

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,)	CRIMINAL CASE NO. 11-0140R
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S MOTION IN LIMINE TO ALLOW TELEPHONIC TESTIMONY OF MEDICAL PROFESSIONAL WITNESSES
vs.)	
)	
WILLIAM T. PENDERGRASS II, ET AL.,)	
)	
Defendants.)	

I. INTRODUCTION

THIS MATTER was heard on March 14, 2012 at 10:30 a.m. in Courtroom 202A on Plaintiff's Motion in Limine to Allow Telephonic Testimony of Medical Professional Witnesses ("Plaintiff's Motion"). Assistant Attorney Generals, Darren Robinson and Eileen Wisor, appeared on behalf of the Commonwealth of the Northern Mariana Islands ("Plaintiff"). William T. Pendergrass II ("Pendergrass") and Jerome Fujihara ("Fujihara") (collectively, "Defendants") were represented by Joaquin Torres and Deputy Public Defender Matthew Meyer, respectively.

Based on the papers submitted and oral arguments of counsel, the Court DENIES Plaintiff's Motion.

II. DISCUSSION

Defendants and the victim engaged in an altercation from which the victim sustained physical injuries. The victim was flown from Rota to Saipan to receive medical care for his injuries. Plaintiff moves the Court to permit the treating Saipan medical professionals to

1 testify telephonically, or via Skype, because their busy schedules may not allow them to attend
2 the jury trial in Rota.

3 Commonwealth Rule of Criminal Procedure 26 provides: “In all trials the testimony of
4 witnesses shall be taken orally in open court, unless otherwise provided by an Act of the
5 Commonwealth Legislature or by any rule adopted by this court.” As Plaintiff conceded at
6 oral argument, there are no rules recognizing the use of telephonic testimony in a criminal trial.
7 Furthermore, Plaintiff could cite only a traffic case in which the CNMI Superior Court
8 admitted telephonic testimony at trial over the objection of opposing counsel, which is largely
9 irrelevant in the current criminal matter. In civil cases, testimony must be taken orally in open
10 court, *except* upon a showing of compelling circumstances or if the witness is an expert who
11 was made available for a pre-trial deposition. NMI R. Civ. P. 43.¹ The Commonwealth
12 Legislature provided no such exception in criminal cases, nor has this Court previously
13 analyzed the issue of whether to admit telephonic testimony in a criminal case.

14 Several jurisdictions with statutes analogous to NMI R. Crim. P. 26 and which have no
15 case law governing the use of telephonic testimony generally deny such use in criminal trials
16 absent exigent circumstances.² See, e.g., *State v. Lemons*, 675 N.W.2d 148, 151-52 (N.D.
17 2004); *Barry v. Lindner*, 81 P.3d 537, 541-42 (Nev. 2003) (“[I]n the absence of such special
18 circumstances, generally courts have not permitted telephonic testimony.”); *Byrd v. Nix*, 548
19 So. 2d 1317, 1319-20 (Miss. 1989) (“In the absence of exigency or consent, telephonic
20 testimony generally has not been allowed.”) (citing cases); see also *Kinsman v. Englander*, 167
21 P.3d 622, 626 (Wash. Ct. App. 2007) (“[W]here there is no statute or court rule permitting
22 telephonic testimony, the trial court may direct the telephonic testimony of witnesses only after
23 all parties’ consent.”).

24
25
26 ¹ Originally, NMI R. Civ. P. 43 was nearly identical to NMI R. Crim. P. 26 in requiring testimony of witnesses to
27 be taken orally in open court. However, an amendment to NMI R. Civ. P. 43, effective April 1, 2008,
28 incorporated an exception that allows the use of “testi[mony] by contemporaneous transmission from a different
location” in civil cases under certain circumstances.

² In the absence of controlling CNMI precedent, it is appropriate for the court to look to analogous state and
federal statutes for guidance. *Pac. Finalicial Corp. v. Sablan*, 2011 MP 19 ¶ 13.

1 Plaintiff has a difficult burden in proving exigent or special circumstances to warrant
2 admission of telephonic testimony in light of Defendant’s Sixth Amendment right “to be
3 confronted with the witnesses against him” (“Confrontation Clause”). U.S. Const. amend. XI.
4 The U.S. Supreme Court interpreted the Confrontation Clause as “guarantee[ing] the defendant
5 a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487
6 U.S. 1012, 1016 (1988). The “face-to-face confrontation between accused and accuser [is]
7 ‘essential to a fair trial in a criminal prosecution.’” *Id.* at 1017 (quoting *Pointer v. Texas*, 380
8 U.S. 400, 404 (1965)). Physical presence of a witness in the courtroom impresses upon the
9 witness the seriousness of the matter, forces the witness to submit to cross-examination, and
10 permits the trier of fact to fully observe the witness’s demeanor in assessing his or her
11 credibility. *United States v. Beaman*, 322 F. Supp. 2d 1033, 1033-34 (D. N.D. 2004) (citing
12 *Maryland v. Craig*, 497 U.S. 836, 845 (1990)).

