



July 17, 2012

FILED

VIA HAND DELIVERY

Tracie K. Lindeman
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701

JUL 18 2012
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CLERK DEPUTY CLERK

**Re: Additional Information Requested by the Nevada Supreme Court
Regarding ADKT 0424**

Dear Ms. Lindeman:

At the recent public hearing on July 9, 2012 to discuss ADKT 0424 (rule changes regarding telephonic and audiovisual appearances in civil cases), the Nevada Supreme Court asked me to conduct research regarding other courts' rules for audiovisual appearances and to then inform the Court of the results of that research. I have completed the research, and I respectfully submit this letter to the Court.

50-State Survey by the National Center for State Courts

In lieu of conducting state-by-state research, I was fortunate to locate a 50-state survey conducted in 2010 by the National Center for State Courts (NCSC) concerning the use of video¹ and telephonic appearances in state courts. As part of its work, the NCSC compiled a spreadsheet of the applicable state rules for video and telephonic appearances in state courts with links to the relevant state court rules. I have taken the liberty of downloading the spreadsheet onto 5 CD's, which I have enclosed herewith for the Court's convenience. Of course, the spreadsheet and other information, including a slideshow of the state court's responses, are available at the NCSC website - <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Technology/NCSC-Video-Conferencing-Survey.aspx>

In short, I could not find any state that takes the same broad approach to audiovisual appearances in civil cases that the proposed rule does. Specifically, for those few states that do allow audiovisual appearances at trials or hearings, the courts first require a showing of good cause to allow for such an appearance. After reviewing

¹ Throughout this letter and although the Court's proposed rule uses the term "audiovisual," I use the terms "audiovisual" and "videoconferencing" interchangeably for ease of reference since many of the state court rules and other authorities use the term "videoconferencing."

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12-22685



the spreadsheet and the various state court rules, I observed the following state court rules or statutes to be particularly noteworthy:

1. Minnesota courts allow for audiovisual testimony only if: (i) the court orders it on its own initiative; (ii) the parties stipulate; or (iii) there is a showing of good cause. *See* Minnesota General Rules of Practice for the District Courts, Rule 131. In making a determination of whether good cause exists, courts must consider eleven different factors. *See* Rule 131.02(d)(4). The Minnesota rules were by far the most detailed, and I have taken the liberty of attaching them to this letter for the Court's convenience.
2. Wisconsin courts allow for telephonic or audiovisual proceedings only if: (i) other rules or statutes allow it; (ii) the parties stipulate; or (iii) there is a showing of good cause. *See* Wisconsin Statute 807.13. In making a determination of whether good cause exists, courts must consider eight different factors, and many of these factors are duplicative of the Minnesota good cause factors. *See id.*
3. Alaska Rule of Civil Procedure 99 allows for telephonic appearances for good cause and in the absence of substantial prejudice to opposing parties.

Absence of ABA Model Rules Regarding Videoconferencing

After researching the issue, I was unable to locate any ABA model rules concerning videoconferencing.

NRCP 43(a)

In undertaking the research for the Court, I had the opportunity to become reacquainted with NRCP 43(a). This rule is very important for the Court to consider in addressing the proposed rule for audiovisual appearances in civil cases, especially if it has not been taken into consideration to date. NRCP 43(a) states:

In every trial, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or by statute. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

In its current form, the proposed rule is not consistent with NRCP 43(a) because the proposed rule creates an automatic right for parties or witnesses to appear by videoconference at trials or hearings instead of first requiring courts to find that "good cause in compelling circumstances" exists. The language of NRCP 43(a) appears to be more in line with the rules of other states, which first require a showing of good cause.

FRCP 43(a) and NRCP 43(a) are very similar. The 1996 advisory notes for FRCP 43 are instructive, and I have attached them to this letter for the Court's convenience and consideration. The 1996 advisory notes make the following points:

1. "Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial."
2. "The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time."
3. "Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness."
4. "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."
5. "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. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying."
6. "Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness."



