NOTES & COMMENTS

RULE 43(A): REMOTE WITNESS TESTIMONY AND A JUDICIARY RESISTANT TO CHANGE

by
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Technology has improved our lives in countless ways. In 1996, it made its way into our federal courtrooms and the Federal Rules of Civil Procedure when the Congress codified Rule 43(a). Rule 43(a) permits a witness to testify remotely via telephone or video transmission upon a showing of good cause. Despite this large step into the modern era, some courts are pressed to exclude a witness's remote testimony because of Rule 43(a)'s burdensome good-cause standard and the risks implicated by such testimony. The judiciary has struggled to find cohesion in determining when remote witness testimony is permissible. This Note critiques some federal courts' reluctance to allow witnesses to testify remotely and proposes a new rule that would meet the demands of modern society.

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I. INTRODUCTION

Technology has become a necessary component in all aspects of everyday life. Industries such as business, medicine, and education have welcomed modern technology and its ability to allow us to seamlessly communicate with others throughout the world. Despite the benefits of telecommunication in other areas of modern life, many courts remain unpersuaded to allow remote witness testimony in the courtroom absent a convincing showing of good cause.

Federal Rule of Civil Procedure (FRCP) 43(a) creates a presumption against "testimony . . . by contemporaneous transmission from a different location" and raises serious concerns about the legitimacy of such evidence.[1] Rule 43(a)'s three-part test gives courts discretion to admit remote testimony upon a showing of good cause under compelling circumstances if the proponent can ensure appropriate safeguards are in place.[2] Today, the federal courts have the power to define the exact

[1] FED. R. CIV. P. 43(a).

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

nature of the burden that FRCP 43(a) places on litigants and the results vary drastically.

Historically, courts have directly addressed the dangers of testimony not taken in open court. Arguments such as the ability of the factfinder to assess witness credibility and improper influence by those present with the witness, among others, have convinced some courts.[3] Other courts have embraced the benefits of relieving litigants and witnesses of travel expenses, forgone business opportunities, environmental costs, and litigation fees that are often associated with open court witness testimony.[4]

This Note takes a critical look at the factfinder's ability to detect truthfulness by a witness's demeanor. It also examines the current split in America's federal court system regarding the admission and application of remote witness testimony in civil proceedings and explores why some courts are pushing back against the tools of today. Further, this Note will determine whether strict adherence to open court testimony regulations is based on sound, fundamental legal principles or on an age-old bias of an institution resistant to change. Ultimately, it proposes an amendment to Rule 43(a) that allows litigants to enjoy the benefits of remote testimony while at the same time mitigating the risks of its admission.

II. THE HISTORY OF WITNESS CREDIBILITY TO FACT FINDING

One of the biggest criticisms of remote witness testimony is that it inhibits the factfinder's ability to assess the witness's demeanor.[5] Those who oppose remote witness testimony on these grounds argue that sufficient observation of the witness's demeanor is lost when a witness is allowed to testify by live video.[6] They would have courts believe that the examiner's ability to engage in physical confrontation with the witness is essential to obtaining truthful testimony.[7] However, preference for open court testimony is largely supported merely by its roots in English common law tradition rather than factual analysis.

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[3] *See infra* Part II.A.

[4] *E.g.*, Aoki v. Gilbert, No. 2:11-cv-02797-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019); Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003).

[5] Comm. on Fed. Courts, *Comments on Proposed Amended Rule 43(a) Federal Rules of Civil Procedure*, 49 RECORD ASS'N B. CITY N.Y. 766, 766 (1994).

[6] *Id.* at 767.

[7] *Id.* at 766–67.

A. History of Open Court Testimony in English Common Law

For hundreds of years, triers of fact have relied on a witness's demeanor to assess credibility.[8] After trials by ordeal were abolished in the English Common Law by King Henry III in 1219, courts were required to rely on juries and judges to engage in fact finding.[9] These "irrational proofs" in England were replaced by jury trials consisting of 12 members of the neighborhood who claimed to have pre-existing knowledge of the facts of the case.[10] As England's population grew larger and mobility increased, courts began to rely on jurors who were less familiar with the facts and on the testimony of witnesses.[11]

The face-to-face confrontation of open court testimony was embraced by 14th-century English common law courts.[12] Jail delivery rolls show that nearly all 14th-century criminal proceedings at common law heard testimony in open court from defendants, sheriffs, coroners, character witnesses, and other parties who could help inform the jury.[13] English common law courts embraced open court testimony so much that it was not until 1831 that Parliament permitted witnesses to testify through written depositions in addition to open court testimony.[14]

In contrast, open court testimony was historically rare in English equity courts.[15] In fact, beginning in the 1450s, the over-worked Court of Chancery largely relied on taking witness testimony through interrogatories.[16] The Court of Chancery found that requiring witnesses to travel long distances to London merely to testify in open court was burdensome and inconvenient and instead, local gentries and dignitaries were specially commissioned to examine witnesses.[17] These commissioned officers would travel to the witnesses, examine them under oath, and bring their written testimony back to court.[18] Sir Charles Barton cited some of the defects of eliciting witness testimony by interrogatory in his 1796 treatise.[19] He noted that

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[8] James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 904 (2000).

[9] *Id.* at 917.

[10] Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600–1850*, 38 HASTINGS L.J. 153, 155 (1986).

[11] *Id.*

[12] Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due?*, 1984 U. ILL. L. REV. 445, 450 (1984).

[13] ANTHONY MUSSON, PUBLIC ORDER AND LAW ENFORCEMENT: THE LOCAL ADMINISTRATION OF CRIMINAL JUSTICE 201–05 (1996).

[14] Fox, *supra* note 12, at 451.

[15] *Id.* at 450.

[16] JOHN P. DAWSON, A HISTORY OF LAY JUDGES 150 (1960).

[17] *Id.*

[18] *Id.*

[19] CHARLES BARTON, AN HISTORICAL TREATISE OF A SUIT IN EQUITY 156–57 (London 1796).

out of court testimony lacked the opposing-party confrontation that helped deter perjury.[20] Similarly, he was critical of the risk that officers would inaccurately transcribe the testimony.[21]

But the law courts' preference for open court testimony eventually won the day with the Great Fusion of Law and Equity in 1875, making open court witness testimony widely available in all English proceedings.[22] Initially, American law and equity courts followed the respective English court procedures by regularly admitting open court testimony at law and largely relying on written interrogatories in equity proceedings.[23] Rule 46 of the Equity Rules of 1912, however, made open court testimony more prevalent in American equity courts by creating a reliance on open court testimony, which continues in the present rules.[24]

B. The Creation of Rule 43(a)

Before American federal courts of equity and law were merged in 1938, they followed different rules about whether to conform to a forum state's rules of evidence. This created confusion and the desire for a universal federal rule of evidence. Prior to 1938, three so-called "conformity statutes" governed conflicts of law with regard to the rules of evidence in federal courts: the Conformity Act, the Rules of Decision Act, and the Competency of Witnesses Act.[25] The Conformity and Rules of Decision Acts did not apply to courts of equity and required federal law courts to conform to the statutory evidence rules of the forum state.[26] However, federal circuits were split as to whether these Acts bound federal courts to conform to the forum state's common law rules of evidence or whether federal courts were free to create their own rules.[27] Meanwhile, under the Competency of Witnesses Act, questions of conformity rarely arose since witness disqualification was largely governed by state statute.[28] This mixed application of evidence rules created the basis for a single rule governing the admission of evidence in federal courts.

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[20] *Id.* at 157.

[21] *Id.*

[22] Fox, *supra* note 12, at 451.

[23] *Id.*

[24] NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952).

[25] Charles C. Callahan & Edwin E. Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 623 (1936); *see* J.D.H., *The Admissibility of Evidence Under Federal Rule 43(a)*, 48 VA. L. REV. 939, 940–41 (1962).

[26] J.D.H., *supra* note 25, at 941.

[27] *Id.*

[28] *See* Callahan, *supra* note 25, at 631–32.

Before the first Federal Rules of Civil Procedure went into effect in 1938,[29] there was no intent that it would govern the rules of evidence.[30] However, the Advisory Committee worried that merging the courts of equity and law could create even further confusion[31] and adopted the 1938 version of Rule 43(a):

> (a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.[32]

Although the 1938 version of Rule 43(a) had little to say regarding the substance of evidence admission, it successfully eliminated the prior ambiguities that plagued federal courts.[33] Of course, this early version of Rule 43(a) was silent regarding remote testimony, leaving the admission of such testimony entirely to the courts.

The U.S. Supreme Court directly addressed the admission of remote testimony in criminal cases in *Maryland v. Craig*. In a 5-4 opinion, the Court held that the trial court's use of remote testimony when convicting a defendant for sexually abusing a minor was constitutional under the Confrontation Clause.[34] At the defendant's criminal trial, Maryland law permitted the child to testify by one-way closed circuit television instead of in open court because the child's presence in court would result in "serious emotional distress such that the child c[ould] not reasonably communicate."[35] Under the Maryland procedure, the child witness, prosecutor, and defense counsel went to a separate room within the courthouse. From this room, the victim was examined and cross-examined while the testimony was recorded and displayed

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[29] J.D.H., *supra* note 25, at 940 n.4.

[30] *Id.* at 942.

[31] *Id.*

[32] FED. R. CIV. P. 43(a).

[33] J.D.H., *supra* note 25, at 942–43 ("[A]ll laws in conflict with the federal rules [we]re of no further force or effect . . . .").

[34] *See* Maryland v. Craig, 497 U.S. 836, 855 (1990).

[35] *Id.* at 840–41; *see* MD. CODE ANN., CRIM. PROC. § 9-102(a)(1)(ii) (1991) (codified as amended by MD. CODE ANN., CRIM. PROC. § 11-303 (West 2019)).

live in the courtroom.[36] The defendant was able to communicate with defense counsel via electronic communication and could raise objections "as if the witness were testifying in the courtroom."[37]

The Court held that the defendant's Sixth Amendment confrontation rights had not been violated by allowing the child to be physically absent from the courtroom during her testimony.[38] The Court reasoned that, in some child abuse cases, the state's interest in the physical and psychological well-being of the victim is sufficiently important to outweigh a defendant's right to physically confront his or her accuser.[39]

Craig signals the beginning of the federal government's need to address some of the issues that first arose regarding remote witness testimony. But as the courts' use of remote testimony increased, so did the need for Congress to directly address its admission.

III. CURRENT RULE 43(A)

In 1996, Congress amended Rule 43(a), which governs the admissibility of remote testimony:

> Form. In every trial, the testimony of witnesses *shall be taken in open court*, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. 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.[40]

Under this version of Rule 43(a), proponents of remote testimony may admit their evidence if they can show there is good cause in compelling circumstances that prevent the witness from testifying in open court and the court has established appropriate safeguards that protect against the dangers of out of court testimony.[41]

The Advisory Committee note to Rule 43(a) further explains the presumptions of the rule's test:

> *The importance of presenting live testimony in court cannot be forgotten*. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to *judge the demeanor* of a witness face-to-

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[36] *See Craig*, 487 U.S. at 841.

[37] *Id.* at 842.

[38] *Id.* at 857.

[39] *Id.* at 852–53.

[40] FED. R. CIV. P. 43(a) (emphasis added). Rule 43(a) was amended in 2007 as part of a general re-styling of the FRCP, but it is substantively the same as it was after the 1996 amendment.

[41] *Id.*

> 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.[42]

The Advisory Committee states that proponents' arguments for good cause in compelling circumstances are "most persuasive" when the witness cannot attend the trial for unexpected reasons, such as illness or involvement in an accident.[43] The Committee goes on to note that transmitted testimony is perhaps better than rescheduling the trial, especially if some witnesses are unable to testify at a later date.[44] Additionally, the witness's importance may be a factor worth consideration.[45]

However, the Advisory Committee warns that "[o]ther possible justifications . . . must be approached cautiously" and that proponents who could "reasonably foresee the circumstances" creating the need for remote testimony will have "special difficulty" in getting past Rule 43(a).[46] As quoted above, mere inconvenience will fail to merit admission of transmitted testimony. The language of Rule 43(a) reveals that unforeseen circumstances and the witness's importance are factors to be weighed in the good cause analysis, and circumstances that are within the proponent's control weigh in favor of exclusion.

The 1996 Advisory Committee note emphasizes that appropriate safeguards should protect against the dangers of inaccurate identification, influence by present persons and inaccurate transmission.[47] Although the language of Rule 43(a) clearly creates a presumption against out-of-court testimony, courts have found themselves at odds in interpreting when the presumption has been rebutted and even whether it should be enforced.

