

Remote Witness Testimony in Criminal Trials: Technologically Inevitable or Constitutionally Doomed?

By Judge Herbert B. Dixon Jr.

In April 2002, the Supreme Court of the United States adopted certain amendments to the Federal Rules of Criminal Procedure proposed by the Judicial Conference. Pursuant to law, Chief Justice William H. Rehnquist transmitted the rules amendments to both houses of Congress. The transmittal to Congress did *not* include a new rule proposed by the Judicial Conference, Federal Rule of Criminal Procedure 26(b), which would have authorized a judge to permit testimony by a witness from a remote location by two-way video.

The proposed rule provided as follows:

Rule 26. *Taking Testimony*

...

(b) *Transmitting Testimony from a Different Location.* In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if: (1) the requesting party establishes excep-

tional circumstances for such transmission; (2) appropriate safeguards for the transmission are used; and (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

Justice Scalia issued a separate statement in support of the Court's decision not to approve the proposed rule in which he stated the following:

I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

... [A] purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image.

Additionally, in language worthy of a modern-day media sound bite, Justice Scalia opined: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."

In response, Justice Breyer issued a dissenting statement, joined by Justice O'Connor, stating:

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where

an absent witness' testimony could be admitted in nonvisual form via deposition regardless.

Furthermore, Justice Breyer added:

... [R]ather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.¹

By way of background, proposed Rule 26(b) was one of many rules amendments drafted by the Advisory Committee on Criminal Rules (Advisory Committee) that underwent public hearings and a public comment interval. Later, the Advisory Committee submitted the rules amendments along with "Committee Notes" that explained the purpose and intent of the amendments to the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee). Thereafter, the Standing Committee recommended the amendments to the Judicial Conference of the United States, which later proposed them to the Supreme Court. After that process, and pursuant to Section 2072 of Title 28, United States Code, the Supreme Court adopted the rules amendments, excluding proposed Rule 26(b), and transmitted its actions to both houses of Congress.

In support of proposed Rule 26(b), the Committee Notes observed that Criminal Rule 15 already recognized the use of depositions to preserve testimony if there were exceptional circumstances in the case and that it was in the interest of justice to do so. The Advisory Committee noted that if the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive



Judge Herbert B. Dixon Jr. is the technology columnist for *The Judges' Journal*. He sits on the Superior Court of the District of Columbia and is a former chair of the National Conference of State Trial Judges. He is chair of the Judicial Division's Court Technology Committee and a member of the Planning Board for ABA TECHSHOW. He can be reached at Herbert.Dixon@dcsc.gov.

evidence. The Advisory Committee concluded that proposed Rule 26(b) would extend the logic underlying the Rule 15 provision allowing deposition testimony of an unavailable witness to allowing the contemporaneous video testimony of a similarly situated witness. Furthermore, according to the Advisory Committee, the proposed rule would parallel a similar provision in existing Federal Rule of Civil Procedure 43(a), which authorizes the court in appropriate circumstances to “permit presentation of testimony in open court by contemporaneous transmission from a different location.” The Advisory Committee concluded that a party against whom a deposition may be introduced at trial normally will have no basis for objecting if contemporaneous testimony is used instead because the use of transmitted testimony is in most regards superior to presenting testimony in the courtroom by way of a written deposition.

Without resorting to writing a law review article or a constitutional analysis of this issue, I suggest that the time is coming when the testimony of witnesses in courtrooms by video from remote locations will be a routine practice—in civil and criminal cases—due solely to advances in technology. Why have I reached that conclusion? Allow me to explain.

Technology has caused the routine and unquestioned acceptance of capabilities that we now take for granted. Among these are the ability to have a conversation with persons on the other side of the world with a small device called a cell phone, which we can hide in our hand; we also have the ability to be transported across the ocean within hours by jet. From our homes and offices we search for information from around the world over the Internet using a computer, and we see and hear scenes from those same distant locations in life-size color and symphonic stereo on our wall-size, high-definition plasma televisions with surround sound.

Changes have occurred in the courtroom as well. Court reporters are producing transcripts nearly simultaneously with the witness’s testimony by using real-time transcription, and lawyers are using trial presentation software to instantaneously retrieve and enlarge just a portion of a

document that is the subject of the testimony. In the event of a slippery witness, the software also permits the lawyer just as quickly to retrieve the contradicting video deposition of the witness along with transcript to accomplish a killer impeachment, demonstrating masterfully to the jury that, on a previous occasion, the witness said something different from what he is now saying from the witness stand.

Another change in the courtroom caused by advances in technology also supports my conclusion; this change concerns the best evidence rule, dating back to the eighteenth century, which presumed inadmissibility of any document that was not an original. The law has adjusted to the realities of modern life. Businesses, court systems, and governments have resorted to electronics as the sole method of keeping records, rejecting the concept of “hard copy” that requires much keeping of paperwork. After a contract, promissory note, or other record has been properly executed and processed, custodians now are routinely scanning an image of the record and discarding the paper document. As far as the custodian is concerned, the antiquated concept of the “original” no longer exists and the official record is

of the cancelled check and a certification from the bank attesting that the image is a true copy of the paper original, which was destroyed. An objection in a courtroom today that a copy of the check should not be admitted in evidence is rarely made.