Conclusion

In light of (i) the information obtained through the NCSC 50-state survey, (ii) the explicit language of NRCP 43(a), and (iii) the 1996 advisory notes to FRCP 43(a), I respectfully submit that the proposed rule concerning audiovisual/videoconferencing appearances in civil cases be amended as follows:

1. The reference to “trials and hearings at which witnesses are expected to testify” in Rule 4(1)(a)(1) should be removed.
2. The reference to “hearings on temporary restraining orders or temporary protection orders” in Rule 4(1)(a)(2) should be removed.
3. If a party or witness wishes to appear at any of the categories which I have suggested be removed (i.e. trials and hearings or hearings on temporary restraining orders *et al*), the proposed rule should be amended to allow a party or witness “for good cause shown in compelling circumstances and upon appropriate safeguards” to protect the interests and rights of the non-moving party to move the court to allow an audiovisual appearance at trial, hearings at which witnesses are expected to testify, or hearings on temporary restraining orders or temporary protection orders. This suggested amendment echoes NRCP 43(a), and it makes that rule and the proposed rule for an audiovisual appearance consistent with one another. Also, the proposed rule should be amended to require courts to consider “good cause” factors when reviewing a motion to make an audiovisual appearance at a trial or hearing at which witnesses are expected to testify. The Minnesota and Wisconsin rules and statutes are very detailed and provide the Court with a good starting point. The Minnesota and Wisconsin factors include²:
 - (i) Whether a timely objection has been made;
 - (ii) Whether any undue surprise or prejudice would result;
 - (iii) The convenience of the parties, counsel, and the court;
 - (iv) The cost and time savings;
 - (v) The importance and complexity of the proceeding;
 - (vi) Whether the proponent has been unable, after due diligence, to procure the physical presence of a witness;
 - (vii) The convenience to the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;

² The “good cause” factors in the Wisconsin and Minnesota rules and statutes are very similar, and I have removed duplicate factors.



- (viii) Whether the procedure would allow effective cross-examination, especially where documents and exhibits available to the witness may not be available to counsel;
 - (ix) The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
 - (x) Whether the quality of the communication is sufficient to understand the offered testimony; and,
 - (xi) Such other factors as the court may, in each individual case, determine to be relevant.
4. Rule 4(1)(a)(7) should be changed to read as follows: "Any proceeding stipulated to by the parties and approved by the court in conformity with Nevada Rule of Civil Procedure 43 and other applicable rules or statutes."
 5. It is also important to note that if the parties wish to stipulate to any of the categories which I have suggested be removed (i.e. trials and hearings or hearings on temporary restraining orders *et al*), a stipulation among the parties is already covered by Rule 4(1)(a)(7), and for that reason, no additional language needs to be included to address a situation where the parties wish to stipulate to an audiovisual appearance.

I have no suggested changes to the proposed rule concerning telephonic appearances.

I respectfully submit that my suggested changes to the proposed rule for audiovisual appearances in civil cases allows for consistency between the proposed rule and NRCP 43(a) while at the same time keeping in place the bulk of the proposed rule and maintaining the stated purpose of the proposed rule as set forth in Rule 2.

I want to thank the Court for the careful and deliberate approach that it has taken with the proposed rules. I also wish to thank the Court for the opportunity to provide the additional information set forth in this letter, and I appreciate the Court's consideration of this information as well as my suggested changes to the proposed rules. Should additional hearings or formal/informal discussions be necessary regarding



ADKT 0424, I am happy to participate. If the Court has any questions or should it require additional information, please do not hesitate to contact me.

Sincerely,

Matthew B. Hippler
of Holland & Hart^{LLP}

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Minnesota General Rules of
Practice for the District Courts,
Rule 131

trial and burdensome citations on appeal. Attorneys and judges with experience in using this system believe it works fairly, predictably, and efficiently. The rule permits flexibility in assignment of exhibit numbers, allowing them to be issued seriatim at trial or in blocks of numbers assigned to each party prior to trial. The rule requires uniform exhibit labels to prevent any uncertainty or wasted effort by parties attempting to obtain a perceived advantage in identifying "ownership" of exhibits through the color of labels.

Rule 131. Use of Interactive Video Teleconference in Civil Cases

Rule 131.01. Definitions.

- (a) "ITV" refers to interactive video teleconference.
- (b) A "terminal site" is any location where ITV is used for any portion of a court proceeding.
- (c) The "venue county" is the county where pleadings are filed and hearings are held under current court procedures.

Rule 131.02. Permissible Uses; Initiation.

In all civil actions and proceedings including commitment proceedings subject to the Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act, the court may conduct hearings and admit oral testimony, subject to cross-examination, by live audio-visual means, where authorized by this rule.

(a) Scheduling Conflicts. All scheduling conflicts and priorities shall be determined by the judge(s).

(b) Use of ITV on Court's Initiative; Notice. If the court on its own initiative orders the use of live audio-visual means (ITV) to conduct hearings and proceedings, it shall give notice in accordance with the Rules of Civil Procedure and General Rules of Practice, which notice shall advise the parties of the duty to exchange information under Rule 131.04, and the prohibition on recording in Rule 131.06(i).

(c) Use of ITV Upon Stipulation. The parties may, subject to court approval and site availability, stipulate that a hearing or proceeding be conducted by ITV in accordance with the procedures established in this rule. The parties shall contact the court administrator as soon as possible to permit scheduling of ITV facilities. A written, signed stipulation requesting the use of ITV shall be filed with the court at least 24 hours prior to the date set for the ITV hearing or proceeding. The stipulation shall be substantially in the form set forth in the Stipulation and Approval form as published by the state court administrator. The parties are responsible for making arrangements to use any site that is outside the control of the court in the venue county, for providing the necessary contact

information to the court administrator, and for ensuring the compatibility of the equipment.

(d) Use of ITV Upon Motion.

(1) Request. Any party may, by motion, request the use of ITV for a hearing or proceeding in accordance with this rule. No motion for use of ITV shall be heard until the moving party serves a copy of the motion on the opposing counsel and files the original with the court administrator at least seven (7) days prior to the scheduled hearing or proceeding for which ITV use is requested. The moving party may, ex parte, contact the court for an expedited hearing date on the motion for use of ITV and for waiver of the usual notice of hearing. The moving party is responsible under Rule 131.02(c) for making arrangements to use any site that is outside the control of the court in the venue county, for providing the necessary contact information to the court administrator, and for ensuring the compatibility of the equipment. The motion shall include, as an attachment, a notice advising the other parties of their right to object to use of ITV, the consequences of failing to timely file an objection, the duty to exchange information under Rule 131.04, and the prohibition on recording in Rule 131.06(i). A sample notice is published by the state court administrator.

(2) Objection. Any party objecting to a motion for use of ITV may file and serve a response to the motion 48 hours prior to the hearing on the motion for use of ITV.

(3) Burden of Proof. The moving party must establish good cause for use of ITV by a preponderance of the evidence.

(4) Good Cause. The Court shall consider the following factors to determine "good cause":

- (i) Whether a timely objection has been made;
- (ii) Whether any undue surprise or prejudice would result;
- (iii) The convenience of the parties, counsel, and the court;
- (iv) The cost and time savings;
- (v) The importance and complexity of the proceeding;

- (vi) Whether the proponent has been unable, after due diligence, to procure the physical presence of a witness;
- (vii) The convenience to the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
- (viii) Whether the procedure would allow effective cross-examination, especially where documents and exhibits available to the witness may not be available to counsel;
- (ix) Whether the surroundings maintain the solemnity and integrity of the proceedings and thereby impress upon the witness the duty to testify truthfully;
- (x) Whether the witness is presently in prison or incarcerated; and,
- (xi) Such other factors as the court may, in each individual case, determine to be relevant.

(5) **Emergency Circumstances.** The court may shorten the time periods provided in this rule 131.02(d) upon a showing of good cause.

(6) **Determination.** If the use of ITV is thereafter allowed and ordered by the court, the hearing shall proceed, by ITV, in accordance with the provisions of this rule. If the court determines that good cause for the use of ITV has not been established, the hearing or proceeding shall be heard as provided by the Rules of Civil Procedure and General Rules of Practice.

Rule 131.03. Costs and Arrangements; Certification.

(a) **Costs.** The party or parties, other than the court, requesting use of ITV for any hearing or proceeding shall be responsible for any additional use or other fees over and above those normally incurred by the venue county in connecting from one court site to another court site within the district or collaboration area.

(b) **Arrangements.** If the court on its own initiative orders ITV, the court shall, through the court administrator where the case is venued, establish and make arrangements to carry out the ITV procedures required in order for the court to hear the case as an ITV hearing or proceeding. In all other cases it will be the responsibility of the party requesting the use of ITV to contact the court

administrator where the case is venued who shall, working with the judge assigned, establish a hearing date and time so that the case may be scheduled as an ITV hearing or proceeding. The court and counsel shall use reasonable efforts to confer with one another in scheduling ITV hearings or proceedings so as not to cause, delay or create scheduling conflicts.

