

## **Appendix E: Review of Case Law Related to Witness Testimony by Remote Transmission Under Federal Rule of Civil Procedure 43 and Federal Rule of Bankruptcy Procedure 9017<sup>1</sup>**

This appendix reviews federal case law regarding the meaning of “good cause in compelling circumstances” and “appropriate safeguards” under Federal Rule of Civil Procedure 43(a), which is made applicable to bankruptcy cases and proceedings by Federal Rule of Bankruptcy Procedure 9017. As a general matter, the case law has followed the advisory committee’s lengthy and detailed note to Civil Rule 43(a).

### **I. “Good Cause in Compelling Circumstances” Under Civil Rule 43(a)**

#### **A. Consent**

If the parties consent to contemporaneous transmission of testimony, “good cause and compelling circumstances” may be established with relative ease.<sup>2</sup> *See, e.g., Scott Timber v. United States*, 93 Fed. Cl. 498, 500 (2010) (citing agreement of parties in granting motion for remote testimony by videoconference); *In re Betcorp Ltd.*, 400 B.R. 266, 272 n.4 (Bankr. D. Nev. 2009) (noting party consent to remote testimony of two witnesses from Australia but also indicating in dicta that court could have found good cause based on travel costs for only a half-day of testimony).

Courts, however, retain discretion to insist on live testimony over the parties’ agreement for any reason, including if the witness is important in the broader context. *See, e.g., In re Mikolajczyk*, No. 15-90021, 2015 WL 3505135, at \*1 (Bankr. W.D. Mich. June 3, 2015) (denying unopposed request to allow remote witness appearances by downstate parties in a case pending on Upper Peninsula of Michigan because travel required was not unusual in a large district and granting motion could logically eviscerate the presumption in favor of live testimony for many cases before the court).

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1. This appendix was prepared by Matthew Hindman of the Administrative Office with the assistance of Elizabeth C. Wiggins and Alexander V. Cranford (intern) of the FJC Research Division. It was based on a memorandum originally prepared by Michael Smith (intern) of the Administrative Office.

2. The advisory committee’s note to Civil Rule 43(a) provides, with respect to the impact of party consent:

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties’ agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

Fed. R. Civ. P. 43(a) advisory committee’s note.

The burden of proving unanimous consent to remote transmission rests with the party seeking to use the remote testimony. See *Garza-Castillo v. Guajardo-Ochoa*, No. 10-00359, 2012 WL 15220, at \*2 (D. Nev. Jan 4, 2012) (denying motion based in part on failure to show agreement of all parties to allow remote testimony).

### **B. Medical Issues**

The advisory committee's note to Civil Rule 43(a) refers to unexpected illness as providing a "persuasive showing" of good cause for remote transmission of a witness's testimony in compelling circumstances. Courts will thus generally permit individuals who are medically unable to attend a hearing or trial to testify from a remote location. See *S.E.C. v. Yang*, 2014 WL 1303457, at \*5 (N.D. Ill. Mar. 31, 2014) (citing advanced pregnancy, as well as consent of other party, in permitting remote witness testimony); *Sallenger v. City of Springfield*, 2008 WL 2705422 (C.D. Ill. 2008) (allowing remote testimony because of a medical condition); see also *In re Emanuel*, 406 B.R. 634, 637 (Bankr. S.D.N.Y. 2009) (citing absence of "health-related reasons" for need to testify remotely as one basis for denying request). At least one court has cited as a basis for granting a request for remote testimony the likelihood that traveling to testify in the state where she was raped would trigger a victim's PTSD symptoms. See *Humbert v. O'Malley*, 303 F.R.D. 461, 465 (D. Md. 2014).

When determining whether illness supports the inability to testify, courts will consider the severity and duration of the illness. If the severity of an individual's medical condition becomes an issue, courts may consider medical records in evaluating the request to testify remotely. See *Martal Cosmetics, Ltd. v. Int'l Beauty Exch. Inc.*, No. 01-7595, 2011 WL 887591, at \*2 (E.D.N.Y. Mar. 11, 2011) (finding insufficient proof that witness was unable to appear). However, courts have looked unfavorably on "cursory doctor's notes," which are statements by doctors that the health of the witness *could* be affected by the witness's having to appear, and these notes are generally not sufficient to establish good cause or compelling circumstance. *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) (*but cf. Humbert*, 303 F.R.D. at 465 (traveling to testify may unnecessarily trigger PTSD symptoms)).

