUE, *supra* note 33, at 247.
44. 28 U.S.C. § 1404(a).
45. *Id.*
46. *Id.*
47. FREER & PERDUE, *supra* note 33, at 263; *see generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947) (explaining that the public interests considered by courts include administrative difficulties resulting from court congestion and a community's interest in having localized interests decided at home); *id.* at 508 (explaining that the private interests considered by courts include the ease of access to proof, cost of obtaining willing witnesses, availability of compulsory process for unwilling witnesses, and any other factors which made the trial "easy, expeditious and inexpensive").
48. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (dismissing the case after finding that Scotland was an appropriate alternate forum and that the United States was an inconvenient forum because witnesses and evidence were in Scotland).

court system exists to which the court can transfer the case.[49] When determining whether to dismiss a case based on *forum non conveniens*, federal courts use the balancing test that the Supreme Court developed in *Gulf Oil Corp. v. Gilbert*, which requires a court to weigh private and public interests.[50]

Under *Gilbert*, courts consider private interests, including the ease of access to sources of proof, the cost of obtaining willing witnesses, the availability of compulsory process for unwilling witnesses, and any other factors that would make the trial "easy, expeditious and inexpensive."[51] Courts also consider public interests, such as the administrative difficulties resulting from court congestion and the community's interest in having localized interests decided at home.[52] When applying the *Gilbert* test to determine if a transfer of venue under § 1404(a) is proper, courts generally consider the convenience of witnesses to be the most important factor in the test.[53]

D. Evolution of Convenience

Although the concept of convenience is entrenched in many aspects of federal civil procedure,[54] courts have generally given convenience the same meaning in every context: the convenience of litigating, that is, the ability to secure a "just, speedy, and inexpensive determination of every action and proceeding."[55] Because courts have generally given convenience the same meaning in all contexts, judicial interpretations of

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49. *See id.*

50. *Gilbert*, 330 U.S. 501.

51. *Id.* at 508.

52. *Id.* at 508–09.

53. *See* Am. Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 254 (W.D. Mo. Jan. 29, 1980); ESPN, Inc. v. Quiksilver, Inc., 581 F. Supp. 2d 542, 547 (S.D.N.Y. Sept. 15, 2008); DeFazio v. Hollister Emp. Share Ownership Tr., 406 F. Supp. 2d 1085, 1090 (E.D. Cal. Feb. 23, 2005).

54. *See generally* 28 U.S.C. § 1404; FED. R. CIV. P. 28(a)(2)(B), 42(b), 77(b); Int'l Shoe Co. v. Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

55. FED. R. CIV. P. 1; *see generally Int'l Shoe*, 326 U.S. 310 (considering the inconvenience of travel a defendant would incur in determining whether a court has personal jurisdiction over the defendant); Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (considering the inconvenience of travel the parties would suffer from granting a motion to transfer venue); *Gilbert*, 330 U.S. 501 (considering the inconvenience of travel the parties would suffer from granting a motion to dismiss a case based on *forum non conveniens*).

convenience in other areas of civil procedure are relevant to analyzing convenience in the context of witness testimony under Rule 43(a).

Over time, the concept of convenience has evolved in the courts alongside technological advances in transportation and communication that have made the everyday lives of Americans more convenient.[56] To illustrate, the Federal Aid Highway Act of 1956 authorized the construction of 41,000 miles of the Interstate Highway System, making transportation easier and more convenient.[57] In the years following the Act, the United States Supreme Court recognized that advances in communication and transportation made litigation in a distant forum much less burdensome for purposes of personal jurisdiction.[58]

1. The Interstate Highway Cases

In 1957, the Supreme Court in *McGee v. International Life Insurance Co.* recognized a "trend . . . toward expanding the permissible scope of state jurisdiction over . . . nonresidents."[59] The court attributed this to the "nationalization of commerce" and the fact that advances in modern transportation and communication made the burden of litigating in a foreign state much less substantial.[60] One year later, the Supreme Court in *Hanson v. Denckla* reaffirmed its previous statement in *McGee*, finding that technological progress lessened the burden that defendants would be forced to carry by litigating a suit in a foreign court.[61] The Court recognized that the standards for personal jurisdiction were evolving with technological advancements in communication and transportation, but it stated that this trend of relaxing standards would not lead to the abolition of the concept of personal jurisdiction of state courts.[62] The Court held that despite modern technology making it less burdensome to litigate in a foreign court, personal jurisdiction is more than just a "guarantee of immunity from inconvenient or distant litigation."[63] No matter how convenient litigation in a distant forum may become, states are still limited

56. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957); Hanson v. Denckla, 357 U.S. 235, 250–51 (1958); *World-Wide Volkswagen*, 444 U.S. 286; Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995); Calix-Chacon v. Glob. Int'l Marine, Inc., 493 F.3d 507, 515 (5th Cir. 2007).

57. Federal Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374.

58. *See McGee*, 355 U.S. at 222–23; *Hanson*, 357 U.S. at 250–51.

59. *McGee*, 355 U.S. at 222.

60. *Id.* at 223.

61. *Hanson*, 357 U.S. at 250–51.

62. *Id.* at 251.

63. *Id.* at 250–51.

in exercising personal jurisdiction to those individuals who have had "minimal contacts" with the state.[64]

In 1980, the Court in *World-Wide Volkswagen Corp. v. Woodson* recognized that the purpose of requiring "minimum contacts" in determining personal jurisdiction was to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum" and to protect federalism and state sovereignty.[65] The Court noted that the advances in transportation and communication technology has accelerated even more since *McGee* was decided 22 years prior.[66] However, the Court further emphasized that the convenience of the defendant is just one of the factors in the determination of personal jurisdiction.[67] The Court reasoned that the concerns over interstate federalism can prevent states from exercising jurisdiction despite that state being the most convenient location for litigation.[68]

2. Travel by Jet

In 1975, Judge Oakes of the U.S. Second Circuit Court of Appeals recognized in his dissent in *Fitzgerald v. Texaco, Inc.* that "in the year 1975 no forum is as inconvenient as it was in 1947" due to the "extraordinary development of worldwide economical air travel by jet."[69] Judge Oakes argued that modern advances made transportation easy and inexpensive, making travelling to appear in court a "relatively simple" task.[70] His dissent even suggested that the "transportation revolution" might call for a complete reexamination of the entire doctrine of *forum non conveniens*.[71] In his concurring opinion, Judge Mansfield agreed that courts should consider the increased speed of travel and the ease of communication when administering the doctrine of *forum non conveniens*, but he did not agree with Judge Oakes that the principles of the doctrine should be modified.[72]

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64. *Id.* at 251.

65. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980). "Federalism" refers to the division of power between the federal government and state governments.

66. *Id.* at 294.

67. *See id.*

68. *Id.*

69. Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.* at 454 (Mansfield, J., concurring).

Twenty years after Judge Oakes's dissent, the Second Circuit in *Effron v. Sun Line Cruises, Inc.* acknowledged that Judge Oakes's dissent may have "provided the spark" for the Second Circuit's holding that modern transportation makes it so that a forum is not inconvenient simply because it is distant from the parties.[73] The Second Circuit disagreed with the district court's assertion that such a holding would deprive a party of its "day in court."[74] The court reasoned that the right to a day in court is not the right to give the actual presentation of the case, but rather to "be duly cited to appear and to be afforded an opportunity to be heard."[75] Thus, "[a] plaintiff may have his 'day in court' without ever setting foot in a courtroom."[76] Convenience continued its gradual evolution into the Information Age.[77]

3. The Information Age

In 2007, the U.S. Fifth Circuit Court of Appeals in *Calix-Chacon v. Global International Marine, Inc.* held that a plaintiff's financial or physical inability to travel to a foreign court did not make the foreign forum so inconvenient that he would be deprived of his day in court.[78] The court reasoned that any plaintiff can have his day in court through the power of "modern conveniences of electronic filing and videoconferencing."[79] The Fifth Circuit's eagerness to support the use of videoconferencing, although understandable, seems to be based on a misunderstanding that the rules for permitting videoconferencing in court are carelessly permissive.[80]

Although the Federal Rules of Civil Procedure have permitted videoconferencing in court since 1996,[81] this allowance was made with great hesitance, and the formation of the rules show the Judicial Conference's trepidation.[82] Federal courts have also contributed to the

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73. Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 10 (2d Cir. 1995).

74. *Id.* at 11.

75. *Id.* (citing Olsen v. Muskegon Piston Ring Co., 117 F.2d 163, 165 (6th Cir. 1941)).

76. *Id.*

77. *See generally* Calix-Chacon v. Glob. Int'l Marine, Inc., 493 F.3d 507 (5th Cir. 2007).

78. *Id.* at 515.

79. *Id.*

80. *See generally* discussion *infra* Part II, Part III.

81. *See* FED. R. CIV. P. 43(a).

82. *See* Advisory Committee on Rules of Civil Procedure, Minutes of Meeting (Nov. 1991) (discussing the positive and negative aspects of embracing

hesitancy in acceptance of videoconferencing technology by avoiding its use in hearings due to unfamiliarity, increased strain on courtroom staff, and the cost of the equipment necessary to support videoconferencing software.[83] This unwillingness to utilize videoconferencing in courts was eventually put to the ultimate test in 2020 when the COVID-19 pandemic took the world by storm.

By mid-April 2020, courtrooms were closed across the nation after 45 states had issued stay-at-home orders.[84] This brought Zoom, Webex, and other videoconferencing software companies to the forefront of society and the legal system.[85] Suddenly, courts across the nation began conducting hearings and even full-fledged jury trials via videoconferencing software.[86] Once a science fiction trope, videoconferencing is now a common reality.[87] Similar to the interstate system and commercial jet travel, videoconferencing has made the everyday lives of Americans much more convenient. Adapting how the courts apply the concept of convenience in the modern world is the natural next step.[88]

II. THE EFFECT OF VIDEOCONFERENCING ON THE CURRENT CONVENIENCE BALANCING TEST

Technological developments such as the interstate highway system and the commercial jetliner have already rendered civil litigation much more convenient than it was in the past, alleviating some of the concerns courts once considered.[89] Thus, the use of videoconferencing may have little effect on certain areas of the law where convenience is considered.

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videoconferencing); Advisory Committee on Rules of Civil Procedure, Minutes of Meeting (Dec. 1995) (discussing the positive and negative aspects of embracing videoconferencing); *see also* discussion *infra* Section III.A.

83. *See* Auld v. Value Place Prop. Mgmt. LLC, No. 08-0798, 2009 WL 10690188, at *2 (W.D. Mo. May 7, 2009); *see also* Iragorri v. United Techs. Corp., 46 F. Supp. 2d 159, 165 (D. Conn. Mar. 31, 1999), *vacated*, 274 F.3d 65 (2d Cir. 2001).

84. *See* Mervosh et al., *supra* note 24.

85. *See Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (Mar. 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic [https://perma.cc/V5S5-MFB8]; *see also* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281 (2020).

86. *See* Morris, *supra* note 25.

87. *See, e.g.*, 2001: A SPACE ODYSSEY (Stanley Kubrick Productions 1968).

88. *See generally* Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995).

89. *See* discussion *supra* Section I.D.

One example is that videoconferencing will likely not have much effect on the application of personal jurisdiction, because prior technological advancements have already changed the way in which convenience is considered for this purpose.[90] In addition, convenience is not the most important consideration in a court's determination of personal jurisdiction, so any effect would be negligible.[91] Although videoconferencing will have a profound impact on the court's balancing of conveniences for venue transfers and *forum non conveniens*, there are still aspects of that analysis on which the use of videoconferencing will have little impact.

Venue transfers pursuant to § 1404(a) and the *forum non conveniens* doctrine both entail the same balancing test; however, a motion for a venue transfer requires a lesser showing of inconvenience than does a motion for dismissal based on *forum non conveniens*.[92] Naturally, the balancing test for a motion to transfer venue is more susceptible to changes in convenience brought on by technological advances because of this lesser standard. Therefore, this Comment's analysis will focus on the effect of videoconferencing on the public and private interests considered in the *Gilbert* balancing test as applied to transfers of venue.[93]

A. Public Interests

The *Gilbert* court stated that the private interests of the litigants are the most important considerations but also listed factors of public interest that courts should consider as well.[94] The relative docket congestion of the transferor and transferee courts is a factor that courts consider as a public

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90. *See generally* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

91. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1780 (2017) (stating that even if there was no inconvenience suffered by a litigant by being subjected to the jurisdiction of a distant state, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgement") (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 294).

92. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (reasoning that Congress's drafting of 28 U.S.C. § 1404(a) indicates that Congress intended to permit courts to grant motions for transfers of venue upon a lesser showing of inconvenience).

93. *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

94. *See Gilbert*, 330 U.S. at 508–09 (factors mentioned by the court include: "administrative difficulties" caused by court congestion, the burden of jury duty placed on the community, and the court's relative familiarity with the law governing the case).

interest in the balancing of conveniences, but this factor alone is not dispositive.[95] Instead, courts give it very little weight.[96] Although this factor is given little weight, it is still worth noting that the use of videoconferencing would affect it. The widespread use of videoconferencing in the court system allows federal courts to work far more efficiently, reducing the administrative difficulties brought on by court congestion.[97] Rather than waiting for a specific date and time at which all parties to a proceeding are available to travel to a courthouse for in-person attendance, videoconferencing eliminates transportation as a hindering factor.

Additionally, videoconferencing allows judges to work more efficiently.[98] Instead of exiting a proceeding, walking back to their chambers to obtain the relevant documents for the next proceeding, and finally walking into a different courtroom to preside over the next proceeding, judges can be "transported" into their next proceeding with a simple click while staying in their chambers with all relevant documents within arm's reach. This allows judges to hold more proceedings per day in a quicker and more efficient manner.

Other public interests that courts consider are the transferor and transferee courts' relative familiarity with the law governing the case and the interest in having local controversies adjudicated locally.[99] The weight given to these factors is dependent on factual information that does not involve communications or transportation in any way.[100] Thus, the widespread use of videoconferencing will not affect the application of

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95. P & S Bus. Machines, Inc. v. Canon USA, Inc., 331 F.3d 804, 808 (11th Cir. 2003).

96. *See* United States v. Scott & Williams, Inc., 88 F. Supp. 531, 535 (S.D.N.Y. Jan. 26, 1950).

97. *See* Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 64 n.2 (2002) (discussing how a videoconferencing program in the First Circuit of Hawaii allowed the court to reduce "case processing time" by 50%).

98. *See* E-mail from Mark Hornsby, U.S. Magistrate Judge, W.D. La. (Sept. 30, 2020) (on file with author) ("[Using videoconferencing] [j]udges can jump from one proceeding to the next effortlessly, allowing us to handle more matters over the same period of time.").

99. *Gilbert*, 330 U.S. at 508–09.

100. *See* Presidential Hosp., LLC v. Wyndham Hotel Grp., LLC, 333 F. Supp. 3d 1179 (D.N.M. July 2, 2018) (finding that the weight of the interest of a local court in a particular controversy is only substantial when the merits of the action are unique to the area of the local court); Van Dusen v. Barrack, 376 U.S. 612, 645 (1964) (observing that it is appropriate to conduct a trial in the state whose laws govern the case).

these factors. Courts have also considered other factors that affect the speediness and efficiency of trial, but these generally have little to no effect on the balancing test.[101] In addition to these public interests, courts also consider the inconveniences that the parties may suffer if the transfer of venue were granted.[102]

B. Private Interests

In *Gilbert*, the Supreme Court wrote that the private interests of the litigants is the most pressing factor a court must consider when determining whether to grant a motion to transfer venue.[103] The Court provided a non-exhaustive list of important considerations, such as the ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, and the cost of obtaining the attendance of willing witnesses.[104] In ruling on a motion to transfer under § 1404(a), courts use these factors in their consideration of the "convenience of parties and witnesses."[105]

1. Ease of Access to Sources of Proof

In 1970, the Supreme Court amended Rule 34 of the Federal Rules of Civil Procedure to make clear that requests for document discovery applied to electronic data compilations.[106] In 1980, the district court in *American Standard, Inc. v. Bendix Corp.* found that the then-recent invention of photocopying made acquiring access to documents much easier, making the location of records and documents a less convincing reason for a transfer of venue.[107] Then, in 2006, the Supreme Court amended Rule 34 again to accommodate for the growth in electronically

101. United Ocean Servs. v. Powerhouse Diesel Servs., 932 F. Supp. 2d 717, 733 (E.D. La. Mar. 11, 2013) (taking into consideration the fact that a transfer of venue would create the need for a third continuance of the trial); Rhodes v. Barnett, 117 F. Supp. 312, 316 (S.D.N.Y. Dec. 15, 1953) (taking into consideration the fact that the action was based on contract law and not tort law); Orix Credit All., Inc. v. Mid-S. Materials Corp., 816 F. Supp. 230, 234 (S.D.N.Y. Mar. 19, 1993) (taking into consideration the existence of a permissive forum selection clause in a contract).

102. *See Gilbert*, 330 U.S. at 508.

103. *Id.*

104. *Id.*

105. *See* FREER & PERDUE, *supra* note 33, at 263; *see also* 28 U.S.C. § 1404(a).

106. FED. R. CIV. P. 33 advisory committee's note to 1970 amendment.

107. Am. Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 264 (W.D. Mo. Jan. 29, 1980).

stored information and to anticipate an increased use of computerized information.[108] Because of these advances in modern technology, litigants do not typically face any substantial burdens associated with discovery.[109] Today, most business documents are "stored, transferred and reviewed electronically."[110] When most relevant documents are electronic, the physical location of those documents is less important to determinations of convenience regarding a motion for a transfer of venue pursuant to § 1404(a).[111]

Despite this, many litigants have argued that videoconferencing would put a substantial burden on their ability to present documentary evidence to the court and to witnesses during examination; but courts have consistently found that sufficient methods exist to effectively present documentary evidence while videoconferencing.[112] Technology has made gaining access to documents and other sources of proof much less inconvenient, but that does not render the ease of access to sources of proof nugatory.[113] There may be instances where a court's decision hinges on its ability to view a physical premises or physical evidence that could not be easily transported to a court. However, in cases in which relevant

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108. FED. R. CIV. P. 33 advisory committee's note to 2006 amendment.

109. *See* XPRT Ventures, LLC v. eBay, Inc., No. 10-595, 2011 WL 2270402, at *3 (D. Del. June 8, 2011).

110. *Id.*; FED. R. CIV. P. 33 advisory committee's note to 2006 amendment.

111. Jagex Ltd. v. Impulse Software, 750 F. Supp. 2d 228, 234 (D. Mass. Aug. 16, 2010); Pence v. Gee Grp., Inc., 236 F. Supp. 3d 843, 857 (S.D.N.Y. Feb. 16, 2017).

112. Sussel v. Wynne, No. 05-00444, 2006 WL 2860664, at *3 n.7 (D. Haw. Oct. 4, 2006); Scott Timber, Inc. v. United States, 93 Fed. Cl. 498, 501 (2010); *see also* Thornton v. Snyder, 428 F.3d 690, 699 (7th Cir. 2005) (finding that a prisoner in a civil rights case was able to do everything via videoconference that he could have done if he were physically present, including presenting twelve witnesses, cross-examining witnesses, and offering other evidence); *accord* Arconti v. Smith, 2020 O.R. 2872, para. 36–37 (Can.) (citing Capic v. Ford Motor Co. of Austl. Ltd. [2020] FCA 486 (15 Apr. 2020) (Austl.)) (agreeing with an Australian federal court judge that although inexperience with videoconferencing may cause some difficulty in sharing documents, there are methods with which litigators can effectively share documents while videoconferencing); Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alta., 2020 ABQB 359, para. 23–25, 36 (first citing Alberta Cent. Airways Ltd. v. Progressive Air. Serv. Ltd., 2000 ABCA 36, para. 1–3 (Can.); then citing De Carvalho v. Watson, 2000 CanLII 28217, para. 14–17 (Can.); and then citing Code Inc. v. Indep. High Electoral Comm'n, 2012 O.R. 2208, para. 20–21 (Can.)) (agreeing with caselaw that found that documents could be made available to the court and witnesses while videoconferencing).

113. *In re* Volkswagen of Am., Inc., 545 F.3d 304, 316 (5th Cir. 2008).

documentary evidence is mostly electronic or there is no need to view any physical premises, videoconferencing and other modern technologies have rendered sources of proof to be just as accessible in a distant forum as they are in a court near the physical location associated with the cause of action.

2. Convenience of Parties

When weighing the relative convenience of parties, federal courts generally look to the parties' preferred fora and the parties' burdens of litigating in each forum in the context of their respective physical and financial conditions.[114] The use of videoconferencing would make it undeniably more convenient for parties to litigate in a distant forum. Rather than forcing a financially downtrodden party to bear the costs of litigation in a distant forum, videoconferencing can provide a much more cost-efficient means for parties to judicially resolve disputes. Whether a party is physically inconvenienced by age, illness, or disability, videoconferencing can provide a method for that party to "have his 'day in court' without ever setting foot in a courtroom."[115] Although the convenience of parties is a relevant factor to the balancing of conveniences, it is typically given less weight than the convenience of witnesses, because the convenience of witnesses is a factor that substantially affects the convenience of litigation for the parties.[116]

3. Convenience of Witnesses

When applying the *Gilbert* test to determine if a transfer of venue under § 1404(a) is proper, courts generally consider the convenience of witnesses as the most important factor in the test.[117] Courts consider the nature and significance of the testimony that any witness will provide in

114. Jones v. GNC Franchising, Inc., 211 F.3d 495, 499 (9th Cir. 2000) (finding that a motion for a change of venue was denied in part because the corporate defendant would not be as financially burdened by litigating in California as the individual plaintiff); WRIGHT ET AL., *supra* note 15, § 3847.

115. Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 11 (2d Cir. 1995).

116. *E.g.*, ESPN, Inc. v. Quiksilver, Inc., 581 F. Supp. 2d 542, 549–50 (S.D.N.Y. Sept. 15, 2008); *see also* DermaMed, Inc. v. Spa de Soleil, Inc., 152 F. Supp. 2d 780, 784 (E.D. Pa. June 14, 2001) ("[I]t is only if witnesses are unavailable for trial and documents incapable of being produced in the forum that the convenience of parties carries sufficient weight to render transfer of venue appropriate.").

117. Am. Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 254 (W.D. Mo. Jan. 29, 1980); *ESPN*, 581 F. Supp. 2d at 547; DeFazio v. Hollister Emp. Share Ownership Tr., 405 F. Supp. 2d 1085, 1090 (E.D. Cal. Feb. 23, 2005).

tandem with any inconvenience that the witness will suffer from attending trial.[118] Thus, the convenience of a party's material witness may outweigh the convenience of many of the opposing party's non-essential witnesses.[119] The court in *Gilbert* listed the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining willing witnesses as two separate considerations.[120] However, it is well established that a court's analysis of the convenience of witnesses can be distilled down to the availability[121] of material witnesses and the ability to secure their live testimony at trial, whether voluntarily or through a subpoena.[122] This stems from the principle that litigants should not be forced to try their cases relying on deposition testimony due to the inability of a court to compel live testimony.[123]

a. The Cost of Obtaining Attendance of Willing Witnesses

Due to the voluntary nature of the willing witness,[124] courts consider factors that may create obstacles to the attendance of the willing witness

118. *E.g.*, Hammann v. 1-800 Ideas.com, Inc., 455 F. Supp. 2d 942, 962 (D. Minn. Sept. 7, 2006); comScore, Inc. v. Integral Ad Sci., Inc., 924 F. Supp. 2d 677, 688 (E.D. Va. Feb. 15, 2013).

119. *See, e.g.*, *Hammann*, 455 F. Supp. at 962 (quoting Nelson v. Master Lease Corp., 759 F. Supp. 1397, 1402 (D. Minn. Apr. 2, 1991)) ("This factor, however, 'should not be determined solely upon a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts; the party seeking the transfer must clearly specify the essential witnesses to be called and must make a general statement of what their testimony will cover.'").

120. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

121. An unavailable witness is one who falls under one of the categories listed in Rule 32(a)(4). A witness is deemed unavailable when he is dead; more than 100 miles from the place of hearing or trial; unable to testify due to age, illness, infirmity, or imprisonment; or unable to be procured by subpoena. *See* FED. R. CIV. P. 32(a)(4)(A)–(D).

122. *See* Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995); United Ocean Servs. v. Powerhouse Diesel Servs., 932 F. Supp. 2d 717, 731 (E.D. La. Mar. 11, 2013); *Am. Standard*, 487 F. Supp. at 262 n.7; Hotel Constructors, Inc. v. Seagrave Corp., 543 F. Supp. 1048, 1051 (N.D. Ill. July 28, 1982).

123. *Gilbert*, 330 U.S. at 511; B.J. McAdams, Inc. v. Boggs, 426 F. Supp. 1091, 1105 (E.D. Pa. Feb. 14, 1977); *United Ocean Servs.*, 932 F. Supp. 2d at 731; *see also Hotel Constructors*, 543 F. Supp. at 1051 ("It is well settled that the trier of fact should not be forced to rely on deposition evidence when the deponent's live testimony can be procured [in another forum].").

124. The willing witness is a witness who will voluntarily attend trial to provide live testimony.

in a particular court.[125] These factors include the expenses necessary for attendance and the length of time the witness must be away from home and work.[126] The use of videoconferencing for witness testimony substantially reduces the cost of attending trial for these willing witnesses. Witnesses who are willing to attend trial but do not want to suffer the costs of travel or miss days of work could very easily give testimony, subject to direct and cross-examination, without ever having to leave their homes. It is unreasonable that in an age of advanced electronic communication when videoconferencing is commonplace, a witness may need to embark on a multi-day journey to present an hour of live testimony at trial.[127] Although important, the cost of obtaining the attendance of willing witnesses is substantially outweighed by the availability of compulsory process for witnesses in the respective courts; there is no reason to worry about willing witnesses changing their minds when the court can compel them to present live testimony at trial.[128]

b. The Availability of Compulsory Process for Unwilling Witnesses

As stated above, the essence of a court's consideration of the convenience of witnesses is whether a particular court can secure the live

125. The ability to secure live testimony at trial is the underlying factor, so when a witness is willing to testify live, the ability to compel her testimony becomes less important. Rather, the court considers the cost of obtaining her willing testimony, because that may affect the witness's willingness to testify. *See* WRIGHT ET AL., *supra* note 15, § 3851.

126. *In re* Volkswagen AG, 371 F.3d 201, 205 (5th Cir. 2004) ("Additional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment."); Crown Crafts Infant Prods., Inc. v. Smart Deals, Inc., No. 11-354, 2012 WL 276063, at *1 (M.D. La. Jan. 11, 2012) (reasoning that an increase in travel costs to two nonparty witnesses was grounds to deny a motion to transfer venue to the Middle District of Louisiana from the Southern District of Florida when all other factors were equal); Actmedia, Inc. v. Ferrante, 623 F. Supp. 42, 44 (S.D.N.Y. Oct. 17, 1985) (reasoning that the severe disruption of business for a small corporation was grounds to grant a motion to transfer venue from New York to Oregon when the adverse party was a large corporation doing business nationwide and all activities relevant to the suit took place in Oregon).

127. *In re* Hudson, 710 F.3d 716, 719 (7th Cir. 2013) (reasoning that "[t]oday documents can be scanned and transmitted by email; witnesses can be deposed, examined, and cross-examined remotely and their videotaped testimony shown at trial").

128. *See* Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

testimony of important witnesses at trial.[129] *Gilbert* recognized that if a judge were to decide on a forum "where litigants cannot compel personal attendance and may be forced to try their cases on deposition," then that result would be unsatisfactory for the court, the jury, and the litigants.[130] If a witness does not fall within the geographical limits of compliance set by the Federal Rules of Civil Procedure,[131] the court cannot compel attendance of the proceeding and may deem the witness unavailable to testify at trial.[132]

A witness is considered unavailable if: (1) the party offering the deposition cannot secure the attendance of the witness by subpoena, (2) the witness is dead, (3) the witness is more than 100 miles from the place of the hearing or outside of the United States, or (4) the witness is unable to attend because of age, infirmity, or imprisonment.[133] If a witness is deemed unavailable, a party may use a deposition of that unavailable witness for any purpose at trial.[134] However, Judge McMahon of the Southern District of New York put it quite clearly in *ESPN, Inc. v. Quiksilver, Inc.* when he stated, "common sense dictates that when one party's witnesses are severely inconvenienced or, worse yet, unavailable because of an inability to compel attendance, the party itself is severely inconvenienced," because it forces that party to depend solely on deposition testimony at trial.[135] The use of depositions at trial is not to be desired because "[i]t is only the absence of live testimony from trial that creates the inconvenience."[136]

i. Videoconferencing and Availability

The widespread use of videoconferencing in civil litigation could seemingly make securing witness testimony tremendously convenient, no matter the forum, by providing a method that makes the dreaded trial

129. WRIGHT ET AL., *supra* note 15, § 3851.

130. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511 (1947); *see also* B.J. McAdams, Inc. v. Boggs, 426 F. Supp. 1091, 1105 (E.D. Pa. Feb. 14, 1977).

131. FED. R. CIV. P. 45(c)(1) (providing that a court may compel witnesses to attend a trial, hearing, or deposition that is within 100 miles of his residence or a location in which he regularly conducts business in person).

132. FED. R. CIV. P. 32(a)(4)(D).

133. FED. R. CIV. P. 32(a)(4).

134. *Id.*

135. ESPN, Inc. v. Quiksilver, Inc., 581 F. Supp. 2d 542, 550 (S.D.N.Y. Sept. 15, 2008).

136. United Ocean Servs. v. Powerhouse Diesel Servs., 932 F. Supp. 2d 717, 731 (E.D. La. Mar. 11, 2013).

deposition relatively obsolete. In fact, not only do the Federal Rules of Civil Procedure make allowances for presenting live testimony in open court via videoconferencing,[137] but they also provide that the geographic limitations set out for service of subpoenas work in a complementary way with videoconferencing.[138]

Rule 45 provides that a subpoena is issued from the court in which the case is pending,[139] and that the subpoena can be served anywhere in the United States.[140] Subpoenas can compel witnesses to testify at a proceeding, so long as the proceeding is within 100 miles of the witness's residence, place of employment, or area in which the witness regularly conducts business in person.[141] Rule 43(a) provides that testimony that is transmitted from a different location is considered given in open court.[142] Thus, when read *in pari materia*, a court may issue a subpoena for a witness to appear at a place within 100 miles of his home to testify via remote transmission, regardless of the location of the court.[143] For example, a court in the Eastern District of Louisiana could compel a witness who resides in New York to physically travel to any location within 100 miles of his home to testify via videoconference for a hearing that is physically happening in New Orleans.

The Advisory Committee's[144] note on the 2013 amendment to Rule 45 expressly states that courts can compel a witness to testify at trial via

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137. FED. R. CIV. P. 43(a).

138. FED. R. CIV. P. 45, advisory committee's note to 2013 amendment ("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)."). A court may compel nonparty witnesses to attend a trial, hearing, or deposition that is within 100 miles of his residence or a location in which he regularly conducts business in person. A court can compel party witnesses to attend a trial, hearing, or deposition that is within the state where the person resides or regularly conducts business in person. FED. R. CIV. P. 45(c)(1).