(c) **Service.** The moving party shall have the responsibility of preparing, serving and filing the motion and notice of motion papers as required by this rule.

(d) **Certification.** By signing a stipulation or motion for use of ITV, a person certifies that the use of ITV will be in accordance with the provisions of this rule, including, without limitation, the requirement in Rule 131.06(i) that no recording shall be made of any ITV proceeding except the recording made as the official court record.

Rule 131.04. Exchange of information.

Whenever ITV is to be used to conduct a hearing or proceeding, evidentiary exhibits shall be exchanged with all other parties and submitted to the court, as appropriate, prior to the commencement of the hearing or proceeding.

Rule 131.05. Location of Participants.

During the ITV hearing:

(a) The judge may be at any terminal site.

(b) The court clerk shall be in the venue county unless otherwise authorized by the presiding judge.

(c) Except as otherwise provided in rule 131.05(d) regarding commitment proceedings, counsel for the parties shall be present at the site from which the party they represent will participate in the hearing, unless the court approves another location prior to the hearing, and witnesses and other interested parties may be located at any terminal site that will allow satisfactory video and audio reception at all other sites.

(d) In commitment proceedings, the respondent's attorney shall be present at the ITV site from which the respondent will participate in the proceedings.

Rule 131.06. Proceedings.

In any proceeding conducted by ITV under this rule:

(a) Parties entitled to be heard shall be given prior notice of the manner and time of the hearing or proceeding.

(b) Witnesses may testify by ITV at all hearings, including contested matters.

(c) Regardless of the physical location of any party to the ITV hearing or proceeding, any waiver, stipulation, motion, objection, decision, order or any other actions taken by the court or a party has the same effect as if done in person. Court orders that bear the presiding judge's signature may be transmitted

electronically or via facsimile machine to the various ITV sites for the purpose of service.

(d) The court administrator of the venue county will keep court minutes and maintain court records as if the proceeding were heard in person.

(e) All proceedings held by ITV will be governed by the Minnesota Rules of Civil Procedure, the General Rules of Practice and state law, except as herein provided. Courtroom decorum during ITV hearings will conform to the extent possible to that required during traditional court proceedings.

(f) A sheriff, sheriff's deputy, bailiff or other licensed peace officer shall be present at each ITV site for the purpose of maintaining order, as the court deems necessary.

(g) The court shall ensure that each party has adequate opportunity to speak privately with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the client in private.

(h) Judges may continue any hearing that cannot proceed due to ITV equipment problems or failure, unless other arrangements to proceed with the hearing are agreed upon by all parties.

(i) No recording shall be made of any ITV proceeding except the recording made as the official court record. This Rule 131 does not supersede the provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.

Rule 131.07. Administrative Procedures.

The following administrative procedures are applicable to all ITV proceedings:

(a) Off-Camera Presence. During a hearing conducted by ITV, all off-camera persons at any participating ITV terminal site must be identified for the record. This shall not apply to members of the public located in general public seating areas of any courtroom.

(b) Court Administrator Duties. The Court Administrator for each county shall be responsible for the following:

(1) Ensure that the ITV equipment is ready and functioning properly in advance of any ITV hearing, so that there will be no interference with the punctual commencement of a hearing.

(2) Provide participants an opportunity to become familiar with use of the ITV equipment and courtroom procedure prior to commencement of the hearing.

(3) Set ITV system configuration as designated by the presiding judge. The presiding judge shall consider the objections or concerns of any party.

(4) Monitor audio and video quality, making adjustments and providing technical assistance throughout the hearing as necessary.

(5) Ensure that any court documents or exhibits that the judge will require prior to or during the course of the hearing are mailed or faxed to the judge prior to commencement of the hearing.

(6) Be familiar with problem management procedures, including steps to be taken in performing initial problem determination, identity and location of individual(s) who should be contacted if initial problem/resolution attempts fail, and service call placement procedures.

(c) Technical Standards. The following technical standards should be followed:

(1) To optimize picture clarity, the room should have diffused lighting and window shades to block external light.

(2) To optimize viewing, monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants.

(3) Cameras and microphones should be sufficient in number to allow video and audio coverage of all participants, prevent crowding of participants, facilitate security, and protect confidential communications.

(4) Audio and visual must be synchronized and undistorted.

(5) All hearing participants should speak directly into their microphones.

(Adopted effective March 1, 2009.)

Advisory Committee Comments—2008 Amendment

In October 1999 the Supreme Court informally approved the use of ITV in civil cases but did not adopt any specific rules. The addition of Rule 131 in 2008 is intended to provide a uniform procedure permitting the use of interactive video teleconferencing (ITV) to conduct hearings and admit oral testimony in civil cases.

It is based on protocols developed and implemented for a pilot project in the Ninth Judicial District and later tweaked by a subcommittee of the Court's former Technology Planning Committee. The success of the pilot project is reported in NATIONAL CENTER FOR STATE COURTS, COURT SERVICES DIVISION, ASSESSMENT OF THE INTERACTIVE TELEVISION PROGRAM IN THE NINTH JUDICIAL DISTRICT OF MINNESOTA (Sept. 1999).

Rule 131.02 identifies the situations in which the district court may authorize the use of ITV by order: upon the court's own initiative, upon stipulation by the parties, or upon a showing of good cause. The court as part of its overall case management practice initiated the bulk of the orders in the Ninth Judicial District pilot project. It is anticipated that use of ITV will vary by district, depending on factors such as geographical size and the nature of the cases.

Rule 131.02(b) recognizes that when a court orders the use of ITV on its own initiative, the court must notify the parties of the use of ITV. Notices are to be in accordance with rules of civil procedure and the general rules of practice. Once an order is filed, MINN. R. CIV. P. 77.04 requires the court administrator to serve notice of the order immediately by mail, and MINN. GEN. R. PRAC. 1.03 requires that service be made on a party's attorney if represented, otherwise on the party directly. The notice of ITV use may also be incorporated into a scheduling order issued under MINN. GEN. R. PRAC. 111.03. Regardless of the precise mechanism, the notice of ITV use must include the information required in Rule 131.02(b). A sample notice is set forth for publication by the state court administrator.

Parties may, subject to court approval, stipulate to the use of ITV under rule 131.02(c). Upon reaching a stipulation, the parties must contact the court administrator as soon as possible to obtain a date and time for the ITV hearing. Failure to provide adequate lead time may result in rejection of the stipulation. The parties are responsible for making arrangements to use any site that is outside the control of the court in the venue county. Parties should be aware that use of court and other governmental terminal sites might be subject to collaboration agreements entered into between courts and other government agencies. This may limit the availability of, or control the costs of using or accessing certain terminal sites, particularly those outside the county or district where the action is venued or outside the state's dedicated MNET network. Under Rule 131.03 parties requesting use of ITV for any hearing or proceeding are responsible for any additional use or other fees over and above those normally incurred by the venue county in connecting from one collaboration site to another. Parties are also responsible for ensuring compatibility of equipment for sites outside the control of the venue county.

Finally, a written, signed stipulation in the format substantially similar to the form appended to the rule must be filed with the court no later than twenty-four (24) hours prior to the hearing. By signing the stipulation the parties certify that they will follow the protocol, including, without limitation, the requirement in Rule 131.06(i) that no recording shall be made of the ITV proceeding except a

recording made as the official record of the proceeding. Access to recordings of proceedings is governed by Rule 4, subd. 3, of the RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH.

Rule 131.02(d) sets forth requirements for requesting ITV use when there is no stipulation by the parties. A formal motion is required, and it must be served and filed at least seven days prior to the scheduled hearing or proceeding for which ITV use is requested. The rule authorizes ex parte contact with the court for purposes of obtaining an expedited hearing date on the motion for use of ITV. See MINN. GEN. R. PRAC. 115.04 (non-dispositive motions normally must be served and filed at 14 days in advance of the hearing). The moving party is responsible under Rule 131.03 for making arrangements to use any site that is outside the control of the court in the venue county, for providing the necessary contact information to the court administrator, for ensuring the compatibility of the equipment, and paying any additional costs incurred by the court in facilitating the ITV session. The motion must also include or be accompanied by a notice informing opposing parties of their right to object, consequences of failure to object, requirements for exchange of information, and prohibitions on recording an ITV session (a sample notice is provided for publication by the state court administrator).