### **C. Travel, Generally**

Although courts recognize that long-distance travel may pose a serious inconvenience, the case law is not consistent regarding whether this factor alone should justify remote testimony. The advisory committee's note does not specifically address the burdens imposed by travel. It does, however, note that depositions generally "provide a superior means of securing the testimony of a witness who is be-

yond the reach of a trial subpoena.” Fed. R. Civ. P. 43(a) advisory committee’s note. This has left courts with wide discretion regarding whether burdensome travel obligations provide good cause in compelling circumstances. At least one court has suggested that courts may be more willing to use their discretion to grant remote testimony motions for third-party witnesses than for parties themselves. *See Rodriguez v. SGLC, Inc.*, No. 08-01971, 2012 WL 3704922, at \*3 (E.D. Cal. Aug. 24, 2012); *but cf. Lopez v. NTI, LLC*, 748 F. Supp. 2d 471 (D. Md. 2010) (plaintiffs were allowed to testify remotely as a result of international travel restrictions).

Courts that have granted motions for remote testimony premised on travel obligations have generally focused on the distances and costs that such travel would entail, sometimes relative to the witness’s or party’s means. *See, e.g., Katzin v. United States*, 124 Fed. Cl. 122, 126 (2015) (citing “substantial expense” a third-party witness located 900 miles from court would incur in terms of time and absence from medical practice in granting remote testimony motion); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) (granting remote testimony motion as to Honduran plaintiffs in light of plaintiffs’ indigence, high costs of travel, and safeguards in place); *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (labeling travel from Oklahoma to the District of Columbia a “serious inconvenience” that justifies remote testimony by a witness); *In re Rand Int’l Leisure Prods., LLC*, No. 10-71497, 2010 WL 2507634, at \*4 (Bankr. E.D.N.Y. June 16, 2010) (citing distances petitioning creditors would be forced to travel—which ranged from 500 to 7,800 miles for international creditors and 1,100 to 2,482 miles for domestic creditors—and prior submission of direct testimony by affidavit in granting motion to appear by video); *In re Betcorp Ltd.*, 400 B.R. at 272 n.4 (noting, in dicta, that court could have found good cause to permit remote testimony given the cost of travel from Australia to the United States for only a half-day of testimony). *See also Herrman v. United States*, 129 Fed. Cl. 780 (2017) (court found that the expense of travel from New York to Washington, D.C., did not qualify as a compelling circumstance). When courts are looking into the inconvenience and costs of travel, factors such as profession are taken into account. For example, in *SEC v. Ferone*, the court narrowed the holding in *Katzin* by ruling that the professional consequences of a Wall Street investor’s travel did not qualify as compelling circumstances, whereas the consequences of a doctor’s travel were sufficient in *Katzin*. *SEC v. Ferone*, 2016 U.S. Dist. LEXIS 17085 (N.D. Ill. 2016).

Courts that have denied remote testimony motions premised on travel obligations have focused on the foreseeable nature of the trip, rather than the distances or costs at issue. *See, e.g., Rodriguez*, 2012 WL 3704922, at \*3 (denying motion because costs of travel were “hardly unforeseen,” request was in any event late, and it

was a party, not a third-party witness, who sought to appear remotely); *Sille v. Parball Corp.*, No. 07-00901, 2011 WL 2680560, at \*1 (D. Nev. July 8, 2011) (denying motion because there was “nothing unexpected concerning the ability of Plaintiff’s witnesses to attend” and “Norway and New York have remained the same distance from Las Vegas”). Other courts have simply noted that remote transmission requires an exceptional case and that ordinary inconvenience and expense will not suffice. *See Humbert v. O’Malley*, No. 11-0440, 2015 WL 1256458, at \*2 (D. Md. Mar. 17, 2015) (assertions about work and family obligations, devoid of evidentiary support, and references to the financial expense of traveling from California to Maryland did not establish compelling circumstances).

Absent other factors, the cost and time required to travel to a courthouse within the same judicial district is unlikely to provide a basis for remote testimony. *See In re Mikolajczyk*, 2015 WL 3505135, at \*1.