139. FED. R. CIV. P. 45(a)(2).

140. *Id.*

141. FED. R. CIV. P. 45(c)(1).

142. GENSLER & MULLIGAN, *supra* note 9, at Rule 43.

143. *Id.*

144. The Advisory Committee on Rules of Civil Procedure is a body of the Judicial Conference of the United States that studies the Federal Rules of Civil Procedure and advises the Judicial Conference on how they should be amended. The rulemaking process generally begins with the advisory committee evaluating a proposed amendment to the Rules, which they then may recommend to the Committee on Rules of Practice and Procedure. If the Committee on Rules of Practice and Procedure approves of the amendment, it recommends the changes

remote transmission from any place described in Rule 45(c)(1).[145] The Advisory Committee discussed and acknowledged this interplay between Rule 43(a) and Rule 45 as far back as May 1993, when the Committee made the first proposal to amend Rule 43(a) to provide for testimony via remote transmission.[146] At that time, the Committee discussed the possibility of modifying the language of the proposed amendment to Rule 43(a) to more directly indicate the relationship between the two, saying, "The court may permit electronic transmission of testimony if the witness cannot be compelled to appear at trial or is excused from appearing at trial [under Rule 45]."[147] This proposal would be realized in the 1996 amendment.

During the May 1993 committee meeting, it was suggested that reading Rule 43(a) and Rule 45 in tandem would allow courts to "deal flexibly with the different needs of different situations."[148] The Committee unanimously agreed that there was no "present reason" to discuss any further the possibility of amending Rule 45 to provide for nationwide subpoenas.[149] Despite the open intent of the Advisory Committee for Rule 45 to be interpreted to allow courts to compel remote testimony in a

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to the Judicial Conference, which in turn recommends the proposed amendment to the Supreme Court of the United States.

145. FED. R. CIV. P. 45, advisory committee's note to 2013 amendment. Rule 45(c)(1) provides:

> A subpoena may command a person to attend a 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.

FED. R. CIV. P. 45(c)(1).

146. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 18 (May 1993).

147. Advisory Committee on Rules of Civil Procedure, Meeting Agenda III-C at 2 (May 1993).

148. Advisory Committee on Rules of Civil Procedure, Meeting Agenda Additional Rules Proposals at 9 (May 1993).

149. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 18 (May 1993).

witness's local area,[150] some courts have refused to interpret the rule this way,[151] while others have embraced this change.[152]

On the contrary, courts unanimously agree that a court may compel a witness to attend a video deposition that is outside of the court's district but within 100 miles of the witness's local area.[153] For example, a court in the Western District of Oklahoma may subpoena a witness residing in Washington, D.C. to appear at a place within 100 miles of Washington, D.C. to give testimony in front of a camera for a video deposition. A party can then later play that video recording in Oklahoma City at trial to serve as testimony.[154] It does not logically follow that a court can issue a subpoena compelling a recorded video deposition to be played at a later trial, but that same subpoena may not be issued if the witness does the exact same thing, yet the testimony is transmitted live to Oklahoma City.

ii. The Effect of Rule 43(a) on Availability

In theory, videoconferencing makes almost every witness available that would otherwise be deemed unavailable pursuant to the Federal Rules of Civil Procedure.[155] The use of videoconferencing under a proper interpretation of Rule 43(a) expands the availability of witnesses by providing parties with greater power to procure live witness testimony by subpoena. Videoconferencing allows a witness to testify at a faraway trial without having to leave a 100-mile radius around her home. Videoconferencing also allows elderly, ill, infirm, or imprisoned witnesses

150. FED. R. CIV. P. 45, advisory committee's note to 2013 amendment.

151. *See* Sutphin v. Ethicon, Inc., No. 2:14-CV-01379, 2020 WL 5229448, at *2 (S.D. W. Va. Sept. 1, 2020); Roundtree v. Chase Bank USA, No. 13-239, 2014 WL 2480259, at *2 (W.D. Wash. June 3, 2014); Ping-Kuo Lin v. Horan Capital Mgmt., LLC, No. 14 Civ. 5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014); Atkinson v. MacKinnon, No. 14-CV-736, 2016 WL 3566278, at *1–2 (W.D. Wis. June 24, 2016); Gipson v. Wells Fargo Bank, N.A., 239 F.R.D. 280, 281 (D.D.C. Oct. 30, 2006).

152. *See In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., No. 3:11-MD-2244-K, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 20, 2016); *In re* Xarelto (Rivaroxabain) Prods. Liab. Litig., No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017); *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 12-CV-00064, 2014 WL 107153, at *7 (W.D. La. Jan. 8, 2014); Kahn v. Sanofi U.S. Servs., Inc., No. 21-mc-01919, ECF No. 14 (E.D. La. Nov. 3, 2021) (PACER); *see also In re* May, No. 13-3064, 2014 WL 12923988, at *3 (Bankr. N.D. Ind. July 9, 2014).

153. FED. R. CIV. P. 45(c)(1).

154. *See generally* FED R. CIV. P. 32(a)(4)(B).

155. FED. R. CIV. P. 32(a)(4)(B)–(E).

to testify at trial without having to endure the hardships associated with attendance. Unless the witness is dead or exceptional circumstances exist that make it desirable to permit the use of a trial deposition,[156] videoconferencing should be used to allow for almost all witnesses to be available for live testimony at trial.

Sadly, this is not the current state of affairs. Although the advisory note to Rule 45 asserts that courts should be allowed to compel witnesses anywhere in the country to testify live at trial via videoconference while staying in the comfort of their own home,[157] Rule 43(a) only permits the testimony via videoconference in the narrowest of circumstances.[158] Rule 43(a) provides that courts may only use their discretion to permit testimony via remote transmission when there is "good cause in compelling circumstances" and "appropriate safeguards" have been put in place.[159] The Advisory Committee note to Rule 43(a) even states that depositions are superior to videoconferencing for obtaining the testimony of witnesses who cannot be compelled to testify at trial.[160]

This puts witnesses in a paradoxical situation—hereinafter referred to as "the Zoom paradox"—in which they are simultaneously available and unavailable, causing inconvenience for all. For example, a party to a matter in the Eastern District Court of Louisiana motions the court to compel a witness who lives in New York to testify at trial via videoconferencing in his residence because the journey to Louisiana would be an inconvenience. Rule 45(c)(1) permits the court to compel a witness to testify at trial so long as the subpoena does not compel him to go further than 100 miles from his home.[161] Thus, the court cannot compel the witness to testify at trial in person, but testimony via videoconference could be an option. However, the Advisory Committee note to Rule 43(a) states that permitting live testimony at trial via videoconference is not justified by showing the mere inconvenience of a witness.[162] Therefore, testimony at trial via videoconferencing is not an option. This witness also does not meet any of the criteria that would deem him unavailable under

156. *See generally* FED. R. CIV. P. 32(a)(4)(E).
157. FED. R. CIV. P. 45 advisory committee's note to 2013 amendment.
158. FED. R. CIV. P. 43(a); FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment.
159. FED. R. CIV. P. 43(a).
160. FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment.
161. FED. R. CIV. P. 45(c).
162. FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

Rule 32.[163] Hence, the witness cannot testify by trial deposition. The witness is both available and unavailable.

C. Rule 43(a) is the Inconvenience

The widespread use of videoconferencing in judicial proceedings is the next, natural step in the evolution of the concept of convenience. Even if the paradoxical interplay of Rule 43(a) and Rule 45(c) did not exist, Rule 43(a) is still a quasi-prohibition on live testimony at trial in the form of videoconferencing.[164] The typical alternative to live testimony via videoconferencing is not in-person testimony, but rather trial depositions submitted pursuant to Rule 32[165]—a method that the Supreme Court in *Gilbert* deemed "not satisfactory to court, jury or most litigants."[166]

The *Gilbert* test is used to provide litigants with the most convenient access to judicial relief. Videoconferencing can provide a method to reduce financial and logistical issues, making litigation much more convenient for the parties. Videoconferencing can provide a cost-effective means of obtaining the attendance of willing witnesses and can even provide a method to allow almost any court to compel unwilling witnesses. Outside of alleviating court congestion, the use of videoconferencing would have little effect on the public-interest factors contemplated under *Gilbert*; however, these factors are not as important as the private-interest factors that the test considers.

With the *Gilbert* test, courts consider all "problems that make trial of a case easy, expeditious and inexpensive."[167] Videoconferencing provides litigants with a tool that can make litigation much more convenient, but Rule 43(a) prevents videoconferencing from being widely used. The problem isn't the ability to conveniently conduct a trial. The problem is Rule 43(a).

III. THE FAULTS OF RULE 43(A)

In 1996, the Supreme Court amended Rule 43(a) to permit witnesses to appear in open court for testimony by "contemporaneous transmission

163. FED. R. CIV. P. 32(a)(4)(A). The witness is not dead; within 100 miles from the place of trial; ill, imprisoned, or infirm; or unable to be compelled. Nor can the court give proper regard to the importance of live testimony and reject it in favor of a trial deposition.

164. *See generally* FED. R. CIV. P. 43(a).

165. GENSLER & MULLIGAN, *supra* note 9, at Rule 43.

166. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511 (1947).

167. *Gilbert*, 330 U.S. at 508.

from a different location."[168] One might imagine a virtual-reality courtroom in which all participants at trial interact over electronic means from many scattered locations. While formulating the amendment for recommendation to the Supreme Court, the Advisory Committee rejected this idea and approached this innovation with caution.[169] The newly amended rule allowed this use of technology, so long as a party showed "good cause in compelling circumstances" and that "appropriate safeguards" were in place.[170]

A. The Rationale of the Requirements

The Advisory Committee note accompanying the amendment warns that courts must not forget the importance that the American judicial tradition places on live testimony.[171] Moreover, the note provides that the solemnity of the trial and presence of the judge "may exert a powerful force for truthtelling."[172] One must be able to judge the demeanor of a witness face to face.[173] The Committee note expressly states that a mere showing that attending the trial would inconvenience the witness does not justify transmission.[174] However, a showing that a witness is unavailable for testimony at trial due to unexpected reasons is considered a persuasive showing of good cause in compelling circumstances.[175]

Moreover, the Advisory Committee also suggested that although a stipulation is not binding on the court, an agreement by the parties that testimony should be presented by remote transmission can be considered good cause in compelling circumstances.[176] The jurisprudence in which courts interpret whether situations are considered a good cause in compelling circumstances is inconsistent. Some courts have blatantly disregarded the Committee note, but others have strictly adhered to it.[177]

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168. FED. R. CIV. P. 43(a).

169. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting (April 1994); Advisory Committee on Rules of Civil Procedure, Minutes of Meeting (October 1994).

170. FED. R. CIV. P. 43(a).

171. FED R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Compare* Sussel v. Wynn, No. 05-00444, 2006 WL 2860664, at *3–4 (D. Haw. Oct. 4, 2006) (finding good cause was shown in compelling circumstances when it would be expensive to have a witness travel from Alabama to Hawaii for a pretrial conference), *and* F.T.C. v. Swedish Match N. Am., Inc., 197 F.R.D. 1

The note also explains that the "appropriate safeguards" mentioned in the amendment are to ensure that the person testifying is properly identified as the witness and that the witness is not being influenced by improper, off-camera coaching.[178] The Committee suggests that depositions provide a "superior means of securing the testimony of a witness" compared to testimony by transmission.[179] Additionally, the note states that transmission of only audio could be sufficient, but video transmission is preferable when the cost of video transmission "is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission."[180]

There are not many cases in which courts interpret what appropriate safeguards need to be adopted to allow for testimony via videoconferencing. However, the case law that does recognize when appropriate safeguards have been adopted focuses primarily on whether the witness is under oath, subject to cross-examination, and whether the witness's identity can be verified by the fact-finder.[181] Although the "additional safeguards" requirement does not impose much of a restriction on the use of videoconferencing, many courts have interpreted the good-cause-in-compelling-circumstances requirement to restrict the use of videoconferencing to the narrowest of circumstances.[182]

This conservative approach to acceptance of testimony at trial via remote transmission pursuant to Rule 43(a) has served as a quasi-prohibition on the use of videoconferencing. Consequently, Rule 43(a) is an obstacle to parties' ability to conveniently obtain the speedy and inexpensive access to justice in civil litigation promised by Rule 1 of the

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(D.D.C. 2000) (disagreeing with the Committee Notes and finding good cause was showing in compelling circumstances when a witness would have to travel from Oklahoma to Washington, D.C.), *with* Humbert v. O'Malley, No. 11-0440, 2015 WL 1256458, at *2 (D. Md. Mar. 17, 2015) (finding no good cause was shown when a witness would have to travel from California to Maryland), *and In re* Mikolajczyk, No. 15-90015, 2015 WL 3505135, at *1 (Bankr. W.D. Mich. June 3, 2015) ("Despite the obvious inconvenience of traveling two hundred miles to testify, the circumstances do not rebut the presumption favoring live testimony in open court that Rule 43 raises.").

178. FED R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

179. *Id.*

180. *Id.*

181. GENSLER & MULLIGAN, *supra* note 9, at Rule 43.

182. *See generally* United States v. Kivanc, 714 F.3d 782, 791 (4th Cir. 2013) (denying request for a witness to present live testimony when the witness was in poor health and the cost of traveling from Turkey to the U.S. for trial would be burdensome); *Humbert*, 2015 WL 1256458, at *2; *In re Mikolajczyk*, 2015 WL 3505135, at *1.

Federal Rules of Civil Procedure.[183] A few vital flaws make Rule 43(a) so restrictive.

B. The Preference for Trial Depositions is Misguided

Rule 43(a)'s preference for trial depositions over live remote testimony is contradictory to the courts' preference for live testimony in open court established in the first clause of the rule.[184] Rule 43(a) was originally promulgated to combat the abuses that developed under the old practice of only using testimony by deposition.[185] The primary purpose of establishing this Rule was to test the accuracy of witness testimony by allowing the trier of fact to analyze the demeanor of witnesses and by subjecting the witness to cross-examination.[186] On the one hand, live testimony is still preferred over trial deposition testimony.[187] On the other hand, the Committee note for Rule 43(a) suggests that depositions provide a "superior means of securing the testimony of a witness" compared to testimony by live remote transmission when the witness cannot be compelled to testify in person at trial.[188]

The availability of compelling a witness to testify via remote transmission should not supplant the admission of deposition testimony under Rule 32.[189] Indeed, the two methods "are meant to compl[e]ment each other; and depending on the nature of the case and the circumstances involved, one procedure may be preferred over another."[190] However, it does not stand to reason that introduction of a recorded video deposition should be preferred over the use of live testimony via remote transmission when the two methods offer essentially the same opportunity to observe the witness's demeanor.[191]

Requests for leave to take a deposition via remote transmission pursuant to Rule 30(b)(4) are liberally granted, so long as doing so will

183. FED. R. CIV. P. 1.

184. FED. R. CIV. P. Rule 43(a) ("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.")

185. *In re* Adair, 965 F.2d 777, 780 n.4 (9th Cir. 1992).

186. *Id.* at 780.

187. *See* FED. R. CIV. P. 43(a).

188. FED R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

189. *See generally* FED. R. CIV. P. 32 (permitting the use of depositions at trial in certain conditions, such as when a witness is unavailable).

190. RLS Assocs., LLC v. United Bank of Kuwait PLC, No. 01 Civ. 1290, 2005 WL 578917 (S.D.N.Y. Mar. 11, 2005).

191. GENSLER & MULLIGAN, *supra* note 9, at Rule 43.

not cause any real prejudice.[192] Courts do not subject this remote deposition to any further scrutiny than a video deposition recorded for introduction at trial under Rule 32.[193] This means that a party can more easily present a deposition at trial than live testimony under Rule 43(a), even though they are both recorded in the exact same manner and using the exact same technology.[194] This result is completely inapposite in light of the federal courts' strong preference for live testimony over recorded testimony.[195]

Additionally, the proponent of a video deposition at trial is not required to present the video but can merely provide the trier of fact with a transcript of the deposition.[196] Another party may request that the proponent present the deposition in non-transcript form, but absent a court order, there is no requirement for the proponent of the video deposition to present the video at trial to the trier of fact.[197] Although many courts worry about the potentially diminished ability of the trier of fact to observe the witness's demeanor with live remote testimony,[198] the use of a transcript from a recorded video deposition makes it entirely impossible for the trier of fact to observe and properly evaluate the credibility of the witness.

The primary reason for the preference for recorded video depositions at trial over remote transmission of testimony seems to be the notice requirement for depositions by oral examination under Rule 30.[199] However, the Committee note for the 1996 amendment to Rule 43(a) provides that appropriate safeguards must be in place to ensure advance notice is given to parties so that they may have the opportunity to depose the witness or argue that the court should require the testimony to be conducted in person.[200] Since advance notice is recommended for both situations, giving all parties the opportunity to be adequately represented

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192. GENSLER & MULLIGAN, *supra* note 9, at Rule 30.

193. *See* FED. R. CIV. P. 32.

194. *Compare* GENSLER & MULLIGAN, *supra* note 9, at Rule 30, *with* FED. R. CIV. P. 43(a).

195. GENSLER & MULLIGAN, *supra* note 9, at Rule 32.

196. FED. R. CIV. P. 32(c).

197. *Id.*

198. *See generally* Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005); United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001); Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993); Edwards v. Logan, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999).

199. FED R. CIV. P. 43(a) advisory committee's notes to 1996 amendment (explaining that deposition procedures ensure that all parties have the opportunity to be represented during the testimony).

200. *Id.*

when the witness gives testimony, the Committee's reasoning for preferring depositions over remote testimony is not sound.[201]

According to the Advisory Committee, if a party requests leave from the court for the remote transmission of testimony at trial, and the party could have reasonably foreseen the circumstances leading to the request, the court should not consider that showing as good cause in compelling circumstances.[202] In the same breath, the Advisory Committee states that the court should put appropriate safeguards in place so that "advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission."[203] These two requirements are contradictory. If a party can reasonably foresee a situation where he may need to offer testimony by transmission, he must give advance notice to the participants;[204] however, if that party can reasonably foresee a situation where he may need to offer testimony by transmission, he "will have special difficulty in showing good cause and the compelling nature of the circumstances."[205]

The courts should not interpret the good-cause-in-compelling-circumstances requirement to contemplate foreseeability,[206] as that is what creates this misguided preference for recorded deposition testimony over live remote testimony. The two should be considered functionally coequal. Therefore, it should be left to the discretion of the judge and parties to decide which form of testimony is most appropriate in the particular circumstances that may arise in a case.

C. Rule 43(a) Creates the Zoom Paradox

On two separate occasions, the Advisory Committee rejected the idea that courts may only permit live testimony via videoconference when Rule 32 would permit presentation of a recorded deposition at trial.[207] In the first instance, the Committee rejected this proposition because it wanted the standard for the admission of live remote testimony to be more

201. *See generally id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Contra id.*
207. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 11 (May 1993); Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 8 (April 1994).

flexible.[208] The second time it was suggested, the Committee agreed that if language limiting the use of testimony via videoconferencing to exceptional circumstances was not added, then the note to the amendment would need to clearly state that "live [in-person] testimony is preferable."[209]

At the next meeting, the Committee expressed concern that the use of remote transmission testimony would only appeal to "trendy" attorneys who are "with it" and enjoy playing with "all the new toys."[210] Addressing these concerns, the Committee added the requirement that only compelling circumstances justify remote testimony.[211] The Committee also stated that if testimony is needed from an unavailable witness, the parties should conduct a videotaped trial deposition.[212]

By adopting the "compelling circumstances" standard, the Committee created a situation in which both of the following cases can be considered a proper interpretation of the rules.[213] When witnesses lived more than 100 miles from the courthouse in *In re Urethane Antitrust Litigation*, the district court held that the circumstances were not sufficiently compelling to allow the use of testimony via videoconferencing at trial.[214] The court reasoned that the use of a trial deposition pursuant to Rule 32 is a better alternative when a witness is more than 100 miles from the place of trial.[215] But when witnesses lived more than 100 miles from the courthouse in *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, the district court held that the circumstances were not sufficiently exceptional to allow the use of a trial deposition pursuant to Rule 32.[216] The court reasoned that live testimony is preferred over the use of a trial deposition pursuant to Rule 43(a), even live testimony via videoconferencing.[217] Considering these inconsistent holdings, a court can compel a witness who lives more than

208. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 11 (May 1993).

209. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 8 (April 1994).

210. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 14 (Oct. 1994).

211. *Id.*

212. *Id.*

213. *See In re* Urethane Antitrust Litig., No. 2:08-5169, 2016 WL 723014 (D.N.J. Feb. 22, 2016); United States *ex rel.* Lutz v. Berkeley Heartlab, Inc., No. 9:14-230, 2017 WL 6015157 (D.S.C. Dec. 1, 2017).

214. *Urethane Antitrust*, 2016 WL 723014, at *2.

215. *Id.*

216. *Berkeley Heartlab*, 2017 WL 6015157, at *2.

217. *Id.*

100 miles from the place of trial to testify live via videoconference, but the rules do not permit the witness to testify live via videoconference because her testimony can be given by means of a trial deposition, which is also not permitted.[218] Thus, the witness is "procedurally available"[219] but "factually unavailable."[220]

D. The Concerns are Outdated

Despite the numerous benefits that the use of videoconferencing can bring to the federal court system, it is not coequal to physical presence.[221] Testimony by videoconferencing is not the same as in-person testimony, but with modern technology, it can serve as a convenient, suitable alternative. The concerns expressed by videoconferencing's detractors are outdated and can be easily remedied. Legal practitioners have long expressed their fear that videoconferencing inhibits the fact-finder's ability to assess the demeanor of a witness.[222] This can strike at the heart of the fact-finder's perception of a witness's credibility.[223] Some have argued that these shortcomings are inherent to videoconferencing because the dynamics of human interaction are based on subtle communications such as the tone of voice, eye contact, and body-language.[224] The perceived differences between in-person and remote testimony are also partially a result of easily remediable technical issues.[225] Studies have shown that issues with witness credibility attributed to the use of

218. *Compare Urethane Antitrust*, 2016 WL 723014, at *2, *with Berkeley Heartlab*, 2017 WL 6015157, at *2.

219. The witness does not meet any of the criteria that would cause him to be deemed unavailable pursuant to Rule 32(a)(4). *See* FED. R. CIV. P. 32(a)(4). The witness also can be compelled to testify in open court pursuant to Rule 45(c), which contemplates compulsion of live remote testimony. *See* FED. R. CIV. P. 45(c).

220. The witness cannot testify remotely because she is limited by the restrictions of Rule 43(a). *See* FED. R. CIV. P. 43(a). Thus, even though she does not meet any of the criteria for unavailability under Rule 32(a)(4), she is rendered unavailable by being precluded from testifying via live remote testimony. *See* FED. R. CIV. P. 32(a)(4).

221. Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005).

222. *See, e.g.*, *id.*; Kathryn Leader, *Closed-Circuit Television Testimony: Liveness and Truth-Telling*, 14 L. TEXT CULTURE 312, 323 (2010) (Can.).

223. *See, e.g.*, *Thornton*, 428 F.3d at 697.

224. RICHARD FRANCIS, CANADA AGRICULTURAL REVIEW TRIBUNAL, UNIVERSAL DESIGN AND VIDEOCONFERENCING AT TRIBUNALS: IMPROVING ACCESS FROM DAY ONE 3 (2015).

225. *See* BRITISH COLUMBIA LAW INSTITUTE, TECHNOLOGY ASSISTED AND REMOTE EVIDENCE PRESENTATION: A PRACTICE RESOURCE 39–40 (2014).

videoconferencing are caused, in part, by the size of the screen depicting the witness, the angle at which the camera is recording the witness, and the physical surroundings in the background of the location from which the witness is transmitting.[226]

However, experiments in criminal, civil, and immigration proceedings have found that presenting testimony via videoconferencing has little prejudicial effect on the party who is expected to be prejudiced by the remote testimony.[227] Taking this into account, courts may invoke practical solutions to combat what little prejudicial effect these technical issues can cause. For instance, courts can establish and enforce presentation standards such as installing life-size screens in courtrooms for the depiction of remote witnesses or ensuring that a witness's camera angle is positioned in a way that would minimize the occasions where the witness looks away.[228] Simply requiring witnesses to transmit their testimony from a dignified setting can also minimize any influence that videoconferencing may have on a fact-finder's assessment of the witness.[229] Little basis exists for the belief that videoconferencing has a substantial effect on a fact-finder's ability to observe the witness's testimony.[230] Further, courts can dampen any negative effect videoconferencing may produce with practical solutions.

In 1990, the Supreme Court held in *Maryland v. Craig* that the use of one-way, closed-circuit television transmission for witness testimony did "not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause."[231] The court reasoned that the live transmission of testimony was permissible when used to further the important state interest of protecting a child abuse victim from being traumatized by confronting his abuser during the victim's face-to-face testimony.[232] Although the Confrontation Clause is not directly applicable to civil trials, the Supreme Court's analysis of remote testimony is pertinent to the issue at hand.[233]

The Supreme Court reasoned that the Confrontation Clause's primary purpose is to ensure the reliability of evidence against the criminal defendant through "physical presence, oath, cross-examination, and

226. *See id.*

227. FRANCIS, *supra* note 224, at 3; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937–938 (2015).

228. BRITISH COLUMBIA LAW INSTITUTE, *supra* note 225, at 39–40.

229. *Id.*

230. Leader, *supra* note 222, at 325–26.

231. Maryland v. Craig, 497 U.S. 836, 852 (1990).

232. *Id.*

233. *See generally id.* at 836.

observation of demeanor by the trier of fact."[234] The Court further reasoned that face-to-face testimony by adversarial witnesses is not an essential component of the confrontation right.[235] The Court found that face-to-face testimony may have subtle effects on criminal proceedings, but when the witness is under oath and subject to cross-examination, and the trier of fact can observe the witness's demeanor and body by video monitor, the testimony is reliable in a way "functionally equivalent to that accorded live, in-person testimony."[236]

The Advisory Committee also expressed doubts about whether technology available in 1996 was reliable enough to support the remote transmission of testimony.[237] The note attached to the 1996 amendment to Rule 43(a) says that the amendment is not meant to specify the means of transmission that a court may allow.[238] In fact, the minutes and reports from the meetings discussing this 1996 amendment suggest that the Advisory Committee primarily considered transmission via telephone, mentioning video transmission without ever considering the means of video transmission or the possibility for the witness to simultaneously view and be viewed by the parties.[239]

The express statements about telephone transmission demonstrate this lack of consideration:[240] there is a recurring concern about providing advance notice to the opposing counsel so that she may have an

234. *Id.* at 837.

235. *Id.*

236. *Id.* at 851–52.

237. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 14 (Oct. 1994).

238. FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

239. *See* Advisory Committee on Rules of Civil Procedure, Minutes of Meeting (May 1993); Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 13–14 (Oct. 1994); Advisory Committee on Rules of Civil Procedure, Meeting Report Exhibit 2, at 1, 3 (Dec. 1994).

240. *See* Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 11 (May 1993) ("One member of the Committee observed that with suitable protective provisions covering such matters as the people who can be present with the witness, telephone testimony is as satisfactory as reliance on a deposition."); Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 13–14 (Oct. 1994) (expressing how permitting testimony via remote transmission would force lawyers to choose between trusting "unseen arrangements made by others" or "arranging to be present with the witness in person."); Advisory Committee on Rules of Civil Procedure, Meeting Report Exhibit 2, at 1, 3 (Dec. 1994) (discussing how providing advance notice of the intent to use remote testimony provides the opportunity to supplement transmitted testimony with a recorded video deposition).

opportunity to supplement the transmitted testimony with a video-recorded deposition.[241] The Committee even went so far as to expressly state that the amendment does not contemplate transmission by facsimile and "direct computer communication."[242] The Advisory Committee's concerns about seeing witness demeanor and the reliability of the technology for transmission were well founded at the time; however, technology has progressed rapidly since 1996.

When the amendment to Rule 43(a) was enacted, the top-of-the-line desktop videoconferencing technology only produced video showing approximately 10–20 frames per second at a nearly $7,000 price point.[243] Today, free videoconferencing software can transmit video at more than 30 frames per second using a camera that costs less than $13.[244] Modern technology can actually transmit a video that is so smooth that a human eye cannot distinguish the video from reality.[245]

Additionally, CERN made the World Wide Web publicly available just three years before the Supreme Court amended Rule 43(a) in 1996.[246] The Committee writing the 1996 amendment could not predict the technological revolution that was dawning at the time. Internet speeds

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241. Advisory Committee on Rules of Civil Procedure, Meeting Report Exhibit 2, at 3 (Dec. 1994).

242. Advisory Committee on Rules of Civil Procedure, Minutes of Meeting 12 (May 1993).

243. P. Harris & F. Wendt, *Intel's technology for videoconferencing*, 34 MGMT. DECISION 34, 37 (1996).

244. *USB 2.0 HD Web Cam with Mic for Computer PC Laptop Desktop Webcam, with Built-in MIC for Facebook Youtube Instagram Video Live Clip-on Plug and Play Skype MAC 720p Microphone (A)*, AMAZON (Sept. 24, 2020, 06:49:44), https://www.amazon.com/Computer-Desktop-Facebook-Instagram-Microphone/dp/B086VLW473/ref=sr_1_4?dchild=1&keywords=cheapest+web cam&qid=1600973138&sr=8-4 [https://perma.cc/22QT-V27B].

245. *See generally* L.E. Humes, et al., *The effects of age on sensory thresholds and temporal gap detection in hearing, vision, and touch*, 71 ATTENTION, PERCEPTION, & PSYCHOPHYSICS 860, 866 fig. 2 (2009) (finding the mean gap-detection threshold for vision in young adults is slightly below 20 milliseconds, and the mean gap-detection threshold for vision in older adults is slightly above 20 milliseconds). The average adult's brain recognizes a change in visual stimulus approximately every 20 milliseconds. Therefore, the average human perceives visual stimulus at approximately 50 frames-per-second or 50 hertz. Computer processors and cameras have progressed to the point that a video can be transmitted at a frame rate higher than 50 hertz.

246. *See* European Organization for Nuclear Research [CERN], *Statement Concerning CERN W3 Software Release Into Public Domain* (April 30, 1993).

have dramatically increased in recent years.[247] In 1996, the standard internet speed was 28.8 kilobytes per second.[248] The recommended minimum speed for videoconferencing is 384 kilobytes per second.[249] At the end of 2007, the average internet speed in the United States was 3,640 kilobytes per second.[250] By 2017, the average internet speed had increased to 18,750 kilobytes per second, over 646 times faster than the average speed in 1996.[251] Access to the internet has also increased over time. In 2018, the U.S. Census Bureau found that 91.8% of households in America paid for a broadband internet subscription.[252] Still, videoconferencing technology is not equally accessible in all communities across America. Although the average availability of the technology necessary to communicate via videoconference has increased, economic disparities and other factors may impede an individual's access. However, unequal access to technology alone should not preclude the adoption of videoconferencing in courts, especially when there are measures that courts may take to address that issue.[253]

In the 24 years since the adoption of the 1996 amendment, technology has evolved at an unprecedented pace. Much like how the development of the interstate highway system and the commercial jetliner made it easier for litigants and witnesses to travel to distant courts,[254] the development of

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247. FED. COMMC'NS COMM'N, OBI TECH. PAPER NO. 4: BROADBAND PERFORMANCE (2010).

248. *Id.*

249. Ashdown & Menzel, *supra* note 97, at 92 n.207; ERICH P. SCHELLHAMMER, A TECHNOLOGY OPPORTUNITY FOR COURT MODERNIZATION: REMOTE APPEARANCES 13 (2013).

250. AKAMAI TECHNOLOGIES, AVERAGE INTERNET CONNECTION SPEED IN THE UNITED STATES FROM 2007 TO 2017 (IN MBPS), BY QUARTER (July 22, 2020), https://www.statista.com/statistics/616210/average-internet-connection-speed-in-the-us/ [https://perma.cc/BC4J-E7SC].

251. *Compare* AKAMAI TECHNOLOGIES, supra note 250, *with* FED. COMMC'NS COMM'N, *supra* note 247.

