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# DUE PROCESS IMPLICATIONS OF TELEPHONE HEARINGS: THE CASE FOR AN INDIVIDUALIZED APPROACH TO SCHEDULING TELEPHONE HEARINGS

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*As the executive branch shrinks and reduces expenditures, its adjudicative functions adjust to the new fiscal reality. Telephone hearings are, therefore, increasingly being used in order to control costs. This Article examines the impact of telephone hearings on the due process elements of unemployment compensation "fair" hearings. The Authors review the applicable federal and state law and find that there is no absolute bar to using the telephone to conduct administrative hearings. They test the empirical effect of the telephone on hearings in California and Maine. Their analysis of hundreds of hearings indicates that parties to telephone hearings are less likely to exercise their rights to submit evidence through witnesses and documents than are parties to in-person hearings. The Authors caution that it is critical to balance the interests of cost savings with the rights of the parties to the proceedings. Failure to do so may result in successful court challenges to this practice.*

## WINDSWEPT

The wind whipped the blowing snow into a torrent of white fog, engulfing the car that Sandy Kirk drove up and down the

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hills of northern Maine. It was just her luck, she thought, to be assigned hearings 250 miles from home during the week between Christmas and New Year's Day.

The tractor-trailers sailed by her on the two-lane highway. They transformed fluffy snow on the road into black ice. She needed to concentrate if she wanted to make it home.

She thought back to how she had handled the last hearing of that day. John Shields, a claimant, had called three hours before his hearing to find out whether it would be cancelled. He told her that he lived ten miles from the hearing site and did not think it was safe to drive. The wind chill factor was fifty to seventy degrees below zero and he did not want to be stranded on an unplowed road. He told her that the state police were advising against any "unnecessary" driving.

Sandy offered to take Mr. Shields's testimony by phone. He asked her whether she would consider the twenty-five pages of documents proving that he did not embezzle money from the convenience store that he had managed. Sandy told him that she would not be able to consider them unless she could review them at the hearing. What she did not say is that she did not want to make a finding that he did or did not embezzle over \$1000 from the cash register based solely on telephone testimony.

The time came for the hearing. When Sandy called for the parties in the lobby, Mr. Shields and an agent for the employer stood up. After Sandy started the hearing, the agent explained that his client, Greg Irons, the vice president of the company, was waiting to be telephoned in Florida, where he was on vacation.

Sandy tried not to show any emotion, but she felt terrible. She had made Mr. Shields drive in this dangerous weather in order to plead his case in person, while Mr. Irons could pick up a telephone in his Florida hotel room. What should she do? The case was not scheduled as a telephone hearing. Mr. Shields had brought his twenty-five pages of documents, which the vice president would not be able to question.

But now, after the hearing, Sandy turned her thoughts again to the road and the weather. She had no time to dwell on the hearing; she had to get home safely.

## INTRODUCTION

The challenge in deciding whether to conduct a hearing by telephone lies in ensuring that individual rights are not compromised. Economic factors will influence the decision, but the decision should be individualized, with the due process rights of the parties as the primary concern.

Sandy's story presents common dilemmas for hearing officers and their managers who schedule telephone hearings:

- Is it appropriate to take telephone testimony from one side for that party's convenience?
- How can documents be admitted if they have not been distributed to the parties before the hearing?
- How much weight should poor weather conditions be given when it makes a telephone hearing more convenient for the hearing staff?
- Are telephone hearings more advantageous to one party because witnesses or documents are less likely to be available in telephone hearings?
- Should the seriousness of the allegations, i.e. felony crime, weigh in favor of an in-person hearing?

This Article attempts to provide a framework to answer these and other questions regarding telephone hearings. It examines the due process implications of conducting unemployment compensation hearings in whole or in part by telephone. Part I presents a framework for a due process analysis of hearings by telephone and examines the relevant federal case law pertaining to the use of teleconferencing in administrative hearings. Part II includes an analysis of state cases that have considered challenges to telephone hearings. Parts III, IV, V, and VI of the Article present the results of a statistical survey conducted in Maine and California for the purpose of comparing in-person hearings with telephone hearings. The statistical survey measured such factors as the nonappearance rate for parties, the rates of representation, the numbers of

witnesses testifying, the extent of documentary evidence production, the rates of reversal for both claimants and employers, and the rates of appeal to the higher authority. The Article concludes with recommendations for the use of telephone hearings in unemployment compensation appeals.

### *Background*

Unemployment compensation hearings are conducted by telephone for a variety of reasons. In many instances, the claimant has moved away from the area in which he was employed and files a claim for benefits in the new location. In such a situation, the hearing will be conducted in the location where the claim was filed, with the claimant appearing in person and the employer participating by telephone. When the claimant has moved out of state, both parties will appear by telephone.

Frequently, parties scheduled to appear at a hearing in person will, upon receiving the hearing notice, request to appear by telephone. In other situations, a party will appear in person but request that a witness be allowed to testify by telephone. When these requests are received in advance of the hearing, the hearing officer can determine whether such an appearance would be appropriate and rule accordingly. When a party initially makes the request at the time of the hearing, however, the decision is not that simple, as Sandy's case illustrates.

Originally, teleconferencing began as an outgrowth of "split hearings," that is, situations where a hearing was held for the claimant in one location and a separate hearing was held for the employer in a different location. The use of teleconferencing made it possible for the opposing parties in each location to question each other, rather than to rely on the presence of a referee at each hearing.<sup>1</sup> California pioneered this procedure, and it received judicial approval with *Slattery v. California Unemployment Insurance Appeals Board*.<sup>2</sup> In *Slattery*, the claimant was discharged from her employment in

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1. See *Slattery v. California Unemployment Ins. Appeals Bd.*, 131 Cal. Rptr. 422, 424 n.4 (Cal. Ct. App. 1976).

2. 131 Cal. Rptr. 422 (Cal. Ct. App. 1976).

Los Angeles and subsequently relocated to Eureka, California. She was awarded unemployment insurance benefits, and the employer appealed. In accordance with then-existing Appeals Board regulations, simultaneous hearings were scheduled for the claimant in Eureka and for the employer in Los Angeles. The claimant was the only witness at the hearing in Eureka. Two witnesses testified for the employer in Los Angeles. Pursuant to the Appeals Board's usual practice, the referee who conducted the Los Angeles hearing made the decision. That referee reversed the Department's determination and ruled in favor of the employer. The Appeals Board affirmed the decision.<sup>3</sup>

Before the court of appeals, the claimant contended that the Appeals Board failed to inform her of authorized procedures, such as telephone hearings, that would have permitted her to examine opposing witnesses and rebut unfavorable evidence at the Los Angeles hearing.<sup>4</sup> The court noted that the governing statute authorized the Appeals Board to adopt rules governing claims and appeals.<sup>5</sup> Pursuant to this statute, the Appeals Board had adopted regulations regarding the conduct of hearings.<sup>6</sup> The California Code of Regulations contains a general due process regulation providing that parties have the right to confront hostile witnesses and to rebut opposing evidence.<sup>7</sup> The Appeals Board did not sufficiently inform the claimant in *Slattery* that these were her rights.<sup>8</sup> The regulations, as written at the time *Slattery* was decided, also provided that, in situations where it was impractical for parties to appear at the same place for a hearing, a hearing for each party would be scheduled

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3. *Id.* at 423.

4. *Id.*

5. *Id.* at 424; *see also* CAL. UNEMP. INS. CODE §§ 411, 1951 (West 1986).

6. *Slattery*, 131 Cal. Rptr. at 424.

7. CAL. CODE REGS. tit. 22, § 5038(b) (1995), provides in part as follows:

Each party shall have these rights: to call and examine parties and witnesses; to introduce exhibits; to question opposing witnesses and parties on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called the witness to testify; and to rebut the evidence against him or her.

*Id.*

8. *Slattery*, 131 Cal. Rptr. at 425.

as nearly simultaneously as possible.<sup>9</sup> The Appeals Board did not follow this regulation, and the claimant was unaware of this procedure.<sup>10</sup>

In reversing the Appeals Board, the court of appeals noted that the claimant did not receive the adversarial hearing that the Board's own rules and practices authorized and to which the claimant was entitled.<sup>11</sup> In dicta, the court commented favorably upon conferenced telephone hearings and noted that such hearings were "an imaginative attempt to solve the due process problems which inhere in the simultaneous hearing concept."<sup>12</sup> The court further noted: "The Board has devised a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing: the opportunity to cross-examine adverse witnesses and to rebut or explain unfavorable evidence."<sup>13</sup>

Before the use of telephone hearings became common, split hearings were often employed in interstate claims.<sup>14</sup> Interstate claims arise when a claimant who has worked for an in-state employer moves out of state and then claims unemployment compensation benefits based on benefit credits that accrued in the first state.<sup>15</sup> A hearing officer from the "agent state" (the

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9. *Id.* at 424. The court quoted then-existing CAL. CODE REGS. tit. 22, § 5041:

Where "because of the distance involved . . . , it is impracticable for parties . . . to appear at the same place of hearing, a hearing for each party will be scheduled . . . as nearly simultaneously as possible." If simultaneous hearings are scheduled, "parties may submit questions to the referee to be asked of the opposing party, . . . in writing . . . prior to the hearing."

*Id.* (citations omitted).

10. *Id.* at 425.

11. *Id.* at 423-24.

12. *Id.* at 424.

13. *Id.* at 425.

14. Jerome R. Corsi & Thomas L. Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 31 ADMIN. L. REV. 247, 249 (1979). Corsi and Hurley argue that the telephone was a development of modern technology that unemployment insurance appeals tribunals underutilized in the face of less desirable alternatives such as the split hearing procedure. *Id.* at 248. The article incorporated a survey of California administrative law judges who were found to be, in general, favorably inclined toward the use of the telephone in appropriate situations. *Id.* at 270.

15. See Mark D. Esterle, *Interstate Claims: Their History and Their Challenges*, 29 U. MICH. J.L. REF. 485, 485 (1996). Claimants who are absent from the states in which their benefit credits have accrued typically may apply for benefits, have their eligibility for benefits determined, participate in appeals hearings, and receive benefit payments. See, e.g., CAL. CODE REGS. tit. 22, §§ 455-1 to 455-9 (1995).

state to which the claimant has moved) would conduct the claimant's hearing, and a hearing officer from the "liable state" (the state from which the claimant had moved) would conduct a separate hearing with the employer.<sup>16</sup> A transcript or tape of each of the hearings would then be sent to the other party for comment or rebuttal before the case would be submitted for decision to the liable state's hearing officer.<sup>17</sup> The disadvantages of such systems were apparent and numerous.<sup>18</sup> Frequently, the agent state's hearing officer was not sufficiently familiar with the liable state's statutes, regulations, precedents, and case law.<sup>19</sup> Thus, much superfluous information might be obtained or a relevant matter not developed.<sup>20</sup> The system allowed for only an indirect opportunity to examine opposing witnesses—a party never confronted the other directly, but could only comment on or rebut testimony based on a review of the tape or transcript. Neither side had the advantage of knowing the testimony of the other side prior to giving testimony. No single hearing officer heard all of the testimony or had the opportunity to question both sides.<sup>21</sup> Additionally, in interstate hearings, the hearing officer who heard the employer's in-person testimony generally also rendered the decision, a situation seen as favoring the employer.<sup>22</sup> In fact, as the *Slattery* court noted, the hearing officer from the liable state decided cases of this type on the basis of what was, in effect, a pretrial deposition from the claimant and a "live" evidentiary hearing at which only the employer's unimpeached and uncontradicted witnesses would testify.<sup>23</sup>

### *Current Developments*

Telephone hearings are superior in many ways to the split hearing procedure of years past.<sup>24</sup> Both parties to a telephone

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16. Corsi & Hurley, *supra* note 14, at 249.

17. *Id.*

18. *Id.* at 250–51.

19. *Id.* at 251.

20. *Id.*

21. *Id.*

22. *Id.* at 252.

23. *Slattery v. California Unemployment Ins. Appeals Bd.*, 131 Cal. Rptr. 422, 425 (Cal. Ct. App. 1976).

24. See, e.g., Corsi & Hurley, *supra* note 14, at 252. Other articles on the subject of telephone hearings include Jerome R. Corsi et al., *Major Findings of the New Mexico*



hearing can be heard by a single hearing officer and can confront, rebut, or impeach unfavorable evidence. Telephone hearings allow for a generally effective right of confrontation, because each party is present before the hearing officer when the other party presents its case.<sup>25</sup>

The telephone hearing procedure is now used to some extent in all unemployment insurance jurisdictions. In most states, approximately twenty percent of hearings proceed with at least one party appearing by telephone. In some states, including Michigan, New York, Rhode Island, and South Carolina, the percentage is lower. In New York, for example, less than fifteen percent of hearings involve the use of a telephone, including the testimony of non-party witnesses. In other states, however, the percentage is significantly higher. These states include the large, sparsely populated states of Alaska, Idaho, Montana, New Mexico, North Dakota, and South Dakota. They also include smaller states such as Iowa and Vermont.<sup>26</sup>

Many factors may be considered in determining whether to schedule a hearing by telephone or in person. As noted earlier, telephone hearings are clearly preferred in situations in which the parties are located in different communities.<sup>27</sup> The trend among the states today is toward increasing the use of telephone hearings, without regard to geographic factors.<sup>28</sup> States generally cite economic reasons to explain this trend; indeed, telephone hearings present some economic advantages over in-person hearings. For example, such hearings enhance available calendar time and hearing officer productivity because they require less travel. Furthermore, hearings can be conducted out of a centralized office, thus eliminating the need to lease out-station hearing facilities. In an all-telephone environment, even hearing rooms can be eliminated, because hearings can be conducted from the hearing officer's desk.

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*Experiment of Teleconferenced Administrative Fair Hearings*, 38 U. MIAMI L. REV. 647 (1984); Jerome R. Corsi & Thomas L. Hurley, *Pilot Study Report on the Use of the Telephone in Administrative Fair Hearings*, 31 ADMIN. L. REV. 485 (1979).

25. Corsi & Hurley, *supra* note 14, at 252.

26. Telephone Interview with Jack Bright, Appeals Specialist, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor (Feb. 5, 1996).

27. See *supra* notes 12-13 and accompanying text.

28. In 1994, for example, Oregon and Texas began hearing over 90% of their appeals by telephone. See Telephone Interview with Jack Bright, *supra* note 26.

Telephone hearings entail costs of their own, however. There is, of course, the expense of the call itself, and lengthy, multi-party conference calls are costly. If the available telephone equipment does not have conferencing capability, operator assistance must be obtained, which adds to the expense. In addition, telephone hearings may result in a higher percentage of appeals to the higher authority.<sup>29</sup> This factor alone can offset any savings. Because the parties will not be physically present, the file must be duplicated and mailed to them in advance of the hearing, thereby increasing staffing and postage expenses. Costs for duplicating and telecommunications equipment are significant. Finally, telephone hearings may generate higher-authority remands because of faulty recordings.

Costs aside, the question is raised as to what, if anything, is sacrificed in a telephone hearing, as opposed to in-person hearings. For example, many nonverbal cues inherent in an in-person hearing can play no role in hearings conducted via telephone. These cues can provide information as to the relationship between the parties; for example, they can signify either cooperation and mutual respect or hostility and mistrust. The manner in which a witness presents herself can influence how the hearing officer will formulate questions and evaluate responses. In other words, the general physical appearance of a party or witness, together with the regard that she shows others present at the hearing, naturally allows the hearing officer to tailor the hearing and enables communication on a multidimensional level. None of this information is available in a telephone hearing. In fact, a hearing officer might consider a tone of voice to be angry, hostile, or uncertain, but might have perceived it very differently had the hearing officer seen the witness.

These factors can and do affect the quality of the evidence produced in the course of a hearing. Because the hearing officer does not receive the information provided by nonverbal cues, she may miss opportunities to develop communication with the parties. Ultimately, loss of these cues can diminish the evidentiary base upon which the hearing officer exercises her judgment.