#### ***D. Restrictions on International Travel***

Courts have granted motions for remote testimony by witnesses who are restricted from entering the United States, although the burden is on the movant to substantiate the restriction on entry. *See, e.g., Jose Gustavo*, 2017 WL 1113334 (E.D.N.C. 2017) (court found that international witness from El Salvador was permitted to give remote testimony because visa issues provided the sufficient compelling circumstances); *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007) (affirming decision allowing plaintiff to testify by video based upon proof that his attempts to secure a visa to the United States were all unsuccessful); *Alcalá v. Hernandez*, No. 14-4176, 2015 WL 1893291, at \*2 (D.S.C. Apr. 27, 2015) (citing likely inability of witnesses to obtain visas, both for reasons out of their control and because of their indigent status, in granting remote testimony motion); *Lopez v. Miller*, 915 F. Supp. 2d 373, 396 n.9 (E.D.N.Y. Mar. 20, 2013) (witness deported from and unable to reenter United States legally “easily satisf[ied]” Rule 43(a)); *Dagen v. CFC Grp. Holdings Ltd.*, No. 00-5682, 2003 WL 22533425, at \*1–2 (S.D.N.Y. Nov. 7, 2003) (granting motion for five witnesses in Hong Kong to testify remotely based in part on difficulty of obtaining visas for four witnesses and apparent inability of fifth witness to enter).

But speculative references to difficulties in obtaining a visa or leaving one’s home country may not create sufficiently compelling circumstances to warrant remote testimony. *See, e.g., Flame S.A. v. Indus. Carriers, Inc.*, No. 13-658, 2014 WL 4181958, at \*2 (E.D. Va. Aug. 21, 2014) (rejecting argument that hypothetical need for key witness to report for duty in Ukrainian army and similar “inchoate possibilities” justified remote testimony); *S.E.C. v. Yang*, 2014 WL 1303457, at \*5 (denying remote testimony motion as to certain witnesses because of witnesses’

failure to substantiate claims that they would have difficulty obtaining visas); *Garza-Castillo*, 2012 WL 15220, at \*1–2 (denying motion to allow remote testimony by witnesses in Mexico in spite of unsupported statement that visas would not be granted by consulate); *Rodriguez*, 2012 WL 3704922, at \*3 (denying motion for remote testimony where the movant claimed the process of securing a visa was complex, but failed to show any actual attempt to obtain one).

### **E. Prejudice**

A court may be more likely to grant a motion to allow remote testimony if denial would seriously prejudice the movant. *See, e.g., Flame S.A.*, 2014 WL 4181958, at \*2 (witness’s “central role” in dispute, and implied prejudice to other party were he not to testify live, supported denial of remote testimony motion); *Dagen*, 2003 WL 22533425, at \*2 (granting defendants’ motion based in part on conclusion that defendants would suffer “incurable prejudice” if the court excluded the testimony); *see also Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498 (2010). Lack of prejudice to the opposing party may also support granting a remote testimony motion. *See, e.g., Humbert v. O’Marrey*, 303 F.R.D. 461 (D. Md. 2014); *Sallenger v. City of Springfield*, No. 03-3093, 2008 WL 2705442, at \*1 (C.D. Ill. July 9, 2008) (granting motion over non-movants’ allegation of prejudice because court found no “tactical advantage” in having witness testify remotely); *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. at 1 (noting lack of prejudice to non-movant resulting from video testimony).

But the importance of a witness (and corresponding prejudice if remote testimony is not permitted) is unlikely, without more, to convince a court to find compelling circumstances. *See S.E.C. v. Yang*, 2014 WL 1303457, at \*6 (denying motion as to certain witnesses despite their importance to the proceeding and admonishing the party for not taking appropriate steps to secure their critical testimony prior to the eve of trial).

### **F. Administrative Cost**

The Supreme Court set out in *Mathews v. Eldridge* that the “government’s interest, including the function involved and the fiscal and administrative burdens that the procedural requirement would entail” are to be taken into account when determining whether due process has been followed. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Significant financial or administrative costs to the government or the parties may also constitute a compelling circumstance for a remote testimony motion. *See Thornton v. Snyder*, 428 F.3d 690 (7th Cir. 2005) (videoconference used over objection from inmate defendant who required a 120-mile, two-police-officer escort, and for witnesses spread across the state); *see also Jennings v. Bradley*, 419 F. App’x 594 (6th Cir. 2011) (same cost issue for maximum security in-

mates); *United States v. Baker*, 45 F.3d 837, 847 (4th Cir. 1995) (referring to government’s “fiscal and administrative concerns” in a civil commitment hearing and cautiously noting the economic benefits of using videoconferencing technology).