Objections to a motion for use of ITV must be made prior to the hearing on the motion. The failure of an opposing party to object may be considered along with other factors set forth in Rule 131.02(d)(4) that may determine good cause for use of ITV. The moving party has the burden of establishing good cause.

Rule 131.02(d)(5) permits the court to shorten the time periods provided for in Rule 131.02 in emergent circumstances upon a proper showing. As of the time of the drafting of this commentary, a different time period is established for requesting ITV use in commitment cases under Rule 14 of the SPECIAL RULES OF PROCEDURE UNDER THE MINNESOTA COMMITMENT AND TREATMENT ACT (requires notice to the other party at least 24 hours in advance of the hearing, and court approval). The drafting committee is of the opinion that following the protocol with the ability to shorten the time frames when necessary will be sufficient to address the needs of commitment and other matters covered by this rule.

Rule 131.03 places responsibility for costs and site arrangements with those seeking to use ITV. The court assumes this responsibility when ordering ITV on its own initiative, as is done for the bulk of the ITV proceedings in the Ninth Judicial District pilot project. When a party or parties initiate the request, however, Rules 131.02(c) and 131.02(d) shift some of the responsibility to the requesting party or parties. Parties also certify that they will comply with the protocol, including the prohibition in Rule 131.06(i) against recording ITV sessions.

Rule 131.04 attempts to highlight an important logistical requirement when ITV is used. Documents and other information need to be exchanged and submitted to the court, where appropriate, prior to the ITV session. This is particularly important when the parties are located at different sites.

Rule 131.07(b) recognizes that ITV use imposes new logistical duties on court administration staff. This section is intended to assist courts as they implement ITV use and to train new staff.

*Rules 131.05-.07 set forth the ground rules for conducting ITV sessions. The prohibition on recording ITV sessions set forth in Rule 131.06(i) and echoed throughout the rule is identical to that applicable to telephone hearings under MINN. GEN. R. PRAC. 115.09. This requirement is consistent with the directives of the supreme court regarding use of cameras in the courtroom. See *In re Modification of Section 3A(10) of the Minnesota Code of Judicial Conduct*, No. C7-81-300 (Minn. S. Ct., filed Jan. 11, 1996) (order reinstating experimental program for audio and video coverage of trial court proceedings); *Order for Interactive Audio-Video Communications Experiment in First Judicial District-Mental Illness Commitment Proceedings*, No. C6-90-649 (Minn. S. Ct., filed April 5, 1995); *Order re Interactive Audio-Video communications Pilot Program in Third Judicial District Mental Illness Commitment Proceedings*, No. C6-90-649 (Minn. S. Ct., filed Jan. 29, 1999); *Order for Interactive Audio and Video Communications, Fourth Judicial District, Mental Health Division, Price and Jarvis Proceedings*, No. C6-90-649 (Minn. S. Ct., filed April 8, 1991).*

Rule 131.05(c) requires that counsel and their party must be present at the same terminal site unless otherwise permitted by the court. In commitment cases, court rules do not permit counsel for the patient and the patient to be present at different sites. See rule 14 of the Special Rules of Procedure Under the Minnesota Commitment and Treatment Act. Witnesses and other participants may be located at any terminal site that allows satisfactory video and audio reception.

Rule 131.07(c) describes equipment and room standards in functional terms. A more detailed discussion of technical issues and terminology can be found in STATEWIDE VIDEOCONFERENCING COMMITTEE, BRIDGING THE DISTANCE: IMPLEMENTING VIDEOCONFERENCING IN WISCONSIN (10/30/2007) (a dynamic document that is continually updated and that is currently available for download from the Wisconsin Supreme Court website, located at <http://www.wicourts.gov/about/committees/ppacvidconf.htm>).

Rule 132. (Reserved for Future Use.)

Rule 133. (Reserved for Future Use.)

Rule 134. (Reserved for Future Use.)