IV. COURTS' INCONSISTENT ANALYSIS OF RULE 43(A)

Rule 43(a)'s discretionary language affords judges broad authority when admitting remote testimony; phrases such as "mere[] . . . inconvenien[ce]," "most persuasive," and "possible justifications" have led to inconsistent decisions within the federal justice system. As I will address, the Advisory Committee has largely left it to the courts to determine what constitutes good cause in compelling circumstances and appropriate safeguards, and the results have been inconsistent.

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[42] FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment (emphasis added).

[43] *Id.*

[44] *Id.*

[45] *Id.* ("Contemporaneous transmission may be better . . . if there is a risk that other—and perhaps more important—witnesses might not be available . . . .").

[46] *Id.*

[47] *Id.*

A. Good Cause in Compelling Circumstances

In *Gulino v. Board of Education*, the district court declined to recognize the burdens of long-distance travel as good cause in compelling circumstances.[48] The New York Board initially attempted to admit a California witness's testimony by telephone, but the court rejected its motion because the Board only cited inconvenience as a justification for admission.[49] The court noted that remote testimony fails to appreciate "the importance of seeing a witness for the purposes of evaluating testimony."[50] The Board modified its motion in an attempt to permit the witness's testimony by video conference instead.[51] Again, the district court denied the Board's motion, citing the 1996 Advisory Committee note to Rule 43(a), asserting that "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial."[52]

The *Gulino* court's decision not to recognize the burdens associated with long-distance travel as more than "mere inconvenience" has been embraced by other courts as well. In *Matovski v. Matovski*, the district court held that distance alone was insufficient to satisfy a showing of good cause for eight Australian witnesses.[53] The petitioner asked the court to permit remote examination of the eight witnesses and himself, arguing that the burden and expense of transporting witnesses from Australia to New York demonstrated good cause.[54] The court denied admission of the eight witnesses' testimony under FRCP 43(a) but allowed the petitioner to testify remotely.[55] Regarding the eight witnesses, the district court noted the Advisory Committee's "plain . . . preference for live testimony."[56] The court reasoned that cross-examination credibility would be of particular importance to assess the veracity of the respondent's "hotly contested" claims that the petitioner had exposed children to the drug trade.[57] The court also held that there was nothing "unexpected" or "compelling" about the witness's travel obstacles because the petitioner had been aware of them since the beginning of the proceeding.[58] Regarding the court's grant

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[48] Gulino v. Bd. of Educ., No. 96 Civ. 8414(CBM), 2002 WL 32068971, at *1 (S.D.N.Y. Mar. 31, 2003).

[49] *Id.*

[50] *See id.* (quoting a letter from defendant's counsel).

[51] *Id.*

[52] *Id.* (citing FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment).

[53] Matovski v. Matovski, No. 06 Civ. 4259(PKC), 2007 WL 1575253, at *3 (S.D.N.Y May 31, 2007).

[54] *Id.*

[55] *Id.*

[56] *Id.* at *2.

[57] *Id.*

[58] *Id.* at *3.

of petitioner's remote testimony, the court deemed the petitioner's inability to obtain a visa, limited financial resources, and distance from the courtroom as sufficient to satisfy good cause in compelling circumstances.[59]

Other courts have construed Rule 43(a) more liberally, finding the burdens of long-distance travel to be good cause in compelling circumstances. In *Dagen v. CFC Group Holdings*, the petitioner requested that the district court allow five witnesses residing in Hong Kong to testify remotely in a New York proceeding.[60] Like the courts in the two previously mentioned cases, the *Dagen* court cited the Advisory Committee's 1996 note.[61] However, this court pivoted from the other courts' interpretation and allowed the remote testimony, claiming that "telephonic testimony [was not] so extraordinary."[62] As to the issue of witness credibility, the court concluded that jurors have "never had any difficulty in evaluating" remote testimony.[63]

The *Dagen* court attempted to distinguish *Gulino* by stating that, here, the defendants' reasons for remote testimony were considerably broader.[64] The court reasoned that the witnesses could face visa obstacles and associated travel costs and that defendants' Hong Kong business would "more or less" halt because the witnesses comprised a large portion of their labor force.[65] Unlike the *Gulino* and *Matovski* courts, the *Dagen* court omitted discussion of the foreseeability of the petitioner's circumstances and the importance of the testimony to the proceeding and, in turn, gave great weight to the petitioner's "legitimate business concerns"—a justification absent in both FRCP 43(a) and the Advisory Committee notes.[66]

In re Vioxx provides another example of the liberal approach. The district court cited *Dagen* when compelling Mr. Anstice, a president of Human Health for the pharmaceutical company Merck, to testify remotely under Rule 43(a).[67] The petitioner in the products liability suit successfully motioned the court to compel Anstice to testify in court or, in the alternative, remotely.[68] The court noted that federal courts were increasingly permitting the use of remote testimony and that remote testimony allows the "jury to see the live witness along with 'his hesitation, his doubts, his variations of language, [and] his confidence.'"[69] The court found that

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[59] *Id.*

[60] Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003).

[61] *Id.*

[62] *Id.*

[63] *Id.* (citing U.S. v. Gigante, 971 F. Supp. 755, 758 (E.D.N.Y. 1997)).

[64] *Id.* at *2.

[65] *Id.* at *1–2.

[66] *Id.* at *2.

[67] *In re* Vioxx Prods. Liab. Litig., 439 F. Supp. 2d 640, 642 (E.D. La. 2006).

[68] *Id.* at 641.

[69] *Id.* at 644 (citing Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946)).

good cause in compelling circumstances did exist because, as president, the witness was sufficiently under Merck's control, the case involved thousands of lawsuits alleging damages from a drug that was prescribed to millions of people, the petitioner offered to pay the witness's travel expenses, and admission would not prejudice the opponent.[70]

Lastly, in *Aoki v. Gilbert*, a district court granted the petitioner's motion to admit remote testimony for 11 witnesses largely on the basis that travel would be inconvenient.[71] The defendant had initially stipulated to admitting the plaintiff's remote testimony under FRCP 43(a), but later objected to its admission after logistical negotiations broke down.[72] The court held that good cause in compelling circumstances existed because the witnesses would be subject to the "general inconvenience of traveling" and all of the witnesses lived outside of the 100-mile subpoena jurisdiction under FRCP 45.[73] The court reasoned that although the Advisory Committee notes "caution that simple inconvenience" is insufficient to admit remote testimony, "courts have nonetheless found" that travel distance alone could justify good cause in compelling circumstances.[74]

These are just a few of the cases that clearly illustrate the flexibility afforded to judges and the inconsistency that litigants receive under the Rule 43(a) analysis. Some judges buttress their exclusion of remote testimony by relying on the open court presumption of Rule 43(a),[75] while others find that remote testimony is not so extraordinary.[76] Some judges deem that "hotly contested" testimony should be presented in open court to assess the witness's credibility,[77] while others have held that jurors have "never had any difficulty in evaluating" remote testimony.[78] Although most of the inconsistencies that litigants face arise when showing good cause and compelling circumstances, defining appropriate safeguards has been murky as well.