13 Plaintiff’s assertion that the medical professional witnesses may be too busy to attend
14 the trial in Rota is insufficient to override the Confrontation Clause. *See Gonsoir v. People*,
15 793 P.2d 1165, 1166 (Col. 1990) (“[C]onvenience of a witness . . . [cannot] override a
16 defendant’s sixth amendment right of face-to-face confrontation.”). Plaintiff’s argument that
17 telephonic testimony allows the defense an opportunity for cross-examination is also
18 unpersuasive. *Id.* “The optimal way of conducting a trial is for the witness to appear in person
19 in court to face the defendant, and to be subject to cross-examination in their presence.”
20 *Beaman*, 322 F. Supp. 2d at 1034; *see also United States v. Lawrence*, 248 F.3d 300, 304 (4th
21 Cir. 2011) (“[V]irtual reality is rarely a substitute for actual presence and that, even in an age
22 of advancing technology, watching an event on the screen remains less than the complete
23 equivalent of actually attending it.”).

24 Although face-to-face confrontations between accusers and the accused is certainly the
25 preferred method at trial, this ideal may yield to contemporaneous, out-of-court testimony in
26 compelling circumstances without violating the Confrontation Clause. *Beaman*, 322 F. Supp.
27 2d at 1034 (“[V]ideo conferencing technology has been upheld as an alternative means of
28 taking the testimony of witnesses in criminal cases.”). For instance, *Beaman* held the taking of

1 a witness's testimony via live video was justified because the witness was subject to subpoenas
2 in two other criminal cases, precluding him from testifying in person at trial. *Id.* at 1035.
3 Indeed, the most critical factor Plaintiff must prove in justifying its request to admit telephonic
4 testimony at trial is to establish the witnesses' unavailability. *Gonsoir*, 793 P.2d at 1167; *In re*
5 *S.B.*, 639 N.W.2d 78, 83-84 (Neb. 2002) (finding that trial court's acceptance of telephonic
6 testimony when witness was not "truly unavailable" violated individual's confrontation rights).
7 During oral argument, Plaintiff properly conceded that it could not, at this time, meet the high
8 threshold showing that its medical professional witnesses will be unavailable³ for trial.⁴

9 At oral argument, Plaintiff preserved the right to make a showing of unavailability as to
10 its witnesses upon further investigation. If Plaintiff does later on prove its witnesses are
11 unavailable for trial, Plaintiff should preserve its witnesses' testimony through a pre-trial
12 deposition, which may be admissible at trial under the hearsay exception of NMI R. Evid.
13 804(b)(1). In any case, given Plaintiff's advance notice that its witnesses may be unavailable,
14 the witnesses may not testify telephonically at trial even if their unavailability is later proven.
15 *See Kinsman*, 167 P.3d at 626. (agreeing with counsel that the trial court erred in allowing a
16 witness to appear by telephone after the trial court previously concluded the witness was
17 unavailable and allowed the admission of the witness's preservation deposition); *see also*
18 *Beaman*, 322 F. Supp. 2d at 1034-35. The Court holds that Plaintiff's witnesses may testify at
19 trial telephonically only upon a showing of compelling circumstances, which Plaintiff has
20 failed to show.

21
22
23
24 ³ "Unavailability as a witness" is defined under NMI R. Evid. 804(a).

25 ⁴ Even though the witnesses' testimony will relate only to their medical examinations and evaluations of the
26 victim, Defendant still has a right and valid interest in having the witnesses present in the courtroom for the jury
27 to fully observe their demeanor. *Gonsoir*, 793 P.2d at 1166; *In re MH-2008-000867*, 213 P.3d 1014, 1019
28 ("[A]bsent a showing of true necessity, based on unavailability, telephonic testimony of a doctor at such a hearing
violates the patient's rights."); *Greener v. Killough*, 1 So. 3d 93 (Ala. Ct. App. 2008) (holding that the trial court
exceeded its discretion by admitting the doctor's testimony by telephone).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

Based on the foregoing reasons, the Court hereby **DENIES** Plaintiff's Motion.

IT IS SO ORDERED this 19th day of March, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge