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Requesting Video Trial Testimony in Light of COVID-19

Idaho district court makes a special exception in extreme circumstances.

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All of us practicing law during these interesting times have come across situations in which we must apply long-standing rules to unique and ever-changing fact patterns. An example of this occurred in *Vasquez v. City of Idaho Falls*, Case No. 4:16-CV-00184-DCN (D. Idaho Apr. 13, 2020). In that case, the plaintiff's racial-discrimination and retaliatory-discharge claims were set to be tried on May 18, 2020. The plaintiff filed a motion to present a fact witness's trial testimony either remotely or, in the alternative, via a video-recorded deposition. The witness was a retired city employee who, according to the plaintiff, would be able to testify as to another city employee's alleged racism against the plaintiff, and to the witness's own reports to the city of the other employee's behavior, to prove that the city had prior knowledge of its employee's behavior. The basis for the motion was that the witness was "especially vulnerable to COVID-19" because he is a 73-year-old diabetic man who lives out of state.

The court began its analysis noting that Federal Rule of Civil Procedure 43(a) provides that "[f]or good cause and compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." The Advisory Committee notes, however, state that "[t]he importance of presenting live testimony in court cannot be forgotten" and that contemporaneous transmission "is permitted only on showing good cause and compelling circumstances." The court granted the motion, finding that the plaintiff had provided good cause for the witness to testify remotely, and ordered the parties to inform the court whether they would prefer "live remote testimony" or a video-recorded deposition. The plaintiff would bear the burden of coordinating the testimony and ensuring that the audio and video quality were set up to the court's satisfaction.

The basis for the court's ruling was the seriousness of the "current pandemic" and the unique risk to the witness due to his age, diabetic condition, and his current residence out of state where there is a statewide shelter-in-place order. The witness's concerns over his ability to travel and to testify live in court were both reasonable and unique to this unusual time. Moreover, the court found that the plaintiff could not have reasonably foreseen the circumstances that justified the transmission of remote testimony. The court also found that the use of remote testimony would not prejudice the defendant because adequate safeguards existed. For example, the testimony would be under oath, and the defendant would have the opportunity to cross-examine the witness. Also, the jury would have sufficient opportunity to observe the witness and make credibility determinations.

It is important to note that the court was not opening the door to remote testimony by every witness who could be called to testify at trial. Instead, this order was limited to one witness who had circumstances that made him particularly vulnerable to COVID-19. There were also no other circumstances that would prejudice the defendant (other than of course not having the witness testify live in the courthouse). The moral of this story is that remote live testimony or a recorded video deposition testimony will be allowed under Federal Rule 43(a) but only under limited and compelling circumstances.