Apparently, however, the telephone format does not adversely affect the hearing officer's ability to evaluate witness credibility. The opportunity to observe the manner and demeanor

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29. See discussion *infra* Part VI.

of a witness while testifying has long been considered almost sacrosanct in evaluating witness credibility.<sup>30</sup> In recent years, however, several commentators have taken exception to this principle. Basing their opinions on studies by psychologists and other social scientists, they have concluded that demeanor based on visual observation is, in and of itself, generally not useful in determining witness credibility.<sup>31</sup> In fact, one commentator has concluded that all demeanor evidence, including auditory cues, is essentially worthless.<sup>32</sup> Moreover, no court has stated flatly that a hearing can be fair only if it is face-to-face. The majority of courts addressing the issue tends to find that observation of demeanor is not essential to a fair hearing because the fact finder has other tools available for determining credibility.<sup>33</sup> Indeed, the intrinsic value of the testimony itself rather than the manner in which the witness delivers it remains a far better ground upon which to base credibility determinations. In short, as stated above, the loss of nonverbal cues can ultimately diminish the evidentiary base of a given hearing. We believe, however, that the absence of visual demeanor evidence, in and of itself, does not significantly impact a hearing officer's ability to make accurate determinations.

Telephone hearings diminish the evidentiary base in other areas as well. For example, although telephone hearings generally protect a party's right of confrontation, they may hinder them instead. Available evidence indicates that a party's right to representation, to submission of documentary evidence, and to subpoena and call witnesses might be compromised in the telephone hearing procedure.<sup>34</sup> In determining whether telephone hearings could go so far as to violate a claimant's due process rights, this Article first presents issues of due process in unemployment compensation hearings.

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30. See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988) (noting that the right to a face-to-face confrontation "ensur[es] the integrity of the fact-finding process"); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952) (noting that demeanor evidence can serve as an "excellent clue to the trustworthiness of testimony").

31. E.g., Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1200 (1993); Margaret A. Lareau & Howard R. Sacks, *Assessing Credibility in Labor Arbitration*, 5 LAB. LAW. 151, 175 (1989); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS. 243, 245 (1988); Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1104 (1991).

32. Wellborn, *supra* note 31, at 1091. But see Blumenthal, *supra* note 31, at 1203 n.288 (criticizing this conclusion as too extreme).

33. See discussion *infra* Part II.B.

34. See discussion *infra* Part II.C.

## I. FRAMEWORK FOR DUE PROCESS ANALYSIS OF TELEPHONE HEARINGS

### A. *The Process Due to Parties*

A claimant must have an opportunity for a “fair hearing” if a state denies her unemployment compensation benefits.<sup>35</sup> In other words, before a claimant may be deprived of her property, due process requires that she receive “notice and opportunity for hearing appropriate to the nature of the case.”<sup>36</sup> The United States Supreme Court has not addressed specifically whether the use of telephone conference hearings may constitute a fair hearing before deprivation of the right to unemployment benefits. The Court, however, has measured many other administrative procedures against the constitutional standard.<sup>37</sup>

The challenge in applying due process is its inherent variability. The Court has stated:

For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. “[U]nlike some legal rules,” this Court has said, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.<sup>38</sup>

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35. 42 U.S.C. § 503(a)(3) (1994). There is no corresponding federal statutory right for an employer whose unemployment insurance tax is increased because a claimant receives benefits.

36. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

37. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (holding that documentary review of social security disability filed prior to termination satisfies the due process requirement); *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (holding that written medical reports may be received in evidence in social security disability termination hearings); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (holding that written correspondence and personal conference with a caseworker prior to termination of welfare benefits is not constitutionally deficient notice).

38. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24–25 (1981) (citations omitted).

The Social Security Act specifically provides for fair hearings:

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for . . . [s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and . . . [o]ppportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . .<sup>39</sup>

In 1971, the Supreme Court considered whether the statutory protections of the Social Security Act sufficiently served for due process purposes. In *California Department of Human Resources Development v. Java*,<sup>40</sup> the plaintiffs argued that California denied them due process of law by cutting off benefits when a former employer appealed an initial grant of benefit payments to claimants.<sup>41</sup> The Court found it unnecessary to reach the question of whether a delay in payment to claimants constitutes a denial of due process.<sup>42</sup> Nevertheless, it identified the interest of those who rely upon unemployment benefits:

A kind of "need" is present in the statutory scheme for insurance, however, to the extent that any "salary replacement" insurance fulfills a need caused by lost employment. The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish. The circumstances surrounding the enactment of the statute confirm this.<sup>43</sup>

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39. 42 U.S.C. § 503(a) (1994).

40. 402 U.S. 121 (1971).

41. *Id.* at 123.

42. *Id.* at 124.

43. *Id.* at 130. This interest is one of the three considerations that must be weighed in determining whether a procedure passes constitutional muster under the due process standard of *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *infra* notes 53–59 and accompanying text.

The Court concluded that the Social Security Act mandates that there be no unreasonable delay in the payment of unemployment benefits.<sup>44</sup> Motivated by *Java*, the United States Department of Labor established a single procedural standard: that all appeals affecting benefit rights are “heard and decided with the greatest promptness that is administratively feasible.”<sup>45</sup> A legitimate question is whether a singular concern for the speed of disposition has adversely affected other procedural protections. Using telephone hearings certainly accelerates dispositions, but does it satisfy other due process protections?

A year earlier, in *Goldberg v. Kelly*,<sup>46</sup> the Supreme Court had addressed the issue of what process is due to welfare recipients who face termination of benefits. The Court first identified the interest of the welfare recipient in the government decision to terminate benefits: “[A] welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . “brutal need” without a prior hearing of some sort is unconscionable . . . .”<sup>47</sup> The Court stated that “[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’”<sup>48</sup> The Court went on to establish the minimum procedural safeguards which must be met prior to terminating the ability to obtain these necessities, including the following:

- the right to timely and adequate notice of the basis for termination;

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The Court reaffirmed this protection from loss of unemployment benefits in *Fusari v. Steinberg*, 419 U.S. 379 (1975). Although the *Fusari* Court found it unnecessary to rule on whether Connecticut’s practice of seated interviews to determine continued eligibility violated the unemployment compensation claimant’s due process rights because the procedures had been changed while the case was pending, the Court nevertheless noted the due process implications of the case:

Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action . . . . In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests.

*Id.* at 389 (citations omitted).

44. See *Java*, 402 U.S. at 133.

45. 20 C.F.R. § 650.1(a) (1995).

46. 397 U.S. 254 (1970).

47. *Id.* at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 899, 900 (S.D.N.Y. 1968)).

48. *Id.* at 262–63.

- the opportunity to defend against the reason for termination;
- the opportunity to confront adverse witnesses;
- the opportunity to present arguments and evidence orally;
- the opportunity to cross-examine witnesses;
- the opportunity for representation by counsel;
- the right to a reasoned decision stating the evidence upon which it relied; and
- the right to an impartial decision maker.<sup>49</sup>

In *Goldberg*, the Court stated the minimum requirements that must be met before a person's welfare benefits could be terminated, essentially establishing the requirements of a full adversarial hearing. A few years later, in *Mathews v. Eldridge*,<sup>50</sup> the Court was faced with the similar circumstances of a social security disability recipient whose benefits had been terminated.<sup>51</sup> Pursuant to the disability benefits scheme, the recipient's medical information was reviewed, and his benefits were terminated based on it. The recipient received a copy of this information and was given an opportunity to respond to it in writing.<sup>52</sup> The Court responded very differently to this situation, however.

Rather than adopt the *Goldberg* minimum standards for this type of proceeding, the *Mathews* Court adopted a three-part balancing approach. The first part of the test considers the private interest that will be affected. The Court did not find the same "brutal need" as in *Goldberg* because the disability recipients have the "option" of applying for benefits through other social welfare programs.<sup>53</sup> The second part of the test

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49. *Id.* at 267-71.

50. 424 U.S. 319 (1976).

51. *Id.* at 323.

52. *Id.* at 335-38.

53. *Id.* at 340-43. Justice Brennan, in his dissent, criticized this distinction, maintaining that it was difficult to distinguish recipients who are totally dependent on social security benefits for food, housing, and medical care, from those receiving welfare benefits. *Id.* at 350 (Brennan, J., dissenting).

analyzes the risks of erroneous deprivation of the private interest identified in the first part, through the procedures used and the value of additional safeguards.<sup>54</sup> The final part of the test focuses on the cost to the agency in time, resources, and money for additional procedural protection.<sup>55</sup> This final consideration takes into account the costs of additional procedures and of providing benefits to ineligible recipients pending decision.<sup>56</sup> The Court recognized that terminated recipients have a right to a fair hearing before an administrative law judge.<sup>57</sup> It considered the percentage of reversals and the likelihood of recovery of benefits: "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."<sup>58</sup>

The *Mathews* test presents a flexible approach, in keeping with traditional concepts of due process. It strikes a compromise between competing interests of accuracy and efficiency, a compromise that is at least fundamentally fair to the individual. The test establishes the minimum level of protection to which the individual is entitled when the state exercises power over the individual's rights of life, liberty, and property.<sup>59</sup>

### *B. Application of the Mathews Three-Part Test*

As a procedure for resolving a disputed claim, the telephone hearing is simply another technique that must pass the *Mathews* three-part test. No federal appellate court has addressed the constitutionality of telephone hearings. In two recent United States court of appeals cases, however, the courts

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54. *Id.* at 343–47.

55. *Id.* at 347–48.

56. *Id.*

57. *Id.* at 349.

58. *Id.* at 348.

59. Courts must apply the *Mathews* analysis to determine whether a procedure for withdrawal of public benefits meets due process standards. *Id.* at 335. However, the states have nearly uniformly dispensed with distinctions among programs by enacting legislation that incorporates the *Goldberg* standards of formal adjudication. See MODEL STATE ADMIN. PROCEDURE ACT §§ 4-201 to 4-221, 15 U.L.A. 7, 74–98 (1981); MODEL STATE ADMIN. PROCEDURE ACT § 9, 15 U.L.A. 137, 207–08 (1961). More than half of the states have an administrative procedure act based on either the 1961 or 1981 Model Acts. Preface to MODEL STATE ADMIN. PROCEDURE ACT (1981), 15 U.L.A. 1 (1990 & Supp. 1995).



used the flexible analysis of *Mathews* to determine that certain state unemployment compensation hearing procedures did not meet due process standards.<sup>60</sup> In so doing, the courts favored the claimants' rights over claims of convenience of cost and administration.

First, in *Shaw v. Valdez*,<sup>61</sup> the plaintiffs challenged the adequacy of the notice of the issues to be considered at their hearings. Colorado had provided only a boilerplate notice listing all possible issues and argued that administrative burdens precluded more detailed notice.<sup>62</sup> The court responded:

[W]e are not persuaded by the consideration that the volume of appeals in such cases required expeditious proceedings, without a more specific notice. The State could afford a fair hearing premised on fair notice by a brief statement of particular factual and legal points to be raised at the hearing, and here the protest letter itself could have been furnished with a warning to the parties that there would be no "issue switching" at the hearing.<sup>63</sup>

Colorado's arguments that the procedure was entrenched and saved money were not enough to justify its procedural devices.<sup>64</sup> Instead, courts evaluate a state's administrative convenience arguments on an objective basis: What are the costs of additional notice procedures that would assist the parties' understanding of the issues? Are there different means of providing notice to the party?<sup>65</sup>

In the second case, *Cuellar v. Texas Employment Commission*,<sup>66</sup> the United States Court of Appeals for the Fifth Circuit found that the plaintiff had alleged sufficient facts to state a constitutional due process claim. Here, the state refused to grant a continuance so that the plaintiff could subpoena a reasonably unanticipated witness, upon whose affidavit the referee relied in disqualifying plaintiff from receiving benefits.<sup>67</sup> *Cuellar* presented the issue as to "whether and under what

60. *Cuellar v. Texas Employment Comm'n*, 825 F.2d 930 (5th Cir. 1987); *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987).

61. 819 F.2d 965 (10th Cir. 1987).

62. *Id.* at 969-70.

63. *Id.* at 970.

64. *Id.*

65. *See id.*

66. 825 F.2d 930 (5th Cir. 1987).

67. *Id.* at 939.

circumstances cross-examination of adverse affiants is required at a disqualification hearing, once provided by the State, before an unemployment benefit referee."<sup>68</sup> The district court found that the state's refusal to provide a subpoena was reasonable, basing its decision, in part, on "the government's interest in hearing all available evidence at the time set for the hearing."<sup>69</sup>

The court of appeals ordered the district court to determine the "precise magnitude of the interests involved to the extent necessary to resolve the issues presented in this case. The district court may be required to determine [under what circumstances] a claimant possesses a general confrontation right" if she ever does.<sup>70</sup>

*Mathews, Shaw, and Cuellar* demonstrate that administrative convenience, efficiency, and cost savings are not complete defenses to due process claims against telephone hearings or other procedures that limit the basic hearing rights enumerated in *Goldberg*. Federal courts will keep an open mind when approaching challenges to state hearing procedures.

## II. ANALYSIS OF STATE CHALLENGES TO TELEPHONE HEARINGS

As noted in the Introduction, taking testimony by telephone represents a relatively new development in the judicial and quasi-judicial systems.<sup>71</sup> Although claimants have challenged the practice on constitutional due process grounds, state courts generally have either supported the use of telephone hearings when they are conducted with sufficient procedural safeguards, or have bypassed the due process issues by denying the appeal on other grounds.

In general, courts that have considered these issues have made narrow fact-specific holdings, often on grounds other than due process. Courts have not specifically addressed all of the fair hearing requirements. An analysis of various state courts' responses to a variety of those issues follows.

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68. *Id.* at 936.

69. *Id.* at 934.

70. *Id.* at 939.

71. See *supra* text accompanying notes 2, 24–34.

*A. Waiver by Absence of Timely Objection:  
Focus on Pennsylvania*

Courts commonly evade due process analysis by finding that the issues raised on appeal are not properly before them. Consistent with appellate procedure in general, a number of courts hold that failure to object to the telephonic hearing at the administrative level results in waiver of that issue on appeal. In other cases, the absence of objection appears irrelevant where the court finds that issues of fundamental fairness are at stake.

The Commonwealth Court of Pennsylvania has had extensive exposure to issues raised by telephone hearings.<sup>72</sup> The reasoning of the commonwealth court, however, produces inconsistent results and appears to depend, at least somewhat, upon results-oriented analysis.

In *Chobert v. Commonwealth Unemployment Compensation Board of Review*,<sup>73</sup> the Commonwealth Court of Pennsylvania clearly set forth their standards for telephone hearings:

We do not condemn the practice of conducting administrative hearings or the examination of witnesses by telephone conference call; but such hearings and examinations must comport with fundamental fairness guaranteed by the due process clause, with the statutory requirement of a fair hearing in unemployment compensation hearings, and with the board's regulations to the same effect . . . .<sup>74</sup>

In *Chobert*, both parties appeared in person at the referee's hearing and neither party was represented by counsel.<sup>75</sup> During the hearing, the referee telephoned one of the employer's witnesses to inquire about the claimant's work habits, without informing the claimant in advance that this witness would be contacted. The telephone witness offered other reasons for the claimant's discharge, testifying, in part, from documents that

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72. Research disclosed relatively few reported state cases on the due process implications of telephone hearings. Of the thirty-six reported cases, twelve emerged from the Commonwealth Court of Pennsylvania.

73. 484 A.2d 223 (Pa. Commw. Ct. 1984).

74. *Id.* at 225 (footnote omitted).

75. *Id.* at 224.

were not available to the claimant. The claimant denied the allegations of the telephone witness.<sup>76</sup> The referee found that the claimant was discharged for the reasons asserted by the telephone witness and denied benefits.<sup>77</sup> The Board adopted the referee's findings and affirmed the referee's decision.<sup>78</sup>

The case does not indicate whether the claimant objected to the telephone testimony below. Regardless, the commonwealth court found that

[c]learly, it was unfair to the uncounseled claimant and contrary to law to permit the company president to testify by telephone from records not available to the claimant to use in cross-examination. . . . The right of due process includes the opportunity of a party to confront and cross-examine adverse witnesses. In this case, the examination having been by telephone, no one at the hearing could know whether the document the company president referred to was used by him to refresh his memory or to introduce as past recollection recorded. If it was for refreshment, the claimant was entitled to have it to refer to in cross-examin[ation]; if it was past recollection recorded, it must have been proved to be accurate and offered into evidence.<sup>79</sup>

A few months later, in *German v. Commonwealth Unemployment Compensation Board of Review*,<sup>80</sup> the commonwealth court again considered an unemployment compensation case that had been decided based upon the testimony of one telephone witness who referred to a document that was not part of the record of the hearing. Unlike *Chobert*, however, *German* was marred by a procedural error. In *German*, the claimant appealed a decision and order of the Board of Review affirming a referee's denial of benefits.<sup>81</sup> The claimant was represented by a paralegal. A private investigator testified by telephone without prior notice to the claimant, and referred to his written reports, which were not entered into evidence. On appeal, the claimant argued that the credibility of the witness appearing by telephone could not be assessed and that the witness's

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76. *Id.* at 224–25.

