

## **Opinion No. 88-81**

December 19, 1988

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Scott D. Spencer, Assistant Attorney General

**TO:** Honorable Phillip R. Ashby, District Court Judge, P.O. Box 488, Albuquerque, New Mexico 81703

### **QUESTIONS**

Is there a legal problem concerning court reporters swearing witnesses over the telephone and then taking testimony in litigation?

### **CONCLUSIONS**

Yes.

### **ANALYSIS**

Witnesses in civil and criminal trials must declare that they will testify truthfully by oath or affirmation. SCRA 11-603, 11-1101. Deposition witnesses must make the same declaration. SCRA 1-030(C)(civil cases); SCRA 5-503(G) (criminal cases). Under New Mexico law, notaries public, county clerks, the secretary of state of New Mexico, certain court clerks and certain military officers may administer oaths. Sections 14-21-1, 14-13-3, 14-13-7 NMSA 1978. In addition, SCRA 1-028(A)(civil actions) and SCRA 5-503(E)(2)(criminal actions) provide that a person appointed by a court to take depositions may administer oaths. A court reporter who administers an oath would have to be qualified to do so under these provisions.

#### Telephone Oaths

Generally, a court reporter may not administer oaths over the telephone. *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983) (oath in presence of officer required); *Carnes v. Carnes*, 138 Ga. 1, 6, 74 S.E. 785, 788 (1912) (long distance swearing over telephone not permitted); 58 Am. Jur. 2d Oath and Affirmation § 12 (1971); 67 C.J.S. Oaths and Affirmations § 5 (1978) (witness must take oath in the presence of an officer authorized to administer oaths). One reason giving for requiring a witness to be in the presence of the officer administering the oath is:

[n]ot to the end that the officer may know him to be the person he represents himself to be, for it is not required that the affiant be identified or introduced or be personally known to the officer; but to the end that he be certainly identified as the person who actually took the oath.

Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228, 229, 83 S.W. 421, 422 (1904). See also McKnight v. State Land Bd., 14 Utah 2d 238, 248-49, 381 P.2d 726, 733 (1963) (stating that although officer administering oath is not obliged to know the veracity of the declaration or that the signer is the person he represents himself to be, officer is required to know and state the person who took the oath declared himself to be the person mentioned in the oath). Another reason is that, in the event a witness is later accused of perjury, the officer who administered the telephone oath will not be able to credibly identify the witness as the one who swore to testify truthfully. Sullivan v. First Nat. Bank, 37 Tex. Civ. App. at 230, 83 S.W. at 422-23. See also United States Automobile Ass'n v. Ratterree, 512 S.W.2d 30, 33 (Tx. Civ. App. 1974) ("[t]o constitute a valid 'oath for falsity of which perjury lies, an affiant must consciously take on himself obligation of an oath by unequivocal act in the presence of persons authorized to administer oath [sic].").

## Telephone Depositions

The New Mexico Rules of Civil Procedure permit telephone depositions:

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For purposes of this rule and paragraph A of Rule 1-028, ...a deposition taken by telephone is taken in the county and at a place where the deponent is to answer questions propounded to him.

SCRA 1-030(B)(7). Rule 1-028(A) identifies persons before whom depositions may be taken:

Within the United States... depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has the power to administer oaths and take testimony.

Rule 1-030(B)(7) does not state expressly that a witness in a telephone deposition must take an oath in the presence of an officer authorized to administer oaths, and this provision has never been construed by courts in this state. However, SCRA 1-030(B)(7) is essentially the same as Fed. R. Civ. P. 30(b)(7), which permits depositions by telephone,<sup>1</sup> and New Mexico courts have looked to federal law when called upon to interpret state rules of civil procedure that are basically the same as their federal counterparts. Benavidez v. Benavidez, 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983); Dial v. Dial, 103 N.M. 133, 136, 703 P.2d 910, 913 (Ct. App. 1985). Accordingly, we have examined cases and other authorities that interpret Fed. R. Civ. P. 30(b)(7).

One commentator has acknowledged that Rule 30(b)(7) might be read to permit communication of testimony by telephone between a deponent in one place and an officer in another. 4A Moore's Fed. Prac. Para. 30.57[15] at 30-126, n. 5 (1988). However, he also interprets the reference in Rule 30(b)(7) to Rule 28(a), which is essentially the same as SCRA 1-028.A, as making that rule applicable to Rule 30(b)(7),

and notes that Rule 28(a) requires a deposition to be taken "before" the officer or person appointed by the court or upon whom the parties agree. *Id.* See also SCRA 1-030(C) (requiring officer before whom depositions in civil cases are taken to put the witness on oath and to personally, or by someone acting under his direction and in his presence, record the witness' testimony); SCRA 5-503(G)(same rule in criminal cases). Because of this, the commentator concludes that the witness must give his or her testimony (as well as the oath, presumably) in the presence of the officer:

Good sense dictates the same result. A deposition from a witness testifying under the eye of neither counsel nor the officer would be undesirable since there would be problems of establishing the identity of the speaker and no very obvious way to preclude coaching. If it is necessary to have the testimony given in the presence of someone, appointment of a monitor and an officer would add needless expense.

