

1       **Rule 43. Evidence.**

2       **(a) Form.** In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise  
3 provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be~~  
4 ~~admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme~~  
5 ~~Court.~~ For good cause and with appropriate safeguards, the court may permit testimony in open court by  
6 contemporaneous transmission from a different location.

7       **(b) Evidence on motions.** When a motion is based on facts not ~~appearing of in the record,~~ the court  
8 may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the~~  
9 ~~matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

10       **Advisory Committee Note**

11       Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since  
12 1996. State court judges have been conducting telephone conferences for many decades. These range  
13 from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial  
14 conferences. These conferences tend not to involve testimony, although judges sometimes permit  
15 testimony by telephone or more recently by video conference with the consent of the parties. The 2015  
16 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a  
17 convenient practice that is more frequently needed in an increasingly connected society and to bring a  
18 level of quality to that practice suitable for a court record.

19       This rule, which grants the judge the discretion to permit testimony by contemporaneous  
20 transmission, must be read in conjunction with Code of Judicial Administration Rule 4-106, which  
21 establishes the standards for contemporaneous transmission. That rule is drafted with the principles that  
22 all participants, whether in the courtroom or in another location, are able to see and hear each other; the  
23 public is able to see and hear all participants; a lawyer and client are able to communicate confidentially;  
24 and there is a verbatim record of the hearing. The technology will be digital cameras, high definition  
25 monitors and audio distributed through the courtroom public address system. Participants should not  
26 have to huddle around a speakerphone or laptop computer.

27       Rule 43 does not require the judge to permit remote testimony in any circumstance, even if all parties  
28 consent, but it does give the judge the authority to permit remote testimony, sometimes even in the face  
29 of a party's objection. There are due process limits to remote testimony, and these must be observed in  
30 all circumstances. But, absent a due process or other constitutional limit, a reviewing court will generally  
31 not find error if remote testimony is within the scope of the rule. See generally, *Constitutional and*  
32 *statutory validity of judicial videoconferencing*, 115 A.L.R.5th 509 (2004) and *Permissibility of testimony*  
33 *by telephone in state trial*, 85 A.L.R.4th 476 (1991).

34       Testimony by contemporaneous transmission is almost always a second-best option compared to  
35 testimony in the courtroom by a witness who is physically present. In that we agree with the 1996  
36 comment to FRCP 43:

37 The very ceremony of trial and the presence of the factfinder may exert a powerful force  
38 for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is  
39 accorded great value in our tradition. Transmission cannot be justified merely by showing  
40 that it is inconvenient for the witness to attend the trial.

41 But we disagree that “ordinarily depositions, including video depositions, provide a superior means of  
42 securing the testimony . . .” Live remote testimony—in which the parties have the opportunity for direct  
43 and cross examination and in which the demeanor of a witness is viewed first-hand by the trier of fact—  
44 seems far superior to reading or viewing a deposition. We concur instead with the opinion of *Bustillo v.*  
45 *Hilliard*, 16 Fed. Appx. 494 (7th Cir. 2001), in which the plaintiff in a civil rights action was compelled to  
46 participate in the trial by videoconference. In the court’s words:

47 Bustillo participated in the trial; he testified, presented evidence, examined adverse  
48 witnesses, looked each juror in the eye, and so on. Jurors saw him (and he, them) in two  
49 dimensions rather than three. Nothing in the Constitution or the federal rules gives a  
50 prisoner an entitlement to that extra dimension, if for good reasons the district judge  
51 concludes that trial can be conducted without it.

52 Id at 495.

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