77. *Id.* at 225.

78. *Id.*

79. *Id.* (citations omitted).

80. 489 A.2d 308 (Pa. Commw. Ct. 1985).

81. *Id.* at 309.

testimony given with the aid of a written report unavailable to the claimant should be treated as hearsay. The paralegal representing the claimant at the hearing had not objected to either the telephonic nature of the testimony or the use of reports that were not part of the record.<sup>82</sup>

The court affirmed the decision of the Board, stating only that the claimant's representative was given the opportunity to object to both the telephone hearing and the use of the reports, and her failure to do so resulted in waiver of the issues.<sup>83</sup> The court therefore found that there was substantial evidence to support the Board's decision.<sup>84</sup>

*German* can be distinguished from *Chobert* in a number of respects. In *Chobert*, the claimant was unrepresented, while in *German* the claimant was represented by a paralegal.<sup>85</sup> In *Chobert*, the witness apparently did not have direct knowledge of the events to which he was testifying and relied on documents that were not offered as evidence.<sup>86</sup> In contrast, the witness in *German* was an actual witness to the events about which he testified.<sup>87</sup> Although the witness in *German* may have referred to a report he prepared based upon his observation, the witness had personal knowledge of the events described.<sup>88</sup> These factual distinctions make the court's apparently contradictory actions appear as reasonable decisions based upon the particular circumstances of the cases.

Interestingly, although the court in *German* held that the claimant waived any objection to the telephone hearing process, it also noted that it could not locate any authority enabling the Board to conduct hearings by telephone.<sup>89</sup> The court thus set the stage for its next round of cases dealing with telephone hearings.

Less than a year after deciding *German*, in *Knisley v. Commonwealth Unemployment Compensation Board of Review*,<sup>90</sup> the commonwealth court vacated and remanded a decision reached in a telephone hearing. The claimant had objected to that form

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Compare Chobert*, 484 A.2d at 224 with *German*, 489 A.2d at 309.

86. *See Chobert*, 484 A.2d at 224.

87. *See German*, 489 A.2d at 309.

88. *Id.*

89. *Id.* at 309 n.3.

90. 501 A.2d 1180 (Pa. Commw. Ct. 1985).

of hearing, and the court found that there were no properly promulgated regulations on telephone hearings to "safeguard the minimum due process rights of the parties and also insure that the hearings are conducted uniformly by the referees."<sup>91</sup> The claimant's hearing before a referee had included taking testimony of a key witness for the employer by telephone.<sup>92</sup>

The *Knisley* court expressed concern about potential areas of abuse "inherent in telephonic hearings."<sup>93</sup> Among the court's concerns was the possibility of witnesses fraudulently misrepresenting their identities at such proceedings and witnesses referring to records that had not been admitted to the hearing record or disclosed to the opposing party.<sup>94</sup> Nothing in the decision of this case suggested that any of the court's concerns had, in fact, been realized previously.<sup>95</sup> Nonetheless, the court mandated the implementation of safeguards that would insure that the hearings would comport with the fundamental fairness guaranteed by the Due Process Clause.<sup>96</sup> It further ordered that until such time as the regulations were adopted, "evidence obtained via telephone, if properly objected to, will be stricken from the record."<sup>97</sup>

Following *Knisley*, at least two other Pennsylvania cases were summarily resolved based upon the Board of Review's failure to promulgate regulations concerning telephone hearings, coupled with a timely objection to telephone testimony.<sup>98</sup> In *Sherman v. Commonwealth Unemployment Compensation Board of Review*,<sup>99</sup> the claimant appealed a decision of the Office of Employment Security. At the referee's hearing the employer testified by telephone. The claimant's attorney timely objected to the taking of testimony by telephone, but to no avail. The referee affirmed the decision of the Office of Employment Security, and the claimant appealed to the Board of Review. The Board remanded the matter to give the employer an opportunity to present in-person testimony, but the employer

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91. *Id.* at 1182.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.*

98. *E.g.*, *Sherman v. Commonwealth Unemployment Compensation Bd. of Review*, 539 A.2d 23, 25 (Pa. Commw. Ct. 1988); *Weston v. Commonwealth Unemployment Compensation Bd. of Review*, 520 A.2d 953, 954 (Pa. Commw. Ct. 1987).

99. 539 A.2d 23 (Pa. Commw. Ct. 1988).

was unavailable for the remanded hearing and requested a continuance. The referee decided the case without evidence from the employer, but because the employer requested a continuance, the Board again remanded the matter to the referee for a second hearing.<sup>100</sup>

At the second remanded hearing, the employer's representative testified that he had been provided a copy of the transcript of the original telephonic hearing and that he had no additional testimony. The employer presented no further evidence. The claimant renewed his objection to the use of any testimony elicited during the telephonic hearing as violative of *Knisley*, but the Board ultimately issued a decision denying benefits. The claimant appealed on the grounds that the decision denying him benefits was based largely upon telephonic hearing evidence to which he had objected.<sup>101</sup>

The *Sherman* court agreed with the claimant, stating that *Knisley* compelled the decision that testimony provided at the original telephone hearing could not be reaffirmed by the employer's witnesses, because it was not properly on the record.<sup>102</sup> Without testimony from the witness who appeared by telephone, the court found that there was no evidence to prove the claimant's misconduct and therefore reversed the decision of the Board.<sup>103</sup>

Nowhere in its decision did the court indicate what, if anything, was objectionable about the telephone testimony. The mere fact of its existence, combined with the claimant's timely objection to it, rendered the testimony improper.<sup>104</sup> The claimant made no suggestion that the testimony was adduced by a fraudulent witness, or that the witness was coached or improperly referred to documents not on the record. Nothing in the decision suggests that counsel did not have a full opportunity to examine or cross-examine witnesses or that there was any concern regarding any witness testifying by telephone who referenced documents not part of the record.

In light of *Knisley*, the only reason for the court's decision was to sanction the agency for failing to promulgate regulations, regardless of whether the actual telephone hearing in this case presented any genuine due process issues. In fact, the

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100. *Id.* at 24.

101. *Id.* at 24-25.

102. *Id.* at 25.

103. *Id.*

104. *Id.*

court scoffed at the suggestion that the absence of substantive concerns should cause it to change its decision.<sup>105</sup> It stated:

Whether strategic or substantive, the claimant's continuing objection to the submission of evidence adduced at the telephonic hearing was correct. It was the employer's duty to present testimony at the first or second remand hearing that would carry the burden of proving willful misconduct on the part of the claimant. The employer did not do so, but instead relied upon the testimony which was given at the telephonic hearing.<sup>106</sup>

In *Weston v. Commonwealth Unemployment Compensation Board of Review*,<sup>107</sup> the claimant appealed an order of the Board of Review, which affirmed, without taking further testimony, the referee's denial of unemployment benefits. The referee had based his decision on a finding of willful misconduct on the part of the claimant. The claimant appealed because, among other things, the hearing before the referee was a telephone hearing to which the claimant properly objected. The claimant argued that, under *Knisley*, the evidence obtained over his objection at the telephone hearing may not be used to support the referee's order. The court did not reveal what other substantive matters were raised on appeal, but only noted that the claimant had other arguments.<sup>108</sup>

The commonwealth court again summarily vacated the Board's decision based upon the timely objection to the telephone hearing, without addressing the claimant's other arguments.<sup>109</sup> Once again the court vacated a decision based on its "serious concern over potential abuse."<sup>110</sup> Here, as in *Sherman*, there was no suggestion that there had been any specific violation of the claimant's procedural due process rights.<sup>111</sup> Rather, because the agency did not promulgate

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105. The court rather tersely dismissed the Board's argument that since the employer's witnesses reaffirmed their telephone testimony in person, any infirmities in the telephone process were rehabilitated. *Id.*

106. *Id.*

107. 520 A.2d 953 (Pa. Commw. Ct. 1987).

108. *Id.* at 953–54.

109. *Id.* at 954–55.

110. *Id.* at 954.

111. *See id.*



regulations, even after the court warned of the consequences of such failure, the testimony would not be allowed under the circumstances.<sup>112</sup>

Consistent with its position in *Knisley*, the commonwealth court also declined to address concerns raised about telephone hearings where there was no timely objection to the procedure in *Schneider v. Commonwealth Unemployment Compensation Board of Review*.<sup>113</sup> In this case, the claimant allegedly was discharged for willful misconduct. The claimant was denied benefits and appealed to a referee. At the hearing a representative of the employer, the claimant, and the claimant's attorney were present in person. The employer's key witness testified by telephone.<sup>114</sup>

Prior to the hearing, the claimant's attorney was unaware that the witness, one of the claimant's students, would testify by telephone, but did not object immediately to the procedure. The referee placed the call and the employer began its direct examination. Due to technical difficulties, the call had to be terminated and reestablished after considerable direct testimony. When the referee attempted to renew the connection with the witness, the claimant's attorney stated, "[T]o save some time, we strongly object to [the student's] testimony."<sup>115</sup> The attorney offered no reason for the objection.<sup>116</sup>

The referee affirmed the decision of the Office of Employment Security and the claimant appealed to the Board of Review. The claimant failed to raise the issue of the telephone testimony with the Board, and the Board affirmed the referee. The court quickly disposed of the claimant's argument that *Knisley* required that the student's testimony be struck, finding that the claimant raised the issue for the first time on appeal to the court. Because the claimant did not raise the issue before the Board, the issue was deemed to be waived.<sup>117</sup>

In *Schneider*, the claimant did not show that the student's telephone testimony in any way affected the claimant's due process rights, and the court did not consider due process.<sup>118</sup>

112. *Id.* at 955.

113. 523 A.2d 1202 (Pa. Commw. Ct. 1987).

114. *Id.* at 1203. The claimant, a wood shop teacher, was discharged for allegedly striking a student with a chisel. *Id.* The employer's key witness was the student who was allegedly struck. *Id.*

115. *Id.*

116. *Id.* at 1203-04.

117. *Id.*

118. *See id.*

Although the cases preceding *Schneider* make clear that no showing of due process harm is required under *Knisley*, the absence of such a showing in this case makes it difficult to fault the court's decision with regard to the allowance of telephone testimony.<sup>119</sup>

Finally, the Commonwealth Court of Pennsylvania has addressed due process issues raised in the context of a telephone hearing, even in the absence of timely objection to the procedure.<sup>120</sup> In *Hoover v. Commonwealth Unemployment Compensation Board of Review*,<sup>121</sup> the court addressed whether the claimant's right to present evidence was "effectively foreclosed by the inherent nature of the telephonic hearing."<sup>122</sup> The claimant in *Hoover* was allegedly discharged for misconduct. The Office of Employment Security denied him benefits, and he appealed to a referee. The hearing consisted of a telephone call between the referee and the claimant, in which the employer did not participate.<sup>123</sup>

The majority of the court took a convoluted approach to the case. Citing its *Knisley* decision, the court noted that the claimant had not objected to the nature of the hearing at the administrative level.<sup>124</sup> The court nonetheless found that "the use of the telephone infringed upon the right of the claimant to present evidence in his behalf."<sup>125</sup> The court reached this conclusion because the claimant had attempted to offer documentary evidence of the falsity of the employer's claims, but it was impossible for the hearing officer to examine the evidence and determine its admissibility over the telephone.<sup>126</sup> The hearing officer simply ignored the evidence. A more honest analysis from the court in light of the hearing officer's decision to ignore the employer's failure to sustain its burden of proof<sup>127</sup> would have been to find that the manner in which the hearing

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119. The *Schneider* court reiterated that *Knisley* disallows testimony by telephone as long as there is timely objection to it, at least until there are properly promulgated regulations to safeguard due process rights. *Id.* at 1203.

120. *E.g.*, *Eddy v. Commonwealth Unemployment Compensation Bd. of Review*, 533 A.2d 191 (Pa. Commw. Ct. 1987); *Hoover v. Commonwealth Unemployment Compensation Bd. of Review*, 509 A.2d 962 (Pa. Commw. Ct. 1986).

121. 509 A.2d 962 (Pa. Commw. Ct. 1986).

122. *Id.* at 963.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. The dissenting judge would have found for the claimant on this basis. *Id.* (Doyle, J., dissenting).

officer *conducted* the hearing infringed upon the claimant's due process rights, rather than to find that the defect was inherent in the nature of the telephone hearing.

Similarly, in *Eddy v. Commonwealth Unemployment Compensation Board of Review*,<sup>128</sup> the court found that the use of the telephone hearing precluded the calling of witnesses.<sup>129</sup> The claimant was denied benefits upon a referee's decision that the claimant left his employment "without cause of a necessitous and compelling nature."<sup>130</sup> This was an interstate claim, and the hearing was by telephone. Early in the hearing, and again later in the hearing, the claimant informed the referee that he wanted witnesses from his local union to testify. Apparently, the referee was technically unable to add additional parties to the hearing's telephone conference call: the referee told the claimant that he did not have the equipment available to meet the claimant's request. The record contained evidence that the testimony of the excluded witnesses would have been relevant and probative.<sup>131</sup>

The court found that *Knisley* controlled, even though the claimant did not object to the procedure.<sup>132</sup> The court correctly found that the claimant's request for additional witness testimony sufficiently preserved the issue for appellate review.<sup>133</sup> The court also took judicial notice that telephone companies possess and market the technology to have conference calls involving four or more participants at different locations.<sup>134</sup> However, rather than find that the referee erred in not offering the claimant the opportunity for a continuance so that his witnesses could be heard at a conference call, the court insisted that the absence of regulations concerning telephone hearings caused the problem.<sup>135</sup> The court acknowledged that the hearing in this matter could only have been conducted by telephone, because the parties and the referee were located in different states.<sup>136</sup> The remanded hearing also would be held by

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128. 533 A.2d 191 (Pa. Commw. Ct. 1987).

129. *Id.* at 192.

130. *Id.*

131. *Id.*

132. *Id.* at 193.

133. *Id.*

134. *Id.* at 193 n.5.

135. *Id.* at 193.

136. *Id.*

telephone, presumably without regulations in place.<sup>137</sup> Under *Knisley*, objection to the telephone procedure for the remanded hearing would necessitate some kind of split hearing procedure.<sup>138</sup> Surely a split hearing would raise more compelling due process issues than the telephone hearing process.

At least two other jurisdictions have addressed the question of whether timely objection is necessary to preserve telephone hearing issues for appeal. In the Florida case *Greenberg v. Simms Merchant Police Service*,<sup>139</sup> for example, the claimant resided in New York when he filed his interstate claim for unemployment benefits with Florida. He was initially denied benefits and appealed. The Florida appeals referee advised him that a hearing on his claim would be held in Florida and in the form of a telephone conference. The claimant received specific directions concerning the telephonic hearing and, as requested, the claimant furnished a telephone number where he could be reached for the conference. The issues were not complex and each party was given the opportunity to testify, cross-examine, and explain his side to the referee. Neither party introduced or discussed documentary evidence at the hearing.<sup>140</sup>

The *Greenberg* court, while finding that the claimant had not raised any objection or disagreement with the telephone hearing process until his court appeal, nonetheless addressed the issues that the claimant raised in his appeal concerning telephone hearings.<sup>141</sup> After analyzing the facts and circumstances attending the case, the court found that the telephone hearing had been fair and the result correct.<sup>142</sup> This court's action differs from that of the Commonwealth Court of Pennsylvania discussed above. Although the *Greenberg* court suggested that the claimant had waived the due process issues not raised at the hearing, it went on to analyze the fundamental fairness

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137. Since the parties were in different states, it would be difficult as a practical matter to hold an in-person hearing. The Board's failure to promulgate regulations from the time of *Knisley*, which was decided in 1985, through the *Eddy* decision two years later, probably suggests that rules would not be promulgated before the hearing pursuant to the remand in *Eddy*.

138. In interstate claim cases, where it is impractical to hold an in-person hearing with both parties present at the same location, the only genuine alternative to a telephone hearing is a split hearing in which the testimony of each party is taken in person at that party's location, outside the presence of the other party. See *supra* text accompanying notes 14–23.

139. 410 So. 2d 566 (Fla. Dist. Ct. App. 1982).

140. *Id.* at 566–67.

141. *Id.* at 567.

142. *Id.* at 568.

of the proceeding.<sup>143</sup> The Commonwealth Court of Pennsylvania, in contrast, seemed more intent on enforcing *Knisley* than on determining fundamental fairness.