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[70] *Id.* at 643.

[71] Aoki v. Gilbert, No. 2:11-cv-02797-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019).

[72] *Id.* at *1.

[73] *Id.* at *2. FRCP 45 limits a federal court's ability to compel attendance in cases in which the witness either lives within 100 miles or within the same state of the trial, hearing, or deposition. FED. R. CIV. P. 45(c)(1).

[74] *Aoki*, 2019 WL 1243719, at *2.

[75] Matovski v. Matovski, No. 06 Civ. 4259(PKC), 2007 WL 1575253, at *2 (S.D.N.Y May 31, 2007).

[76] Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003).

[77] *Matovski*, 2007 WL 1575253, at *2.

[78] *Dagen*, 2003 WL 22533425, at *1.

B. Appropriate Safeguards

The Advisory Committee note explains that appropriate safeguards protect against inaccurate identification of witnesses, influence by persons present with the witness, and inaccurate transmissions.[79] Although the appropriate safeguards' analysis is intended to be separate, in reality this bar is likely to be achieved upon a finding of good cause in compelling circumstances.[80]

In *FTC v. Swedish Match North America, Inc.*, the district court granted the petitioner's motion to present remote witness testimony because traveling from the witness's Oklahoma residence to the Washington D.C. court would cause "serious inconvenience" and because appropriate safeguards were in place.[81] The court reasoned that appropriate safeguards are in place when the witness testifies: (1) in open court; (2) under oath; and (3) with an opportunity for cross-examination.[82] Oddly, the court found that testifying remotely by "live video in open court" satisfied the first hurdle.[83] The court went on to note that because the witness would also testify under oath and would be subject to cross-examination, "there is no practical difference between live testimony and contemporaneous video transmission."[84] The court also found that any delay in transmission does not advantage a remote witness because delay only occurs between questioning and transmission; the witness answers the question as soon as he or she receives it.[85] Judge Facciola acknowledged that "the Advisory Committee Notes . . . are more hostile than [he is] to live video transmission," stating:

> I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence. To prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other.[86]

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

[80] *See* Salguero v. Argueta, No. 5:17-CV-125-FL, 2017 WL 1113334 (E.D.N.C. Mar. 23, 2017); *Dagen*, 2003 WL 22533425; *Matovski*, 2007 WL 1575253; FTC v. Swedish Match N. Am., Inc., 197 F.R.D. 1 (D.D.C. 2000). These courts found that appropriate safeguards were in place and that petitioners had demonstrated good cause in compelling circumstances.

[81] *Swedish Match*, 197 F.R.D. at 2.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

Similarly, in *Vaugh v. Stevenson*, the district court cited the *Swedish Match* safeguards when it denied petitioner's motion to have four witnesses examined by telephone.[87] The court first held that the petitioner's inability to afford costs associated with the witnesses' seven-hour drive to the courthouse was insufficient to show good cause.[88] The court reasoned that the petitioner's decision to bring her claim in federal court made these costs avoidable and voluntary.[89] The court found that the petitioner had neglected to identify any appropriate safeguards.[90] Unlike in *Swedish Match*, the *Vaughn* court further noted that protection against inaccurate identification and influence by others could be secured by having a notary public present with the remote witness to check identification and "to subsequently affirm that no one else [is] present."[91]

However, in *Salguero v. Argueta*, the district court made no mention of any of the three safeguards used in *Swedish Match* when it permitted two witnesses to testify under Rule 43(a). Instead, the *Salguero* court held that appropriate safeguards are in place when the witness: (1) is properly identified; (2) testifies from a private room, free from outside influence; and (3) "troubleshoot[s]" the video connection with the courthouse staff before testifying.[92]

Courts' mercurial definitions are just one flaw in the appropriate safeguards analysis. As the above cases demonstrate, very few, if any, motions for contemporaneous witness testimony are denied solely for failing to apply appropriate safeguards. Although the Advisory Committee note requires that appropriate safeguards are in place, in actuality, a finding of appropriate safeguards is often a foregone conclusion upon a showing of good cause in compelling circumstances. The Advisory Committee carries its presumption for open court testimony on the factfinder's ability to assess a witness's demeanor. Some argue, however, that this truth-telling ability is overstated.

V. CRITIQUE OF DEMEANOR EVIDENCE

In order to determine the value of demeanor evidence, a close analytical look at its strengths and weaknesses is required. Excluding remote testimony on the basis that the factfinder's ability to assess the witness's demeanor will be lost presumes,

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[87] Vaughn v. Stevenson, No. 04-cv-01002-MSK-CBS, 2007 WL 460959, at *3 (D. Colo. Feb. 7, 2007).

[88] *Id.* at *2–3.

[89] *Id.* at *3.

[90] *Id.*

[91] *Id.*

[92] Salguero v. Argueta, No. 5:17-cv-125-fl, 2017 WL 1113334, at *2 (E.D.N.C. Mar. 23, 2017).

first, that we can in fact determine truthfulness from a witness's demeanor and, second, that this ability is lost once the witness testifies remotely. "Demeanor" is defined as a witness's "[o]utward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions."[93] Professor Olin Guy Wellborn not only believed that demeanor is ineffective as a metric for determining credibility, but that it actually diminishes the accuracy of an individual's ability to determine credibility.[94] Professor Wellborn asserts there are three main "paralinguistic" cues that comprise a witness's demeanor: face, body, and voice.[95] In his article, *Demeanor*, he examined five different studies[96] which evaluated the observers' ("subject") ability to determine whether a witness ("respondent") was being truthful.[97]

There are four trial conditions that psychological experiments typically cannot replicate: the context that other evidence provides the observer; cross-examination; deliberation with other observers; and the preparation, or "coaching," of the respondent.[98] However, Professor Wellborn believed that these conditions inhibit, rather than enable, the observer's deception-detecting abilities, writing that it is "more likely that the presentation of successive witnesses . . . only makes it more difficult . . . to process any nonverbal information."[99] Further, the stress of cross-examination is likely to make it appear as though witnesses are being untruthful, even when they are being honest.[100] According to the "Othello error" rule, an honest respondent under stress may exhibit behavior that is likely to be interpreted as deceptive.[101] Similarly, an interrogator's suspicious nature can make it appear as though a witness is being untruthful.[102] If a single individual has only a chance ability to determine truth-telling from a witness's demeanor, then there is no reason that deliberating as

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[93] *Demeanor*, BLACK'S LAW DICTIONARY 523 (10th ed. 2014).