*Perotti v. Quinanes*, 790 F.3d 712 (7th Cir. 2015), distinguishes *Thornton* and provides an analytical framework for determining when expenses to the state are “compelling circumstances.” In *Perotti*, the court did not allow inmates to testify by teleconference; the economic burden was not compelling because the inmates “were not scattered all over the state” and most parties and witnesses were not inmates. The opinion sets forth a balancing test with the relevant factors to be considered:

A court may therefore not simply assume that remote appearance by video conferencing will necessarily be good enough in any case. The court still must balance the prisoner’s interest in being present physically in the courtroom and the government’s interest in having him remain in his place of incarceration. In balancing those competing interests, the court should still have in mind how important credibility is to the case, and how remote appearance may (a) limit the factfinder’s ability to evaluate the inmate’s credibility as a witness, (b) make it more difficult for the inmate as a party to confront and evaluate the other witnesses and exhibits, (c) impose a logistical burden on the inmate’s ability to interact with his counsel, the court, and opposing counsel, and to react on the fly to unexpected developments. Requiring a prisoner to appear remotely is not a decision to be made lightly, as we said in *Thornton*, 428 F.3d at 698, and the court must make the decision with a realistic appreciation of how much the available technology will enable all parties to see and hear of [sic] one another, and how the limitations of video conferencing are likely to impact the presentation of the inmate’s case, the factfinder’s assessment of the evidence, and the fundamental fairness of the trial.

*Perotti*, 790 F.3d at 725.

Fiscal concerns are usually insufficient on their own to justify good cause. See *Terrell v. United States*, 2007 U.S. Dist. LEXIS 72993 (E.D. Mich. 2007) (distinguished from *Baker*, 45 F.3d 837, where fiscal and safety concerns were found; here, fiscal concerns alone did not satisfy good cause).

### **G. Foreseeability**

“A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.” Fed. R. Civ. P. 43(a) advisory committee’s note. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known. *Id.*

Consistent with the advisory committee's note, parties who are aware of the need for remote testimony but do not file timely motions with the court appear unlikely to succeed on their Civil Rule 43(a) motions. *See, e.g., Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (emphasizing trial court discretion regarding remote testimony and citing foreseeability as a basis for affirming district court's denial of remote testimony motion); *Air Turbine Tech., Inc. v. Atlas Copco AB*, 410 F.3d 701, 714 (Fed. Cir. 2005) (affirming denial of remote testimony motion on basis that movant unnecessarily waited until one month before trial to submit the motion); *Flame S.A.*, 2014 WL 4181958, at \*3 (denying remote testimony motion filed after close of discovery and "just before trial" on the basis, among others, that the need for relief was foreseeable); *S.E.C. v. Yang*, 2014 WL 1303457, at \*6 (denying motion because, among other things, purported difficulties in obtaining a visa were knowable in advance and party failed to take deposition during discovery period); *Niemeyer v. Ford Motor Co.*, No. 09-2901, 2012 WL 5199145 (D. Nev. Oct. 18, 2012) (denying remote testimony motion, which was filed after court declined to permit untimely deposition of plaintiffs' witness, because the "quandary" in which plaintiffs found themselves was of their own making); *Golden Dawn Corp. v. Neves (In re Neves)*, No. 09-33043, Adv. Pro. No. 10-02122, 2014 WL 7012674, at \*7 (Bankr. S.D. Fla. Dec. 11, 2014) (citing *Niemeyer* and denying remote testimony motion for similar reasons); *In re Emanuel*, 406 B.R. at 637 (citing absence of "unexpected" reasons for need to testify remotely as one basis for denying request made by disbarred fugitive lawyer who sought to avoid in-person appearance for fear of being arrested).