PART F. SPECIAL PROCEDURES

FRCP 43 Including Advisory Comments to the Rule

CUnited States Code Annotated CurrentnessFederal Rules of Civil Procedure for the United States District Courts (Refs & Annos)▣ Title VI. Trials**→ → Rule 43. Taking Testimony**

(a) In Open Court. 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 good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; November 20, 1972, and December 18, 1972, effective July 1, 1975; March 2, 1987, effective August 1, 1987; April 23, 1996, effective December 1, 1996; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, § 635 (Proof in common-law actions), [former] § 637 (see §§ 2072, 2073) (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify U.S.C., Title 28, § 725 (now 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 *Yale L.J.* 622 (1936), and *Same*: 2, 47 *Yale L.J.* 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) § 1885 et seq.

Note to Subdivision (c). See [former] Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on

Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A. 8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1, 23 L.Ed. 521 (1876); *Nelson v. United States*, 201 U.S. 92, 114, 26 S.Ct. 358, 50 L.Ed. 673 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A. 8th, 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary Note on Advisory Committee Regarding Rules 43 and 44

Note. These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence*, 3d ed. 1940, 200-204; Green, *The Admissibility of Evidence Under the Federal Rules*, 1941, 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States*, C.C.A.2d, 1941, 117 F.2d 387, cert. den., 1941, 313 U.S. 587, 61 S.Ct. 1120; *Mosson v. Liberty Fast Freight Co.*, C.C.A.2d, 1942, 124 F.2d, 448; *Hartford Accident & Indemnity Co. v. Olivier*, C.C.A. 5th, 1941, 123 F.2d 709; *Anzano v. Metropolitan Life Ins. Co. of New York*, C.C.A.3d, 1941, 118 F.2d 430; *Franzen v. E. I. DuPont De Nemours & Co.*, C.C.A.3d, 1944, 146 F.2d 837; *Fakouri v. Cadais*, C.C.A. 5th, 1945, 147 F.2d 667; *In re C. & P. Co.*, S.D.Cal.1945, 63 F.Supp. 400, 408. But cf. *United States v. Aluminum Co. of America*, S.D.N.Y.1938, 1 Fed.Rules Serv. 43a.3, Case 1; Note, 1946, 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F.R.D. 124, 137-138.

1966 Amendment

Note to Subdivision (f). This new subdivision [subdivision (f)] authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

1972 Amendment

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 [sic; probably means 607], and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The

subdivision is no longer needed or appropriate and is deleted.

1987 Amendment

The amendment is technical. No substantive change is intended.

1996 Amendment

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

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.

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. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement

ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

2007 Amendment

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

HISTORICAL NOTES

References in Text

The Federal Rules of Evidence, referred to in subd. (a), are set out in this title.

Effective Date of Amendments Proposed November 20, 1972, and December 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub.L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of Title 28.

CROSS REFERENCES

Amendment of pleading to conform to evidence, see Fed.Rules Civ.Proc. Rule 15, 28 USCA.
Compelling giving of testimony, application of rules, see Fed.Rules Civ.Proc. Rule 81, 28 USCA.
Depositions of witnesses in foreign country, see 28 USCA § 1781.
Evidence--
 Generally, see 28 USCA § 1731 et seq.
 Hearing before master, see Fed.Rules Civ.Proc. Rule 53, 28 USCA.
 Exceptions to rulings unnecessary, see Fed.Rules Civ.Proc. Rule 46, 28 USCA.
 Foreign law, determination of, see Fed.Rules Civ.Proc. Rule 44.1, 28 USCA.
 Harmless error in admitting or excluding evidence, see Fed.Rules Civ.Proc. Rule 61, 28 USCA.
 Interested persons, competency, see 28 USCA § 1822.
 Offer of judgment, see Fed.Rules Civ.Proc. Rule 68, 28 USCA.
 Perpetuation of testimony by action, see Fed.Rules Civ.Proc. Rule 27, 28 USCA.
 Pre-trial procedure, see Fed.Rules Civ.Proc. Rule 16, 28 USCA.
 Proof of official record, see Fed.Rules Civ.Proc. Rule 44, 28 USCA.
 Record made in regular course of business, see 28 USCA § 1732.
 Record on appeal, form of testimony included in, see Federal Rules of Appellate Procedure Rule 10, 28 USCA.
 Subpoena for attendance of witnesses and obtaining evidence, see Fed.Rules Civ.Proc. Rule 45, 28 USCA.
 United States, evidence to establish claim on default, see Fed.Rules Civ.Proc. Rule 55, 28 USCA.
 Witnesses generally, see 28 USCA § 1821 et seq.