[94] Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991).

[95] *Id.* at 1078.

[96] For brevity, only three of the five studies will be discussed in this Comment. The other studies may be found at GERALD R. MILLER & NORMAN E. FONTES, THE EFFECTS OF VIDEOTAPED COURT MATERIALS ON JUROR RESPONSE 11–42 (1978); Glenn E. Littlepage & Martin A. Pineault, *Verbal, Facial, and Paralinguistic Cues to the Detection of Truth and Lying*, 4 PERSONALITY & SOC. PSYCH. BULL. 461 (1978).

[97] Wellborn, *supra* note 94, at 1078–88.

[98] *Id.* at 1079.

[99] *Id.* at 1079–80.

[100] *Id.* at 1080.

[101] *Id.* This phenomenon's name derives from Othello's mistaken interpretation of Desdemona's distress after hearing of his infidelity. *Id.*

[102] *Id.*

a group of people would fare any better.[103] Finally, Professor Wellborn states that there is no conclusive empirical data on whether a "coached" witness's deception is more or less likely to go undetected.[104]

A. Hocking Study

John E. Hocking, Joyce Baucher, Edmund P. Kaminski, and Gerald R. Miller analyzed the ability of 719 observers to assess the respondents' truthfulness by observing their demeanor.[105] The respondents were criminal justice students who were incentivized to lie during videotaped interviews by being told their ability, or lack thereof, to deceive the interviewer was imperative to good police work and may affect any letter of recommendations from the school.[106] The subjects observed the videotaped interviews of the respondents in different formats—color, black-and-white, body only, face only, video only, and audio only—in an effort to determine which nonverbal cues, if any, enabled the subjects to determine when the respondent was lying.[107]

The subjects mostly cited to nonverbal cues empowering them with truth-detecting abilities. Many stated that the respondents were less likely to make eye contact when they were lying.[108] Subjects also noted that lying respondents appeared tense and nervous, slow to respond to questions, gestured unnaturally, swallowed too much, stuttered, and did not speak fluently.[109] Similarly, the subjects believed that they could detect a lying respondent when their bodies were stiff, they squinted, smiled unnaturally, had "tight" faces, and scratched their heads.[110]

However, the accuracy of visual-only conditions was 0.467; in other words, below chance.[111] Audio-only conditions were the third most accurate, at 0.613, transcript-only conditions were second most accurate at 0.625, and the most accurate of conditions were total information (color, head and body video, with audio) at 0.637.[112] Hocking and the others concluded that people may simply mistake

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[103] *Id.* at 1081 ("Even if some individuals possess superior lie detection skills, it is hard to imagine how such individuals could impart their insights or persuade others to defer to their judgments.").

[104] *See id.* at 181–82.

[105] John E. Hocking et al., *Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Cues*, 6 HUM. COMM. RES. 33, 36 (1979).

[106] *Id.*

[107] *Id.*

[108] *Id.* at 42.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 40.

[112] *Id.* at 40–41.

body cues as representing lying when they actually reflect stress.[113] Professor Wellborn noted that this inability to detect deception from nonverbal information is supported by other studies as well.[114]

B. Maier & Thurber Study

Wellborn pointed to a 1968 study conducted by Norman R.F. Maier and James A. Thurber that similarly concludes that nonverbal cues diminish the accuracy of detecting deception.[115] In this study, subjects were asked to watch videotapes of role-played interviews to determine the truthfulness of the respondent.[116] The role-played scenario depicted a confrontation between a professor and one of his students who was suspected of altering an exam before returning it to the professor for regrading.[117] Subjects watched four videos, two with honest students and two with dishonest students.[118] The subjects evaluated the interviewees under three conditions: visual and audio; audio-only; and reading the transcript.[119]

Maier and Thurber found that under audio-only conditions, the subjects' deception-detection accuracy was 77.0%; 77.3% when reading the transcripts; and only 58.3% under visual and audio conditions.[120] Maier and Thurber concluded that these results support the hypothesis that visual cues distract the trier of fact.[121] Professor Wellborn believes that studies such as these upset the popular legal premise that a witness's demeanor is of great value.[122] In the context of remote witness testimony, these findings support admission on the basis that little, if anything, is lost in the way of assessing witness credibility when the trier of fact observes the witness through a monitor. However, at least one study has shown that observing a witness's body language during testimony may allow detection of deception.

C. Ekman & Friesen Study

Professors Ekman and Friesen conducted a study testing subjects' ability to identify truthful and untruthful statements based on the respondents' facial and

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[113] *Id.* at 43.

[114] Wellborn, *supra* note 94, at 1085.

[115] *Id.* at 1082.

[116] Norman R.F. Maier & James A. Thurber, *Accuracy of Judgments of Deception When an Interview Is Watched, Heard, and Read*, 21 PERSONNEL PSYCHOL. 23, 23 (1968). Professor Wellborn notes that an obvious weakness of this experiment was that respondents were only role-playing; that is, they were pretending to lie. Wellborn, *supra* note 94, at 1082–83.

[117] Maier & Thurber, *supra* note 116, at 23.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See* Wellborn, *supra* note 94, at 1075.

body expressions.[123] This study found that subjects had a greater likelihood of detecting deception when they were able to view the respondent's entire body as opposed to only their face.[124] The subjects were 22 nursing students who were asked to watch videotaped interviews in which respondents were told to lie about their feelings.[125] The nursing students were further instructed that their ability to detect deception would be under scrutiny and germane to their career.[126] During the interview, respondents first watched stressful films that showed burn victims and then watched films with pleasant images.[127] Respondents were told to lie about their feelings when watching the stressful films and to be honest about their feelings when watching the pleasant films.[128] At no point was the interviewer allowed to see which type of film the respondent was watching.[129]

The subjects watched the interviews from two different perspectives: a head-on view of only the respondent's face and another view showing both the respondent's face and body.[130] The results showed that subjects were able to accurately detect deception 63.50% of the time when observing both respondent's face and body.[131] When the observers viewed only the respondent's face, they accurately detected deception just 47.69% of the time; less than chance.[132] However, Professor Wellborn believes that this study, in conjunction with the other studies analyzed in his paper, demonstrates that subjects likely had the ability to read cues from stress but not cues from deception.[133]

In sum, these studies show demeanor evidence is questionable at best. And even if triers of fact do notice a witness's body cues, they probably use this information incorrectly, mistaking signs of stress for signs of deception. By excluding remote testimony based on demeanor evidence, courts are improperly denying litigants the opportunity to enjoy its benefits.

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[123] Paul Ekman & Wallace V. Friesen, *Detecting Deception from the Body or Face*, 29 J. PERSONALITY & SOC. PSYCHOL. 288, 288 (1974).

[124] *Id.* at 294–95.

[125] *Id.* at 289–90.

[126] *Id.* at 289.

[127] *Id.* at 290.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 292.

[132] *Id.*

[133] Wellborn, *supra* note 94, at 1086 ("This outcome strongly suggests that . . . subjects 'read' body cues indicating stress from watching the disturbing film, not cues indicating deception.").

VI. ADVANTAGES OF REMOTE WITNESS TESTIMONY

Although courts are divided as to the benefits of remote testimony, after a closer look, I find that its admission should be granted more liberally. Considering the current trends in globalization, environmental concerns, and improvements in technology, the benefits addressed below will continue to far outweigh the dangers of its admission.

The benefits of remote witness testimony are not simply limited to the economic benefits mentioned above.[134] The ability to "transport" an expert or other witness directly into the courtroom from the convenience of their own home or office saves time, eliminates travel and logistical burdens (especially when traveling internationally), mitigates harm to the environment, prevents forum shopping, and could increase public access to the justice system.

A. Cost

Some of the monetary benefits of remote witness testimony are immediately apparent: the parties will save the unnecessary costs of witnesses' lodging, gas, airfare, parking, food—the list goes on—as they travel from one place to another. Most of these costs are immediately eliminated once the witness is permitted to testify from their present location. Another more covert cost is paying an expert's rate as he or she waits to testify. Remote witness testimony does not require an expert be "on the clock" while sitting outside of a courtroom awaiting examination. This phenomenon surely incentivizes opponents to engage in insidious tactics—prolonging their presentations while the opponent's "meter" is running. This practice would cease if an expert could go to work, log in, testify, and seamlessly go back to work.

B. Time

The witnesses are the first to save time when testifying remotely. Instead of traveling by car or plane for hours, or even days, just to appear in court, they need not travel further than their nearest computer or other nearby testifying location. Sitting in traffic on the way to testify could be a thing of the past! This benefit would have a particularly strong impact on rural communities, international witnesses, and other parties that are likely to live far from the courthouse. Busy experts could testify during breaks at work, minimizing the amount of time they are away from their own occupations.

The court proceeding will save time as well. Courts must often suspend proceedings while waiting for witnesses to arrive from far-away locations. This disrupts the flow of the proceeding and can lead to delays in the trial. By allowing witnesses

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[134] *See* Dagen v. CFC Grp. Holdings Ltd., No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1–2 (S.D.N.Y. 2003) (holding that cost was sufficient rationale to justify good cause).

to testify from a location of their convenience, the court may proceed with fewer delays.

C. *Visas*

Aside from the expenses of travel, international witnesses often must apply for visas before entering the United States. By eliminating travel altogether, they are spared this logistical concern that arises from the requirement of being physically present. Physical travel to a United States courtroom could be prohibitive for some witnesses if they are ineligible for a visa. Precluding a witness's testimony altogether because of a visa restriction, a procedure that is collateral to the merits of the case, is not in the interest of justice because it denies the factfinder the opportunity to hear potentially valuable testimony. And as the United States moves towards stricter regulation of foreign visitors entering the country, visa requirements could likely become prohibitive.

D. *Environment*

A round-trip flight from Los Angeles to New York City emits 0.58 metric tons of carbon dioxide equivalent.[135] Further, even witnesses who are only required to travel short distances to the courtroom will likely use a mode of transportation that does some harm to the environment. By reducing the need for travel, remote witness testimony avoids this needless harm to the environment.

E. *Forum Shopping*

The doctrine of *forum non conveniens* allows judges to remove an action to a different jurisdiction if the case would be better heard in another court.[136] However, "forum shopping" occurs when litigants misuse this doctrine to gain an unfair advantage over their opponent by removing a proceeding to a jurisdiction with more favorable law or to one that is inconvenient to the opposing party.[137]

To directly address forum shopping, the Court in *Gulf Oil Corp. v. Gilbert* outlined public interest factors that must be taken into consideration before applying *forum non conveniens*.[138] One of the Court's considerations was the cost of obtaining the attendance of willing witnesses.[139] By reducing the cost of obtaining

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[135] *Flight Carbon Footprint Calculator*, CARBON FOOTPRINT, https://calculator.carbonfootprint.com/calculator.aspx?tab=3 (last visited Nov. 16, 2019).

[136] Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 391 (2017).

[137] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[138] *Id.* at 508–09.

[139] *Id.* at 508.

willing witnesses, remote witness testimony eliminates one of the predicates on which litigants may invoke *forum non conveniens*, thus reducing forum shopping.[140]

F. Disabled Persons

The Americans with Disabilities Act (ADA) of 1990 states that "no . . . individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[141] Although the ADA provides some protection for disabled persons, not all courthouses are accessible to those with disabilities.[142] And although Rule 43(a) provides courts with discretion in determining good cause in compelling circumstances, it makes no mention of an exception for disabled persons.[143] Permitting a disabled witness to testify from an accessible location furthers the purpose of the ADA—to eliminate discrimination against individuals with disabilities.[144] Rewriting Rule 43(a) to allow for greater admission of remote testimony would grant disabled persons greater access to the courts.

As globalization increases, our video transmission capabilities improve, and the environment becomes more polluted, the need for remote testimony becomes more apparent. A federal rule that widely permits the use of witness testimony could cheaply, quickly, and effectively mitigate many of the burdens associated with obtaining in court witnesses.

VII. PROPOSED RULE 43(A)

This Note calls on Congress to revise FRCP 43(a). Rule 43(a) should read: "Remote Witness Testimony. At trial, a witnesses' testimony *may* be taken by contemporaneous transmission from a different location."
The Advisory Committee notes would add:

> This amendment relieves parties from the burdens of open court testimony. If an *opponent rebuts the presumption* that appropriate safeguards are in place, a witness shall be permitted to testify from a *Remote Media Room*. Remote Media Rooms must provide appropriate safeguards by ensuring the witness testifies from a location that protects against perjury and collusion. An opponent of remote testimony by *video transmission* will have special difficulty in showing appropriate safeguards are not in place.