*Id.*<sup>2</sup> At least one case applied this construction of Rule 30(b)(7) and concluded that a consistent construction of Rules 30(b)(7) and 28(a) required that a person who is in the witness' presence at the place of the deposition must administer the oath. *Jahr v. IU International Corp.*, 109 F.R.D. 429, 433 (M.D.N.C. 1986).

Based on this federal authority, and in the absence of any New Mexico authority, it is our opinion that SCRA 1-030(B)(7) does not change the general rule, and the court reporter must administer the oath and take the deposition in the witness' presence.

### Telephone Testimony in Court

Unlike depositions, trial testimony by telephone is not expressly permitted under the New Mexico Rules of Civil Procedure. Cf. SCRA 1-043(A) (providing that "[i]n all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these and other rules"). See also *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984) (court had no statutory authority to promulgate procedure substituting closed circuit television for in-court examination of witnesses). However, New Mexico and other courts have allowed telephone testimony and other forms of out-of-courts testimony in varying degrees, depending on the type of action involved.

Use of such testimony is most problematic in criminal proceedings because of a defendant' constitutional right to confront witnesses testifying against him. See U.S. Const., amend. VI; N.M. Const., art. II, § 14. One court has stated that testimony taken by telephone in a criminal action is not proper unless the accused knowingly and intelligently waives his or her right to confront witnesses. *People v. Lawson*, 124 Mich. App. 371, 374-75, 335 N.W.2d 43, 45 (1983). See also *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, \_\_\_, 108 S. Ct. 2798, 2802-03 (1988) (finding that confrontation clause guarantee of face-to-face meeting between defendant and witnesses before trier of fact was violated by placement of screen preventing witnesses from seeing defendant). But see *Mattox v. United States*, 156 U.S. 237, 243 (1895) (general rules of law favoring face to face confrontation at trial occasionally must give way to public policy considerations and the

necessities of the case). Reportedly, however, telephone conferences are fairly common in criminal litigation for motion hearings and other pretrial matters that do not implicate a defendant's constitutional rights. Hanson, Olson, Shuart and Thornton, Telephone Conferencing in Criminal Court Cases, 38 U. Miami L. Rev. 611 (1984).

Courts have condoned the use of telephone testimony for at least some civil proceedings, such as administrative hearings. See, e.g., *State v. Gomez*, 99 N.M. 261, 268-69, 657 P.2d 117, 124-25 (1982) (use of telephonic hearing in connection with termination of welfare benefits did not deprive claimant of due process rights). Accord *Casey v. O'Bannon*, 536 F. Supp. 350, 352-54 (E.D. Penn. 1982); *Schexnider v. Blache*, 504 So. 2d 864, 866-67 (La. 1987); *Sterling v. District of Columbia*, 513 A.2d 253, 255 (D.C. App. 1986). In other kinds of civil actions, the limited case law indicates that courts have permitted witnesses to testify without being physically present in court, but they also have taken precautions to at least approximate courtroom conditions. See, e.g. *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (en banc) (allowing use of two-way closed circuit television for testimony of expert witness in case involving violation of a municipal ordinance); *Ferrante v. Ferrante*, 127 Misc. 2d 352, 485 N.Y.S.2d 960 (N.Y. Super Ct. 1985) (permitting plaintiff in action for accounting and infliction of mental anguish to testify via telephone conference call that court reporter simultaneously videotaped and transcribed). As in the criminal area, courts increasingly are allowing use of telephone conferences in civil matters, except perhaps for important testimony and hearings on the merits. See, e.g., *DeFoor and Sechen, Telephone Hearings in Florida*, 38 U. Miami L. Rev. 593 (1984); Hanson, Mahoney, Nejelski and Shuart, *Lady Justice----Only a Phone Call Away*, 20 Judge's J. 40 (1981) (telephone conferences used in civil actions, including those in New Mexico, for pretrial conferences, setting trial dates, motion hearings, some kinds of expert witness testimony, commitment proceedings, small claims trials, and where the parties stipulate).

Because any permissible use of telephone testimony in court proceedings would depend on the specific facts and circumstances involved, we do not address whether or when this procedure is proper. Assuming, however, that telephone testimony is appropriate in some circumstances, our conclusion that a deposition witness must take an oath and testify in the presence of an authorized officer also would apply to any testimony that a witness gives to the court over the telephone. The same potential for abuse in telephone depositions also exists in any other situation where a witness gives sworn testimony by telephone.

## **ATTORNEY GENERAL**

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## **GENERAL FOOTNOTES**

[n1](#) That rule provides:

The parties may stipulate in writing, or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

Fed. R. Civ. P. 30(b)(7).

[n2](#) The treatise suggests the following procedure for stenographic depositions taken by telephone:

[T]he sensible arrangement, if not the one required by the Rules, is to serve a subpoena commanding the deponent to appear at the office of a notary or other person qualified to administer oaths in the place where the deposition is to be taken. On the arrival of the deponent, the officer can make the necessary telephone connections and when the parties to be represented at the taking of the depositions are on the line, can swear the deponent and record the testimony.

4A Moore's Fed. Prac. Para. 30.57[15] at 30-126, n.5 (1988).