#### **H. Other Matters**

Other issues that arise in a particular case may also inform a decision on whether to permit remote testimony. *See, e.g., Humbert*, 303 F.R.D. at 465 (permitting remote testimony by witness who, among other things, was responsible for schooling her autistic child); *Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 214 (Bankr. N.D. Ohio 2016) (referencing court's arrangement for plaintiff and defendant, who were barred by state court order from direct contact, to appear from separate remote locations with live video between the court and those locations); *In re Skoglund*, No. 14-90050, 2014 WL 1089865, at \*1 (Bankr. W.D. Mich. Mar. 19, 2014) (referencing grant of permission to testify remotely based on section 362(c) time constraints, court's schedule, and distance between courthouses); *Dagen*, 2003 WL 22533425, at \*2 (granting motion in part based on the fact that five witnesses in Hong Kong constituted a "large portion" of defendants' labor force and flying them to the United States to testify would seriously harm their business).

## II. Appropriate Safeguards Under Civil Rule 43(a)

Courts are required to establish appropriate safeguards before allowing videoconferencing. These safeguards should ensure that the communication will have all of the qualities of live testimony. *Thornton*, 428 F.3d at 698–99. Some of these safeguards are indispensable to the fairness of the proceeding. Parties may propose other safeguards, and the court may require any safeguards it deems necessary. *See, e.g., Sprint Nextel Corp. v. Yoak*, No. 13-01292, 2014 WL 6796074, at \*2 (E.D. Mo. Dec. 2, 2014) (directing counsel to confer as to appropriate safeguards).

### A. Ability to Identify the Witness, Listen, and Observe; Cross-Examination

The court must be able to identify, communicate with, and judge the demeanor of the witness. Fed. R. Civ. P. 43(a) advisory committee’s note; *see also Jennings*, 419 F. App’x at 598 (affirming order regarding video testimony and noting, with respect to safeguards, that “[t]he jury could listen to the witnesses and observe their demeanor, [the plaintiff] could question them, and the transmission was instantaneous”); *Lopez*, 915 F. Supp. 2d at 396 n.9 (noting that everyone in the courtroom could see and hear the witness and that the opposing party had opportunity for cross-examination).

Often, courts will test their videoconferencing equipment prior to and during the proceeding to ensure that communication with the witness is seamless. *See, e.g., In re Rand Int’l*, 2010 WL 2507634, at \*5 n.3 (noting requirement that parties conduct tests of connection and technology before court would rule on videoconference motion and further requiring that movants demonstrate compatibility of their conferencing protocols and technology with those of the court); *Virtual Architecture, Ltd.*, 2012 WL 388507, at \*2 (referring to judge’s testing of transmission quality, confirming witness’s ability to see and hear the court, and evaluating other aspects of videoconferencing system prior to commencing trial). If the quality diminishes after establishing the connection, the court may decide to terminate the transmission and strike the testimony from the record. *In re Rand Int’l*, 2010 WL 250763, at \*6.

Courts should insist, to the extent possible, that the time and structure of the remote testimony be established in advance of the hearing in order to plan for proper examination. *Id.* If parties will use documents in the examination, the documents should be provided to the court and parties in advance. *Id.* at \*5. Parties in videoconferences have also previously used fax machines to send documents in real time. *See Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1276 (9th Cir. 1990).



### **B. Private Attorney–Client Communication**

Videoconference technology must not preclude attorneys from communicating privately with their clients, even if the two are in different physical locations.

While videoconferencing may force an attorney to choose between being with her client and standing before the judge, *Rusu v. U.S. I.N.S.*, 296 F.3d 316, 323 (4th Cir. 2002), it may not otherwise come between their communications. Many remote transmission technologies actually allow for private communication during remote transmission. See *Valenzuela-Gonzalez*, 915 F.2d at 1277. Or attorneys may speak with clients “offline,” for example, on a private telephone. *United States v. West*, No. 08-669, 2010 WL 3324886 (N.D. Ill. Aug. 18, 2010). The key point is that the system the court or the parties use may not restrict the attorney’s ability to communicate freely with his or her client.

In international cases, the government may be ordered to retain local counsel who would represent a defendant’s interest during the deposition of witnesses overseas. *United States v. Csolkovits*, 794 F. Supp. 2d 764 (E.D. Mich. 2011) (court ordered the government to pay reasonable attorney fees and to retain local Bahamian counsel to represent defendant’s interest during depositions in the Bahamas).

### **C. Avoiding Undue Influence; Limiting the Persons in the Room**

The court must also adopt procedures to ensure that the witness is protected from undue influence by other persons during the videoconference. Fed. R. Civ. P. 43(a) advisory committee’s note.