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[140] *See* Gardner, *supra* note 136, at 412–13.

[141] Americans with Disabilities Act, 42 U.S.C. § 12132 (2012).

[142] Peter Blanck et al., *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 830 (2004).

[143] *See* FED. R. CIV. P. 43(a).

[144] 42 U.S.C. § 12101(b)(1).

Proposed Rule 43(a) confers on the parties—and the courts—the efficient and practical benefits mentioned above.[145] This rule has four key components that allow the re-writing of Rule 43(a) to better serve litigants and the courts.

A. "May be Taken by Contemporaneous Transmission"

Proposed Rule 43(a) permits remote witness testimony in all situations. This Note has explained the need for a more liberal construction of Rule 43(a) and will not repeat itself here. Modern advancements in the quality of remote video transmissions now allow the justice system to advance into the 21st century. Remote testimony should be permitted in all civil proceedings so long as the logistics of the transmission can protect against the dangers of out-of-court testimony. Of course, it is important to allow the courts to determine on a case-by-case basis whether the mechanics of the proponent's remote testimony provides appropriate safeguards. Cases that proceed to trial are rarely "one-size-fits-all," and Proposed Rule 43(a) justly permits a judge to make that determination. However, it puts the burden on the opponent to demonstrate that appropriate safeguards are not in place.

B. Burden of Proof

The burden of proof rests on the opponent because admission of remote testimony should be the rule, *not* the exception. By placing the burden on the opponent, Proposed Rule 43(a) creates the presumption that the proponent's remote testimony will be permitted. The allocation of burdens is "a question of policy and fairness."[146] Here, placing the burden on the opponent furthers the policies underpinning the admission of remote witness testimony while granting the opponent a fair opportunity to rebut the presumption. If the court finds that appropriate safeguards are not in place, the witness will still be permitted to testify from a remote location where appropriate safeguards are in place.

C. Remote Media Room

If a proponent cannot demonstrate that appropriate safeguards can protect against the dangers of out-of-court testimony then the witness will still be permitted to testify from a remote media room. In a 1994 article anticipating the effects of remote testimony in the context of the Confrontation Clause, Professor Frederic I. Lederer describes testifying from what he calls a remote media room (RMR).[147] In

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[145] *See supra* Part IV.

[146] *See* William J. Bridge, *Burdens Within Burdens at a Trial Within a Trial*, 23 B.C. L. REV. 927, 931 (1982) (citing J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 18 (3d ed. 1940 & Supp. 1981)).

[147] Frederic I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1120 (1994).

an RMR, there is an appropriate courtroom appearance, including flags and a bailiff, to impress upon the witness the weight of testifying in open court.[148] Multiple video cameras transmit from both the courtroom and the RMR: one viewing the witness's face to show their demeanor; one viewing the RMR in full to ensure the witness is not being prompted off-screen; and one viewing the defendant—appearing to the witness—so that the witness must actually see the defendant.[149] Under Proposed Rule 43(a), RMRs would be in actual courtrooms; the witness would check in with court staff who would administer the testimony under oath, and proceed to a courtroom—or even a booth—where the witness would "log in" to the far-away proceeding. Ubiquitous RMRs have only recently become feasible because of the advancements in video technology.

D. Preference for Video Transmission

Much of the danger of remote witness testimony stems from the inability to fully observe the witness.[150] However, modern video transmission technology now allows people to conduct job interviews,[151] date,[152] and even visit a doctor,[153] all from their home computers. As such, Proposed Rule 43(a) creates a higher burden for the opponent when the proponent seeks to admit remote witness testimony using simultaneous video and voice transmission—like Skype or FaceTime. The presumption of admission still applies to voice-only transmissions (e.g., telephone communications). However, a court will have greater discretion in finding appropriate safeguards in cases attempting to admit voice-only transmissions because the dangers are more likely to be present.

VIII. DEFEATING THE DANGERS

The 1996 Advisory Committee note to Rule 43(a) cautions that "the importance of presenting live testimony in court cannot be forgotten."[154] In April 1994, the Committee on Federal Courts (CFC) published a comment on then-proposed Rule 43(a), detailing some of the common concerns regarding remote witness

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[148] *See id.*

[149] *Id.* at 1120–21.

[150] *See supra* Part VI.

[151] *See* Laura DeCarlo, *How to Ace Your Video Interview*, JOB-HUNT, https://www.job-hunt.org/job_interviews/handling-video-interviews.shtml (last visited Mar. 29, 2019).

[152] *See* Cassie Murdoch, *This Dating App Will Let You Video Chat with Matches Before You Waste Your Time IRL*, MASHABLE (Aug. 17, 2017), https://mashable.com/2017/08/17/badoo-dating-app-video-chat/#SKjn7oWx3Pq0.

[153] *See Virtual Visits*, UNITED HEALTHCARE, https://www.uhc.com/individual-and-family/member-resources/health-care-tools/virtual-visits (last visited Feb. 5, 2020).

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

testimony.[155] In fact, the comment advocated that then-proposed Rule 43(a) went too far, and that a higher standard of "exceptional circumstances" was required to avoid prejudice to the nonmoving party.[156] The major concerns cited in the comment are: (1) the factfinder's ability to assess a witness's demeanor; (2) motivations for the witness to commit perjury; (3) lack of control over the witness; and (4) the increased possibility for outside collusion.[157] But proposed Rule 43(a) addresses these concerns.

A. Demeanor

As this Note has explained, one of the greatest issues regarding remote witness testimony is its failure to assess the witnesses' demeanor.[158] However, studies have brought into question factfinders' true abilities to assess credibility from a witness's demeanor.[159] For those who still have their doubts about letting go of open court testimony, Proposed Rule 43(a) provides for RMRs as a backstop to establish appropriate safeguards.

In an RMR, a camera transmits a video of the witness's face, allowing the factfinder to observe the witness's facial expressions in high definition.[160] A second camera projects a video of the witness's whole body as well as the entire RMR into the courtroom.[161] This camera puts to rest any concern that the factfinder is deprived of the whole picture.[162] In fact, the factfinder would have the ability to see more of the witness's body language than in a conventional courtroom where the witness's lower half is blocked by a podium.

B. Motivation to Lie

The CFC argues that face-to-face confrontation is necessary if cross-examination is to remain "the greatest legal engine ever invented for the discovery of the truth."[163] It argues that a witness may be more likely to lie when being examined via

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[155] Comm. on Fed. Courts, *supra* note 5.