The Pennsylvania cases applying *Knisley* also may be profitably contrasted with a similar case from New York. The New York Supreme Court, Appellate Division, addressed the due process implications of a telephone procedure in *In re Hoffman*.<sup>144</sup> In *Hoffman*, the claimant was denied unemployment benefits on the grounds that he was discharged for misconduct. The claimant appealed and a hearing was held, during which a representative of the employer testified by telephone. The claimant vigorously objected to this testimony by telephone, but it was allowed over the claimant's objection.<sup>145</sup> The court held that the claimant was not denied due process despite his objection because the claimant had the opportunity to cross-examine the employer's witness at length.<sup>146</sup> It should be noted that telephone conferences are specifically authorized under regulation in New York.<sup>147</sup> Nothing in the court's decision, however, indicated that the existence of regulatory authority for telephone hearings disposed of the matter.<sup>148</sup> Rather, the decision appeared to rest upon the fact that the procedure afforded the claimant all the process he was due.

The cases in this Part show that courts are unwilling to approve automatically telephone hearings as within the dictates of due process absent specific guidelines to govern the procedure. Yet all too often, courts do not address these due process issues because parties to the proceedings have failed to object in a timely fashion.

### *B. Credibility Determinations Without Observing Demeanor*

Parties who challenge telephone hearings on due process grounds most frequently allege that the lack of demeanor analysis hinders or prevents credibility determinations in such

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143. *Id.* at 566-68.

144. 525 N.Y.S.2d 423 (N.Y. App. Div. 1988).

145. *Id.* at 424.

146. *Id.* at 425.

147. *Id.*

148. The court explained in some detail what due process was required, *id.* at 424, and only incidentally mentioned the regulatory permission for telephone testimony, *id.* at 425.

hearings. Courts have therefore developed an elaborate analysis of this issue. In many cases, determining which of several witnesses is telling the truth may be the key to reaching the correct result. The question presented in the context of telephone hearings is whether the fact finder can make adequate credibility determinations absent observance of witness demeanor.

Lawyers profess that witness demeanor can be used to identify the lying witness. Is the witness twitching? Is he refusing to look the fact finder in the eye? Is he sweating in a room that is not overly warm? Lawyers typically cite these kinds of demeanor cues as ways of determining whether a witness is lying, although some believe that "witness demeanor is a very treacherous technique for assessing credibility."<sup>149</sup> Psychological research indicates that many of the well-known demeanor clues to credibility are indeterminate.<sup>150</sup>

A majority of the courts that have addressed this issue has purported to do a *Mathews v. Eldridge*<sup>151</sup> balancing test in making their determinations. In general, the courts have found summarily that claimants' interests in the financial benefits they were seeking were very important, as were the states' interests in cost control and in ensuring that only eligible individuals were awarded benefits. Those courts, however, found the risk of an erroneous determination caused by not observing demeanor virtually insignificant, thus swinging the balance in favor of telephone hearings.

In *Casey v. O'Bannon*,<sup>152</sup> a federal district court was asked to decide whether due process demanded that applicants rejected for public assistance receive face-to-face appeals hearings, as opposed to telephone hearings. The defendant agency had established new procedures whereby telephone hearings via conference call could replace, at the applicant's option, in-person hearings in cases where travel to a regional hearing site would be onerous. The plaintiffs argued that the new procedure effectively foreclosed them from having face-to-face hearings and that the deprivation violated their due process rights. The plaintiffs specifically argued that the telephone hearing process deprived them and the hearing

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149. Lareau & Sacks, *supra* note 31, at 155.

150. *Id.*; see also Corsi & Hurley, *supra* note 14, at 263 n.26 (noting that observers cannot accurately determine when a person is lying).

151. 424 U.S. 319 (1976); see *supra* text accompanying notes 50–59.

152. 536 F. Supp. 350 (E.D. Pa. 1982).

officer of the opportunity to judge demeanor properly. This format, the plaintiffs urged, made "meaningful cross-examination of an adverse witness virtually impossible in that counsel can neither gauge visual reactions of witnesses nor discern when a witness testifies from memory or is using documents as an aid."<sup>153</sup>

The court side-stepped most of the issues that the plaintiffs raised by accepting the defendants' assertion that they were currently installing speaker phones in public assistance offices.<sup>154</sup> The court opined that the only issue that could survive the installation of the speaker phones was the question of whether the hearing officer must have the opportunity to observe demeanor and credibility.<sup>155</sup> The *Casey* court held that a hearing officer's visual analysis is not a constitutional requirement of a hearing, finding that hearing officers can effectively judge credibility over the telephone by noting tone of voice, pauses, and levels of irritation.<sup>156</sup> The court agreed that demeanor was a useful tool in making credibility determinations, but it was not necessary to such determinations.<sup>157</sup>

In *State ex rel. Human Services Department v. Gomez*,<sup>158</sup> the plaintiff appealed his denial of Aid to Families with Dependent Children (AFDC) benefits, arguing that the telephone hearing he received violated due process. The New Mexico Court of Appeals found that these hearings indeed violated due process. The Supreme Court of New Mexico, however, adopted the opinion of the court of appeals' dissenting judge, Judge Wood, and held that telephone hearings were constitutional.<sup>159</sup> Judge Wood noted that "demeanor" is not an aspect of the constitutional right of confrontation under either New Mexico case law or federal constitutional law and that Gomez's due process rights would have been violated only if the hearing was not

153. *Id.* at 351.

154. *Id.* at 353. The speaker phones would permit all witnesses to be present at one location, with only the hearing officer at a remote location. *Id.* The court avoided the issue that witnesses may be aided by unseen and unheard third parties, and this avoidance may have been premature, because the conference calling system that would have rendered this issue moot was only "currently in the process" of being installed. *Id.* (emphasis added).

155. *Id.*

156. *Id.* at 353-54.

157. *Id.*

158. 657 P.2d 117 (N.M. 1983).

159. *Id.* at 118.

conducted in a “meaningful manner.”<sup>160</sup> Here, the hearing was conducted in a meaningful manner because the issue was essentially a medical question as to whether the claimant was disabled from working.<sup>161</sup> In fact, the documentary medical evidence showed that the claimant genuinely believed that he was unable to work, but that his belief was not accurate.<sup>162</sup> Therefore, the claimant’s credibility played only a minor role in making an accurate determination.<sup>163</sup>

Interestingly, however, *Gomez* implied that where a witness’s credibility was an important factor, observing demeanor might be more important to conduct the hearing in a “meaningful manner.”<sup>164</sup> The risk of error in not observing demeanor may be greater where witness credibility is determinative of a matter than where it is not—after all, demeanor evaluations are subjective in nature and are not susceptible to accurate measurement in the judicial or quasi-judicial setting. The *Gomez* court, however, suggests in dicta that seeing the witness might reduce the rate of erroneous determinations to some extent.<sup>165</sup> The court does not detail, however, how observation of witness demeanor might cure the increased risk. The obvious inference is that visual cues would permit more accurate fact finding.<sup>166</sup>

Other courts have found specifically that demeanor is not determinative in making credibility assessments and, therefore, that telephone hearings can properly give the hearing officer adequate information upon which to determine credibility.<sup>167</sup> The majority view appears to agree with the court’s dicta in *Slattery v. California Unemployment Insurance Appeals Board*<sup>168</sup> that “a conference telephone hearing [is] an imaginative attempt to solve the due process problems which inhere in

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160. *Id.* at 124.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.* at 124–25.

165. *Id.*

166. *But see* Lareau & Sacks, *supra* note 31, at 193 (arguing to the contrary).

167. *See, e.g.,* Greenberg v. Simms Merchant Police Serv., 410 So. 2d 566, 567 (Fla. Dist. Ct. App. 1982) (finding telephone conferences far superior to written records in determining credibility); Miller Memorial Nursing Ctr. v. Steinbacher, No. 1375, slip op. at 9 (Ohio Ct. App. Mar. 24, 1989) (finding audio mechanism sufficient to assess the witness’s demeanor); Babcock v. Employment Div., 696 P.2d 19, 21 (Or. Ct. App. 1985) (determining that what a witness says and how he says it is of equal or greater importance than demeanor in determining credibility).