252. U.S. CENSUS BUREAU, PERCENT OF HOUSEHOLDS WITH A COMPUTER AND PAID INTERNET SUBSCRIPTION BY STATE: 2018, ProQuest Statistical Abstract of the U.S., 2020 Online Edition, https://statabs.proquest.com/sa/docview.html?table-no=1181&acc-no=C7095-1.24&year=2020&z=4FAA820BE5B3DFA6147EF0A5F5DB0C54EAF64E8F&accountid=12154 [https://perma.cc/A4GX-5S8S].

253. *See* discussion *infra* Part V.

254. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957) (discussing how advances in modern transportation and communication made the burden of litigating in a foreign state much less substantial); *see also* Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) (discussing how the

videoconferencing technology has made it so that litigants and witnesses can have convenient access to courts with relatively little need to travel. However, Rule 43(a) is an obstacle, preventing federal courts in the United States from taking advantage of the technology.[255] Rule 43(a) must be amended to provide a more lenient standard for the use of videoconferencing in courts. In order to craft the proper solution, the Advisory Committee can inform its opinion on how to go forward by looking to Canada, whose rules for permitting videoconferencing in court are more lenient than those of the United States.[256]

IV. LOOKING TO THE GREAT WHITE NORTH FOR GUIDANCE

Canadian courts adopted rules that allowed for courts to use videoconferencing in judicial proceedings at approximately the same time as the United States.[257] Although adopted at the same time, the rules that Canadian courts adopted are far less restrictive than their American counterparts.[258] The geography and climate of Canada makes testimony via videoconferencing a useful tool for many of the provincial courts as well as the federal court system.[259] Fears over the use of videoconferencing in American courts can be assuaged by looking at how its use has unfolded in Canada.

A. Canadian Federal and Provincial Courts

Canada Federal Court Rule 32 authorizes the use of technology for remote appearances in a "hearing."[260] The Supreme Court of Canada has not decided whether a "hearing" applies to a trial, but lower Canadian courts have held that the rule should be interpreted liberally.[261] There are

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"extraordinary development of worldwide economical air travel by jet" made traveling to a distant forum substantially easier).

255. *See generally* FED. R. CIV. P. 43(a).

256. *Compare* Federal Courts Rules, SOR/1998-106 § 32 (Can.), *with* FED. R. CIV. P. 43(a).

257. *E.g.*, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08 (Can.); British Columbia Evidence Act, R.S.B.C. 1996, 124, § 73 (Can.); Federal Courts Rules, SOR/1998-106 § 32 (Can.).

258. *Compare* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08 (Can.), *and* British Columbia Evidence Act, R.S.B.C. 1996, 124, § 73 (Can.), *and* Federal Courts Rules, SOR/1998-106 § 32 (Can.), *with* FED. R. CIV. P. 43(a).

259. *See* BRITISH COLUMBIA LAW INSTITUTE, *supra* note 225, at 56.

260. Federal Courts Rules, SOR/1998-106 § 32 (Can.).

261. Farzam v. Canada (Minister of Citizenship and Immigr.), 2005 F.C. 1453, para. 28 (Can.).

no particular guidelines that provide when courts should allow the use of videoconferencing, but courts take into consideration any prejudice that the parties may incur from conducting the hearing remotely and the principle that the rules should be interpreted "so as to serve the just, most expeditious and least expensive determination of every proceeding on its merits."[262]

Alberta's Rules of Court allow courts to conduct "electronic hearings" in which all participants can hear each other, regardless of whether participants and the court can see each other.[263] Upon request of a party, the judge may make the decision to conduct electronic hearings based entirely on the court's discretion, taking into consideration whether the parties agree to conduct the hearing remotely.[264] Courts have interpreted this rule to allow hearings, witness examinations, and even trials to be conducted in whole or in part by electronic means.[265]

Most provinces have similar rules that provide broad discretion to courts to allow the use of videoconferencing in hearings.[266] Although each province has established its own rules on using videoconferencing at trials and hearings, most provinces seem to turn to Ontario's rules and case law on this issue.[267] In *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, the Alberta Court of the Queen's Bench relied heavily on Ontario's Rules of Civil Procedure and case law from Ontario's provincial court to determine when to apply Alberta's rule allowing for the use of videoconferencing.[268] Prince Edward Island and Newfoundland and Labrador also have rules that are nearly identical to Ontario and thus, use Ontario case law to help interpret the rules.[269]

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262. Rovi Guides, Inc. v. Videotron Ltd., 2020 F.C. 596, para.18 (Can.); *Farzam*, 2005 F.C. 1453, para. 27 (quoting Federal Rule 3) (Can.).

263. Alberta Rules of Court, Alta. Reg. 124/2020 § 6.10 (Can.).

264. *Id.*

265. Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta, 2020 ABQB 359 (Can.).

266. *See generally* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08 (Can.); Prince Edward Island R. of Civ. Proc. 1.08 (Can.).

267. *See Sandhu*, 2020 ABQB 359 (Can.); Prince Edward Island R. of Civ. Proc. 1.08 (Can.); N.L. *Rules of the Supreme Court, 1986*, 47A (Can.).

268. *Sandhu*, 2020 ABQB 359 (Can.).

269. Prince Edward Island R. of Civ. Proc. 1.08 (Can.); N.L. *Rules of the Supreme Court, 1986*, 47A (Can.).

B. Ontario's Courts

So long as equipment is available at the court or provided by a party, Rule 1.08 of Ontario's Rules of Civil Procedure allows courts to conduct nearly all hearings and proceedings by telephone or videoconference.[270] Originally, the rule required the consent of the parties to conduct the proceedings remotely; however, in 2008 Rule 1.08(3) was amended to allow courts to order remote proceedings on their own initiative.[271] Rule 1.08(5) provides a list of factors that a court should consider when determining whether to permit telephone or videoconferencing.[272] Courts have interpreted this list of factors as an "acknowledgement of the usefulness of taking evidence by way of a video conference" rather than a barrier that allows it only under exceptional circumstances.[273] This provides a stark contrast to the requirements provided in the Rule's American counterpart.[274]

Though courts in Ontario have interpreted Rule 1.08 as encouraging the use of videoconferencing in hearings and proceedings—refusing to read-in harsher restrictions than the law requires—judges must still exercise their discretion judiciously when determining whether to use

270. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08(1) (Can.). Courts are allowed to use videoconferencing to conduct motion hearings, application hearings, status hearings, trials, hearings for directions on reference, appeals and motions for leave to appeal, pre-trial conferences, and proceedings for judicial review.

271. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08(3) (Can.).

272. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.08(5) (Can.) (In deciding whether to permit or to direct a telephone or videoconference, "the court shall consider, (a) the availability of telephone conference or video conference facilities; (b) the general principle that evidence and argument should be presented orally in open court; (c) the importance of the evidence to the determination of the issues in the case; (d) the effect of the telephone conference or video conference on the court's ability to make findings, including determinations about the credibility of witnesses; (e) the importance in the circumstances of the case of observing the demeanour of a witness; (f) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason; (g) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and (h) any other relevant matter.").

273. Midland Res. Holdings Ltd. v. Shtaif, 2009 CanLII 67669, para. 24 (Can. O.N.S.C.).

274. *See* FED. R. CIV. P. 43(a).

videoconferencing.[275] The court in *Midland Resources Holdings Ltd. v. Shtaif* warned of the broad discretionary power Rule 1.08 provides to judges.[276] The court reasoned that the decision should be made on a case-by-case basis depending on what is most just and convenient, given the facts of the case.[277] The court recognized that if the quality of the connection was poor, it would impact the clarity of the video.[278] However, the *Midland* court also reasoned that because videoconferencing allows courts to reliably view the witness with clarity, courts should encourage the use of videoconferencing.[279] Therefore, so long as the judge exercised proper discretion, the use of videoconferencing should be encouraged.[280]

When addressing the use of videoconferencing for witness examination in preparation for a judicial mini-trial[281] in *Arconti v. Smith*, Justice Myers of the Ontario Superior court declared, "It's 2020."[282] Observing that communications technology has vastly improved, Justice Myers said, "We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively."[283] Justice Myers opined that modern technology provides a more efficient and cost-effective alternative to personal attendance, so courts should not reject this new technology.[284]

Justice Myers dismissed the concern that counsel would not be able to give as effective of a presentation via videoconference, saying that the "use of readily available technology is part of the basic skillset required of civil litigators and courts."[285] He opined that videoconferencing is not the answer to everything, but rather is a tool to be used.[286] Use of technology will not necessarily "produce perfection," but many of the concerns

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275. *Compare Midland Res. Holdings*, 2009 CanLII 67669, para. 22 (Can. O.N.S.C.), *and* Concord Adex Inc. v. 20/20 Mgmt. Ltd., 2017 O.R. 3897 (Can.), *with* 1337194 Ontario Inc. v. Whitely, 2004 Carswell Ont. 2312 (Can.).

276. *Midland Res. Holdings*, 2009 CanLII 67669, para. 22 (Can.).

277. *Id.*

278. *Id.* at para. 26.

279. *Id.*

280. *Id.* at para. 22.

281. A judicial mini-trial is a structured negotiated settlement technique, designed like an expedited trial, which allows the parties to present their cases and have a judge render a non-binding opinion on how the dispute should be resolved. The judge who conducts the judicial mini-trial will not sit as the trial judge.

282. Arconti v. Smith, 2020 O.R. 2872, para. 19 (Can.).

283. *Id.*

284. *Id.*

285. *Id.* at para. 33.