Being required to present a witness physically in the courtroom also has financial implications. Consider the difficulties encountered by the prosecution in the case of *United States v. Timothy McVeigh* of presenting numerous records authentication witnesses. In that case, the defendant was tried, convicted, and sentenced to death on eleven counts stemming from the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people. Twenty-seven of the witnesses were telephone company employees who were flown in from around the country merely to authenticate pages of phone records. The individual testimony of most of those witnesses was completed in minutes. In one case, the witness on the stand for just 50 seconds.² In today’s world, is remote testimony a possibility for such routine witnesses?

Obviously the Confrontation Clause imposes a tremendously important positional requirement that must be satisfied. But, can technological advances provide

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the electronic copy. In some cases, the historical custodian no longer has control of the original paper. For example, to prove that he paid his bill, a customer historically would produce the canceled check that the bank had returned to him with his monthly statement. Instead, now, banks and sometimes vendors are processing the payments with electronic images, and the check writer never receives the cancelled original. Instead, the check writer now proves that he paid his bill with a copy

a sufficient basis to permit testimony in a criminal trial by a witness from a remote location? That is the issue raised by the Supreme Court’s decision to not adopt proposed Rule 26(b).

Remote witness testimony generally is attacked on the grounds that it is an inadequate substitute for in-court physical testimony. One argument against remote testimony is that an absent witness will not experience the courtroom’s influence on truth-telling. Another argument is that

the in-court participants (judge, jury, and lawyers) will lose the ability to assess the demeanor and credibility of a witness viewed only by video. In addition, another often-used argument against remote testimony is the critical need for the witness to face the defendant in open court.

Considering the lack of significant problems implementing Federal Rule of Civil Procedure 43(a), which was partly the inspiration for proposed Criminal Rule 26(b), Justice Breyer considered the rejection of 26(b) unjustified—especially in view of the rule’s safeguards that (1) the requesting party must establish exceptional circumstances for such transmission; (2) appropriate safeguards for the transmission are used; and (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(5). Unfortunately, however, in the absence of the proposed rule, parties in federal criminal cases do not have any specific authorization for remote testimony, leaving judges to address such requests on a case-by-case basis. Thus, Justice Scalia’s statement and the Supreme Court’s failure to approve the proposed rule for remote testimony in criminal cases indicates doubt by some members of the Court about the desirability or constitutionality of remote testimony.

At the 2008 Annual Meeting of the American Bar Association, during a presentation on the subject of remote witness testimony, Professor Fred I. Lederer noted that videoconferencing is improving con-

stantly and that state-of-the-art “telepresence” installations can almost duplicate being in a room with a distant participant. At some point, according to Professor Lederer, it will be difficult to even realize that a law firm colleague, opposing counsel at a settlement meeting, or remote hearing participant is not within a few physical feet. Noting that we are in a transition stage in which our legal system has not yet fully adapted to even the present realities of videoconferencing let alone what is to come, Professor Lederer concluded that at some point we will have to decide when, if ever, physical presence is truly mandated and, as technology improves, why.³

As we are impressed with technological advances during the term of our generation, the framers of the Constitution and the Bill of Rights would be astounded—probably equating the capabilities of today’s two-way video and audio transmissions with witchcraft. The Confrontation Clause was not written in a room illuminated by electric lights or using word processing software on a computer or even a manual typewriter. No one would dispute that two-way, high-definition video with surround sound was not contemplated when the Confrontation Clause came into being. Considering the quality of video today, and larger than life, pixel clear, photographic-like pictures received on high-definition television screens, I suggest that the sweat on a witness’s brow, the glint in his eye, and the quiver of his lip would be

more visible by video than if the witness appeared in person. A rejection of any process other than physical presence to satisfy the Confrontation Clause is dismissive of today’s technological advancements and unacceptably ignores the extent to which judges, courts, laws, and procedures have adapted to modern-day life.

When today’s judges are succeeded by a new generation of judges that has routinely shared pictures and videos of ongoing events by cell phone and that has only known television of the high-definition variety, will the same concerns that remote video does not satisfy the Confrontation Clause resonate? Or will the next generation conclude that the Confrontation Clause can be satisfied by the significant technological advances that were never contemplated when our country was founded? I predict the latter. ■

Endnotes

1. Chief Justice Rehnquist’s transmittal, the separate statements of Justices Scalia and Breyer, and the proposed rule with Committee Notes are located at <http://www.supremecourtus.gov/orders/courtorders/frcr02p.pdf>.
2. Michael Fleeman, *McVeigh Phone Trial Retraced Prosecutors Call 27 to Recount Calls for Explosives, Rental Truck*, PITTSBURGH POST GAZETTE, May 8, 1997, at A8; Fred I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL RTS. J. 887, 919 (2004).
3. Fred I. Lederer, *The Legality and Practicality of Remote Witness Testimony*, ABA Criminal Justice Section Program (Aug. 8, 2008).