[156] *Id.* at 769.

[157] *Id.* at 766–67; *see also* Eric Croft, *Telephonic Testimony in Criminal and Civil Trials*, 14 HASTINGS COMM. & ENT. L.J. 107, 117 (1991) ("Telephonic testimony has raised concerns in three general areas: (1) the lack of a physical appearance by the witness in court, (2) the lack of control over the witness and her surroundings, and (3) the inability of the court and jury to see the witness.").

[158] *See supra* Part II.

[159] Hocking et al., *supra* note 105; Maier & Thurber, *supra* note 116; Wellborn, *supra* note 94; *see also* MILLER & FONTES, *supra* note 96; Littlepage & Pineault, *supra* note 96.

[160] *See* Lederer, *supra* note 147, at 1120–21.

[161] *Id.*

[162] Comm. on Fed. Courts, *supra* note 5, at 767.

[163] *Id.* at 766 (citing 5 WIGMORE, EVIDENCE § 1367 32 (1923)).

a monitor rather than in person.[164] For these opponents, physical interaction between the witness and opposing counsel is critical to the fact-finding process because opposing counsel may be the only one who knows whether the witness is lying.[165] This premise was accepted by the Court in *Coy v. Iowa*.[166] There, the Court opined that "it is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[167]

However, the Court neglected to support this assertion with analytical proof.[168] Judicial opinions are not short of conclusory statements about the importance of a witness's physical presence, which seem to buttress their holdings on rhetoric rather than data.[169] Courts can continue to ensure the veracity of witness testimony by administering an oath.[170]

Whether testifying from home or from an RMR, a witness would be required to be sworn in by an officer of the court—just like in a real courtroom. If the facts of a particular case create a heightened potential for a witness to lie under oath, the court may require the witness to testify from a real courthouse in an RMR. Once in an RMR, the witness would have to view the defendant—and potentially the fact-finder—"face-to-face" and would be in the physical presence of a bailiff or other court official. The following skepticisms concerning perjury can be dismissed as well.

C. Lack of Witness Control

Concerns about the ability of a court to enforce penalties for perjury and control the mechanics of the video transmission are also raised by the CFC.[171] They caution that remote witness testimony may permit a witness to "take off on any course of conduct that he should see fit, and there would be absolutely no remedy th[e] court would have . . . ."[172] Similarly, the CFC discusses the potential for witnesses to manipulate the lighting and camera angle to make themselves appear larger and more powerful or weaker and more sympathetic.[173]

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[164] *Id.* at 766–67.

[165] *Id.* at 767.

[166] *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

[167] *Id.*

[168] *Id.* at 1012–35.

[169] *See id.* at 1019; *see also, e.g.*, Jay v. Boyd, 351 U.S. 345, 375–76 (1956) ("An honest witness *may* feel quite differently when he has to repeat his story looking at the man whom he will harm . . . .") (Douglas, J., dissenting) (emphasis added).

[170] Croft, *supra* note 157, at 117 ("One of the principal ways to insure [sic] witness veracity is by administering an oath.").

[171] Comm. on Fed. Courts, *supra* note 5, at 768.

[172] *Id.* (quoting Byrd v. Nix, 548 So. 2d 1317, 1318 (Miss. 1989)).

[173] *Id.* at 768–69.

The first of these concerns is not without merit, especially in transnational litigation. Under 18 U.S.C. § 1621, "[w]hoever—having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true" may be charged with perjury.[174] Presumably, under section 1621 the United States would still be able to charge remote witnesses with perjury even if they are outside the physical jurisdiction of the United States.

However, which country would have jurisdiction and whether there is sufficient justification under international law to apply section 1621 extra-territorially is uncertain.[175] The Hague Convention seems properly suited to address this international issue but does not yet provide guidance.[176] Perjury in transnational litigation is a complex and murky area of law that is outside the scope of this Note. For now, it is enough to note that Proposed Rule 43(a) does not complicate the analysis because international remote witness testimony is already permissible under the current Rule 43(a).[177]

Further, the possibility that a witness could manipulate the cinematography affecting the factfinder's assessment of his or her testimony while still providing appropriate safeguards is doubtful. However, to protect against such manipulation, courts could require the witness to contact the court before the proceeding to confirm that the connection and lighting are adequate. In any event, we already trust jurors to put aside perceptions of witness credibility based on real-life appearances in open court,[178] so why would we not trust them to do the same with witnesses' cinematographic appearances?

D. Collusion

Lastly, the CFC addresses the possibility that witnesses will be tempted to have someone else present—outside the factfinder's view—to "coach" them during their testimony.[179] Fear of "coaching" may be easily dispensed with by simply asking the witness to adjust the camera to show the court that no one else is present in the room. Although voice-only transmissions can be fertile grounds for collusion, video transmission gives courts the ability to observe a witness's wandering eyes. Again, if

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[174] 18 U.S.C. § 1621 (2012).

[175] Martin Davies, *Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation*, 55 AM. J. COMP. L. 205, 223–25 (2007).

[176] *Id.* at 225.

[177] *See* FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment.

[178] *See* FED. R. CIV. P. 43(a).

[179] Comm. on Fed. Courts, *supra* note 5, at 769.

a case presents a risk of collusion, the judge may order the witness to testify from a court-administered RMR.

A presumption of admission for remote witness testimony promotes efficiency in judicial proceedings with minimal risk of jeopardizing the fact-finding process. But the dangers of remote transmissions should not be quickly disregarded. Proposed Rule 43(a) recognizes this and provides the court with an alternative backstop by requiring the proponent to testify from an RMR when the proponent has logistically failed to provide appropriate safeguards. It is worth noting that all of these dangers are currently present, and dealt with accordingly, under current Rule 43(a).

IX. CONCLUSION

The current FRCP 43(a) fails to recognize that society is on the precipice of an all-digital age. Certainly, the most important component of the courts' transition into the modern era is providing fair and equal jurisprudence to the litigants that come before them. Assessing the veracity of a witness's testimony is one of the most crucial steps in achieving this goal. However, the presumption that this can only be achieved by open court testimony is founded upon traditions with historical roots that are almost a thousand years old—long before we could avail ourselves of analytical studies, the internet, and video chatting. Courts are already increasingly admitting remote testimony and this trend will continue. It is time that Rule 43(a) be re-written to embrace technology, end the incongruous holdings of American federal courts, and grant litigants the benefits of the 21st century.