286. *Id.* at para. 20.

expressed are a result of unfamiliarity with videoconferencing.[287] It's not as "horrible as it is uncomfortable."[288]

In *Arconti*, the court recognized concerns about abusing the use of videoconferencing to cheat but reasoned that an unfounded fear of abuse was not a good basis to not use technology.[289] The court pointed out that parties could use hand signals or Bluetooth technology to improperly prompt witness testimony when the parties are in the same room in court; thus, the risk of clandestine witness coaching is not unique to videoconferencing.[290] The court also addressed the fear that counsel's team and clients would be separated and thus not able to communicate with one another in the way they would in court.[291] Justice Myers quickly dismissed this as a result of being uncomfortable with technology and suggested that in the same way that litigators must learn to handle junior counsel whispering information to them during an examination or argument in court, litigators must learn to do the same with technology.[292]

Similarly, in the United States, an attorney's technological incompetence is not a valid reason to avoid the use of videoconferencing technology. In 2012, the American Bar Association added commentary on the ABA Model Rules of Professional Responsibility to provide that lawyers should "keep abreast of changes in law and its practice" in the form of continuing their legal education and understanding relevant technology.[293] Thirty-eight states have since adopted this requirement into their individual rules of professional conduct.[294] Professor Dane Ciolino of the Loyola University New Orleans College of Law has opined that all states should likewise adopt versions of this requirement of technological competency into their rules.[295]

Prior to the COVID-19 pandemic, counsel's ignorance of videoconferencing technology may have been excusable and given some weight in considering the use of videoconferencing; however, a reasonable argument no longer exists for counsel to be inept in the use of videoconferencing. Counsel who is not reasonably knowledgeable about widespread technological advances in the practice of law would likely be

287. *Id.* at para 43.
288. *Id.*
289. *Id.* at para. 25–26.
290. *Id.* at para. 25.
291. *Id.* at para. 37.
292. *Id.*
293. MODEL RULES OF PRO. RESP. r. 1.1 cmt. 8 (Am. Bar Ass'n 1983).
294. DANE S. CIOLINO, LOUISIANA LEGAL ETHICS: STANDARDS AND COMMENTARY 15 (2020).
295. *Id.* at 16.

considered incompetent.[296] Moreover, when weighing the conveniences of the parties for *forum non conveniens* and changes of venue pursuant to § 1404, most courts find the convenience of counsel is irrelevant, improper to consider, or entitled to very little weight.[297] Thus, an argument that courts should avoid videoconferencing technology due to an attorney's unfamiliarity is absurd. Unlike U.S. federal courts, Canadian courts have been able to adapt to the changes in videoconferencing technology with ease due to their lenient standards for allowing live testimony via videoconferencing in court.[298] U.S. federal courts need not adopt the broad discretion for the use of videoconferencing technology found in Canadian law. The mere fact that the Canadian judicial system has not suffered, despite the vast discretion given to judges, should embolden the Judicial Conference to adapt its own rules in light of this technological innovation.

V. A CONVENIENT SOLUTION

Informed by a thorough analysis of the Canadian and U.S. systems, the Judicial Conference should recommend that the Supreme Court amend Rule 43(a) of the Federal Rules of Civil Procedure to establish a standard for using videoconferencing for testimony at trials and hearings that provides judges with greater discretion, while also providing parties with a means of litigating in a convenient manner. Ideally, the Supreme Court should amend Rule 43(a) to state:

> 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 the convenience of parties and witnesses, in the interest of justice, and with due regard to the importance of in-person testimony in open court, a* court may permit testimony in open court by contemporaneous transmission from a different location.[299]

Rather than establishing a list of prerequisites to meet before judges may use their discretion, the proposed amendment provides judges with great discretion on whether to permit testimony via contemporaneous

296. *See* MODEL RULES OF PRO. RESP. r. 1.1 cmt. 8 (Am. Bar Ass'n 1983).

297. 17 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.13 (3d ed. 2020); WRIGHT ET AL., *supra* note 15, § 3850.

298. *See generally* Arconti v. Smith, 2020 O.R. 2782 (Can.).

299. FED. R. CIV. P. 43(a) (emphasis added to show proposed amendment).

transmission. The proposed amendment merely provides general concepts that should guide judges on what to consider in their analysis.

A. Interpretation of the Amendment

By considering the "convenience of parties and witnesses," a judge should first consider the relative circumstances of the parties and witnesses, keeping in mind that if the witness and parties consent to conducting testimony via remote transmission, little reason exists to deny this request.[300] Consideration of the "interest of justice" reminds judges that although their analysis is based primarily on providing the parties with a speedy, inexpensive, and convenient resolution to the action, providing justice is the most important priority.[301] Thus, although convenient, if a judge were to discern that permitting testimony via remote transmission would impair the imposition of justice, that judge should not allow it. Finally, by providing that judges should give "due regard to the importance of in-person testimony in open court" in making their determination, the statute reaffirms the position that although leave to testify via remote transmission should be liberally given, technical glitches and other potential shortfalls make it so that videoconferencing should not wholly replace the use of live in-person testimony.[302]

B. A Solution to Most Doubts: Resurrect the Phone Bank

One of the primary concerns regarding the increased use of videoconferencing in courts is that videoconferencing disposes of the ceremony of trial and solemnity of the courtroom, both of which impose a truth-telling force on witnesses.[303] Indeed, there may be a sense of drama that accompanies the act of testifying in person that is lost when appearing remotely. The physical presence of attorneys, parties, and the finder of

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300. *See generally* Alberta Rules of Court, Alta. Reg. 124/2020 § 6.10(2)(a) (Can.) (providing that electronic hearings may be permitted if the parties agree to hold it in such a way); *accord* FED R. CIV. P. 43(a) advisory committee's note to 1996 amendment (providing that courts may find good cause in compelling circumstances when parties agree that testimony should be offered via remote transmission); *see also* discussion *supra* Part II.

301. *See generally* FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

302. *See generally* discussion *supra* Part III.

303. *See* FED R. CIV. P. 43(a) advisory committee's note to 1996 amendment; FRANCIS, *supra* note 224, at 3.

fact, in a neutral setting, may create a discomfort and pressure for a witness that can be helpful to the examination process.[304] That same witness, when testifying via videoconference from a favorite armchair at home, would likely not feel that same pressure to tell the truth as he or she would if providing testimony in person.[305] Although courts should not solely rely upon this issue to dispose of the use of videoconferencing, it is a concern that should be addressed.

In a letter to a local bar association, Judge Dennis Bailey of the 17th Judicial Circuit of Florida scolded lawyers for dressing inappropriately when attending hearings via videoconference.[306] Attorneys had appeared shirtless, in bed, and even lounging poolside.[307] These instances are demonstrative of how court participants may shrug aside the solemnity and gravity of legal proceedings when the physical aspects of a proceeding are stripped away.[308] However, there are measures that courts may employ to maintain the solemnity of the space while using videoconferencing technology. For instance, the District Court of Western Australia has issued a rule that requires that the room in which a virtual appearance takes place and the dress code of persons appearing virtually must "maintain the dignity and solemnity of the court, consistent with the venue being treated as part of the court room for this purpose."[309]

Although establishing rules that help to preserve the solemnity of the courtroom is likely effective, there is an alternative solution that may be better. The proliferation of cellphones has left empty, unused phonebanks in many federal courthouses across the country. Once bustling phonebanks, the payphones themselves have been removed and all that remains are empty compartments and booths. For example, in 2013, the Eastern District of New York removed 25 public payphones, leaving empty phone booths in the Brooklyn Federal Courthouse.[310] In the

304. Arconti v. Smith, 2020 O.R. 2872, para. 27 (Can.).

305. *Id.*

306. Dennis Bailey, *Virtual View from the Bench During the COVID-19 Pandemic: A Letter from the Honorable Dennis Bailey*, https://www.westonbar.org/so/61N5VoOJe?fbclid=IwAR3gBGUaUfpC8qs0612nMrw-lSDgZkDFiOiCcKGXBjd3SDS8PisCrslHN6c#/main [https://perma.cc/RU3E-6W2D] (last visited Oct. 1, 2020).

307. *Id.*

308. *See generally id.*

309. District Court of Western Australia, *Practice Direction No 2.5 of 2019: Obligations of the Applicant* (14 July 2020).

310. John Marzulli, *Budget Cuts See Major Pay Phone Hangup at Brooklyn Federal Courthouse*, DAILY NEWS (Aug. 7, 2013), https://www.nydailynews.com

Southern District of New York, there are 46 more empty phone booths lying unused in the Daniel Patrick Moynihan and the White Plains federal courthouses.[311]

The U.S. federal court system should utilize these spaces to set up areas for individuals to appear for remote proceedings at their local courthouses. Each booth would contain a camera and a monitor that individuals could use to appear at any federal courthouse in the country by simply going to their local federal courthouse. Even in remote regions of the country, distant from any federal courthouse, individuals can more easily travel to the nearest federal courthouse than they can across the country to the specific courthouse where the in-person proceedings are taking place. This solution would provide a controlled area, free of interruption and distraction, for witnesses and pro se litigants to appear remotely. This solution would ensure the truth-telling force brought on by the solemnity of the courthouse is not lost because the witnesses would still be subjected to the solemnity and grandeur of the courthouse from which they are remotely testifying. Additionally, this solution could provide a controlled setting where the court can make sure that the individual is not receiving any improper coaching or the like when giving remote testimony.

This solution can also provide videoconferencing technology to those who would not otherwise have ready access. Although internet access is widespread, courts should still take into consideration factors that inhibit an individual's access to the use of videoconferencing technology, such as economic inequality. Using phonebanks in this way can provide a reliable means of access to videoconferencing technology for those who do not otherwise have access. This solution, paired with the implementation of the proposed amendment to Rule 43(a), would allow the federal court system to provide the public with a speedy, inexpensive, and just method of litigating claims.

CONCLUSION

Courts seek to provide litigants with a speedy, inexpensive, and just resolution to all actions and proceedings.[312] In its effort to do this, the court system has recognized that the invention of the photocopier, the commercial jet, and many other things have made the task of litigating a

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/new-york/brooklyn/cuts-pay-phone-hangup-brooklyn-courthouse-article-1.1419571 [https://perma.cc/9PCK-62WK].

311. *Id.*

312. FED R. CIV. P. 1.

much more convenient process.[313] The adoption of videoconferencing software for use in court seems to be the next, natural step. However, Rule 43(a) of the Federal Rules of Civil Procedure has severely limited the use of videoconferencing for testimony by requiring that courts only permit it when there is good cause in compelling circumstances.[314]

The Judicial Conference should recommend that the Supreme Court amend Rule 43(a) to allow for remote testimony at the discretion of the presiding judge, with deference to scenarios where the parties consent to presenting witness testimony remotely. This would not only serve the court system by providing a more efficient means of conducting proceedings, but it would also provide greater and more convenient access to judicial relief for the aggrieved. Coupled with an effort to transform unused phone booths in federal courthouses into spaces for remote testimony, this proposed amendment will ensure a "just, speedy, and inexpensive determination of every action and proceeding."[315]

The world will never be the same after the COVID-19 pandemic ends. Twenty years passed before the Second Circuit adopted the evolution of the concept of convenience as laid out by Judge Oakes in *Effron*.[316] Twenty-four years have passed since federal courts were first allowed to utilize videoconferencing technology.[317] It's time to adapt. "It's 2020."[318]

313. *See generally* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957); Hanson v Denckla, 357 U.S. 235, 250–51 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995); Calix-Chacon v. Glob. Int'l Marine, Inc., 493 F.3d 507, 515 (5th Cir. 2007).

314. *See generally* FED. R. CIV. P. 43(a).

315. FED. R. CIV. P. 1.

316. *See generally* Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975) (Oakes, J., dissenting); *Effron*, 67 F.3d 7.

317. *See generally* FED. R. CIV. P. 43(a).

318. Arconti v. Smith, 2020 O.R. 2872, para. 19 (Can.).