This may be accomplished by limiting who is present with the remote witness or by requiring the witness to be alone. See, e.g., *Lopez*, 915 F. Supp. 2d at 396 n.9 (noting that “everyone in the courtroom was able to see and hear [the witness] and the people with him”); *Scott Timber, Inc.*, 93 Fed. Cl. at 501 (approving as a reasonable safeguard the requirement that no one other than the witness be present during remote testimony); *In re Rand Int’l*, 2010 WL 2507634, at \*5 (limiting who could be present with the witness during remote testimony to an attorney who was prohibited from conferring with the witness, a videoconference operator, and a translator, if necessary).

Connection quality may also affect the court’s ability to limit undue influence. The number of cameras and quality of transmission help to ensure that the witness is not being influenced or coerced by any other party in the room. Some courts have also opted to conduct videoconferences exclusively from government buildings, which may ensure freedom from undue influence.

#### ***D. One Example of Appropriate Safeguards***

Although there is no limit to the types of safeguards courts may choose to implement in connection with remote testimony, one court cited a fairly comprehensive list—suggested and agreed upon by the parties—that may be instructive for courts facing this issue. *See Alcalá v. Hernandez*, No. 14-4176, 2015 WL 1893291, at \*2–3 (D.S.C. April 27, 2015). It is helpful to note that the petitioner and his father, Mr. Monterosas, were each to be testifying remotely.

- Petitioner and Mr. Monterosas will report to the Foreign Relations Secretary’s local office in Córdoba, Veracruz, Mexico, on May 11, 2015, and May 12, 2015, by 8:30 AM EST;
- When at the appropriate local office, Petitioner and Mr. Monterosas will provide sufficient documentation to a consular official who will verify their identities with the Court prior to their testimony;
- Petitioner and his counsel will troubleshoot any problems with the technology in advance of the trial, and will work with the translator and Court/Consular staff to ensure that he and Mr. Monterosas can be heard and understood;
- Petitioner and Mr. Monterosas will testify separately, in a closed room, free of any outside influence (both in-person and through other technological means) on their testimonies;
- All documentary evidence presented to Petitioner and Mr. Monterosas will be marked prior to the trial and provided to them to facilitate their testimony; and
- Petitioner (through counsel) will pay any costs associated with the remote testimony.

*Id.* In addition to the substance of these safeguards, note the means by which they were developed: by the parties themselves. Courts should give serious consideration to this approach, as it not only relieves the judge of his or her obligation to draft safeguards without party input, but also lessens the chances that the parties will later take issue with the nature or context of the remote testimony.

### **III. The Federal Rules of Evidence and Remote Transmission**

The Federal Rules of Evidence, which also apply in matters arising under the Bankruptcy Code (*see* Fed. R. Bankr. P. 9017), further inform how parties may offer testimony. Indeed, Civil Rule 43 expressly subjects its “open court” requirement to the Federal Rules of Evidence: “the witnesses’ testimony must be taken in open court *unless a federal statute, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise.*” Fed. R. Civ. P. 43(a) (emphasis added).

Evidence Rule 611 grants judicial discretion over examinations and evidence. The rule provides, in pertinent part:

**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

Federal courts have interpreted Rule 611 as granting federal trial courts “wide latitude” over the mode and order of presenting evidence. *Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003); Bankr. Evid. Manual § 611:1. When judges’ exercise of such latitude arguably conflicts with Civil Rule 43(a)—most commonly in connection with testimony by declaration in bankruptcy proceedings—courts have generally deferred to the discretion afforded by Rule 611. *See, e.g., Doan v. Tong (In re Duc Doan)*, No. 06-1428, 2007 WL 7535061, at \*6 (B.A.P. 9th Cir. Aug. 10, 2007); *see also Saverson v. Levitt*, 162 F.R.D. 407, 409 (D.D.C. 1995); *Lewis v. Zermano (In re Stevinson)*, 194 B.R. 509, 511 (Bankr. D. Colo. 1996); Bankr. Proc. Manual § 9017:2 (“To the extent there is any inconsistency between Civil Rule 43 and the Federal Rules of Evidence, the Rules of Evidence control.”)

Evidence Rule 611 thus provides federal courts with another tool for controlling the means of presenting evidence, even where Civil Rule 43 might otherwise restrict the use of contemporaneous transmission from an out-of-court location.