168. 131 Cal. Rptr. 422 (Cal. Ct. App. 1976).



the simultaneous hearing concept."<sup>169</sup> These findings are not based upon due process grounds, however, but are grounded in common law determinations concerning demeanor. The genuine due process analysis is given short shrift in these cases, with great weight given to a finding, for example, that "in a world of limited public resources . . . the Division has a strong interest in employing telephone hearings as an efficient and fair response to its logistical limitations."<sup>170</sup> This consideration is equivalent to the *Slattery* court's analysis of due process concerns, despite the absence of any factual information upon which to ground such a finding in *Slattery*.<sup>171</sup>

Similarly, several courts have found telephone testimony acceptable, particularly where the court has found that there is no constitutional right to confrontation.<sup>172</sup> Courts that have allowed testimony by telephone in court proceedings have rested on the same grounds as courts in the administrative context.<sup>173</sup>

In contrast, at least one court has found important the opportunity to observe demeanor in administrative hearings.<sup>174</sup> Courts that have declined to allow testimony by telephone in civil litigation have determined, at least in part, that if the testifying witness is not present for the fact finder to observe his demeanor, testimony by telephone would violate the right of confrontation, which includes the right of meaningful cross-examination.

169. *Id.* at 424.

170. *Babcock*, 696 P.2d at 21.

171. *Slattery* concerned a hearing in which there was no telephone testimony. Instead, simultaneous hearings were scheduled for the claimant and the employer, at different locations. 131 Cal. Rptr. at 423. The Appeals Board's procedures provided for a telephone hearing, but the claimant was not informed of such procedure. *Id.* at 424. The court's decision rested upon the Board's failure to give the claimant notice of all of the procedures available to her. *Id.* at 425. Therefore, the court did not have any facts relating to telephone hearings with which to perform a due process analysis.

172. See Michael J. Weber, Annotation, *Permissibility of Testimony by Telephone in State Trial*, 85 A.L.R. 4TH 476, 487-93 (1991).

173. See, e.g., *In re Juvenile Appeal*, 446 A.2d 808, 812 (Conn. 1982) (finding no denial of due process where putative father in a hearing to terminate his parental rights was denied a continuance that would have allowed him to appear in person rather than by telephone); *In re W.J.C.*, 369 N.W.2d 162, 164 (Wis. Ct. App. 1985) (finding that the telephone testimony of court-appointed psychiatrist and psychologist at a commitment hearing did not violate appellant's due process rights).

174. See *Shaball v. State Compensation Ins. Auth.*, 799 P.2d 399, 405 (Colo. Ct. App. 1990) (finding that the hearing officer did not abuse discretion in refusing to hear a witness's testimony by telephone where the witness's credibility was significant).

In *Shaball v. State Compensation Insurance Authority*,<sup>175</sup> the court held that the hearing officer did not err by prohibiting a critical witness from testifying by telephone.<sup>176</sup> In *Shaball*, the complainant appealed the decision of the State Personnel Board, which upheld termination of her employment by a state agency. The complainant, discharged for fraudulently allowing payment of non-compensable workers' compensation claims,<sup>177</sup> wished to offer testimony of the person whose claims were alleged to have been fraudulently paid. Due to personal problems, however, the witness was unable to appear in person at the time and place of the hearing. The complainant requested that the witness be allowed to testify by telephone. She neither made an offer of proof as to the testimony to be offered nor requested a continuance so that the witness could appear in person. The complainant had earlier successfully blocked the agency from having witnesses testify by telephone.<sup>178</sup>

The hearing officer declined to grant the request for the witness to appear by telephone. The court concluded that the hearing officer "apparently determined that claimant's credibility was significant and that therefore she must testify in person."<sup>179</sup> The court held that the hearing officer has discretion to determine evidentiary matters and found no abuse of that discretion.<sup>180</sup> Implicit in the court's decision was its belief that where credibility is an important factor, observing demeanor is at least a significant, if not necessary, assessment in making a credibility determination.<sup>181</sup>

*Shaball* is troublesome because the court effectively avoids the due process implications of preventing an individual from testifying. As noted above, the complainant's discharge revolved around whether she had fraudulently allowed non-compensable claims to be paid.<sup>182</sup> The court should not have required the claimant to offer proof in order to determine whether the individual whose claims allegedly were paid fraudulently would have relevant evidence to offer. The *Shaball* decision suggests that although the witness may have been absent from the

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175. 799 P.2d 399 (Colo. Ct. App. 1990).

176. *Id.* at 405.

177. *Id.* at 401–02.

178. *Id.* at 405.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 402.

hearing because of reasons beyond the witness's control,<sup>183</sup> those reasons should have been explored in greater depth. Notwithstanding the complainant's objection to the telephone testimony of agency witnesses, if the complainant's witness was absent for reasons beyond the complainant's or the witness's control, due process might require that the witness be allowed to testify by telephone or that the complainant be offered a continuance in order to take the witness's testimony in person.<sup>184</sup> The court's shallow analysis of this issue leaves the due process concerns unresolved.

In summary, cases that have specifically addressed whether the inability to observe witness demeanor deprives a party of a fair hearing are not unanimous. None, however, flatly asserts that a hearing can be fair only if it is face-to-face.<sup>185</sup> The majority of courts addressing the issue generally leans toward finding that observation of demeanor is not critical to a fair hearing because the fact finder has other tools available for determining credibility. This tendency holds true in both the administrative hearing context and in a variety of categories of civil litigation.

Courts are nevertheless reluctant to assert that telephone hearings are clearly permissible where the credibility of a witness is the factor on which the case will turn. In such event, some opinions suggest that viewing demeanor may be crucial enough to require at least that the key witness's testimony be taken face-to-face.<sup>186</sup> As recently as 1994, the United States Court of Appeals for the Eleventh Circuit held that "when credibility determinations are not in issue, an [administrative] judge may hold a hearing by telephonic means" under the applicable statute.<sup>187</sup> Scientific evidence, however, suggests that the usefulness of visual cues as a tool for determining truthfulness is greatly overrated.<sup>188</sup> Courts should, and apparently most

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183. The witness had difficulties with her car and children. *Id.* at 405.

184. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

185. See, e.g., *State ex rel. Human Servs. Dep't v. Gomez*, 657 P.2d 117, 125 (N.M. 1983) (rejecting the lower court's decision that the inability of the hearing officer to observe the demeanor of witnesses denies a party due process of law).

186. See, e.g., *Shaball*, 799 P.2d at 405 (finding no abuse of discretion in denying telephonic testimony where the witness's credibility was in issue); *Gomez*, 657 P.2d at 124 (suggesting, in dicta, that in cases in which witness credibility may be dispositive, the case may require a face-to-face hearing).

187. *Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994) (footnote omitted).

188. See, e.g., *Corsi & Hurley*, *supra* note 14, at 263-64.

would, carefully consider reversing an administrative appeal hearing solely on the ground of inability to observe demeanor.

*C. A Party's Right to Present Witnesses  
or Other Evidence*

Only a few courts have addressed the issue of whether telephone hearings adversely affect a party's right to present witnesses and evidence. None have condemned the telephone hearing process in this context per se. Some courts, however, have found defects in the conduct of the telephone hearing that violated a party's due process rights. Although particular courts have found a party's due process rights to have been affected adversely, each made clear that the defect was curable without eliminating telephone hearings.

In *Hoover v. Commonwealth Unemployment Compensation Board of Review*,<sup>189</sup> the court found that, under the circumstances of the case, the use of telephone hearings infringed upon the claimant's right to present evidence on his behalf.<sup>190</sup> Similarly, in *Eddy v. Commonwealth Unemployment Compensation Board of Review*,<sup>191</sup> the court found that the particular telephone procedure the agency used in this case prevented a party from presenting witnesses.<sup>192</sup>

In neither *Hoover* nor *Eddy* did the court engage in due process balancing in reaching a decision. Instead, the court found that not permitting parties to present all evidence and testimony that they believed necessary violated general hearing requirements.<sup>193</sup> In both *Hoover* and *Eddy*, the defects, while perhaps attributable to the telephone hearing process, might have been easily cured. In *Hoover*, for example, the hearing officer could have held the record open to receive the claimant's documentary evidence and reopened the hearing, if necessary, after its receipt.<sup>194</sup> The hearing officer in *Eddy* could have

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189. 509 A.2d 962 (Pa. Commw. Ct. 1986).

190. *Id.* at 963; see *supra* text accompanying notes 118–22.

191. 533 A.2d 191 (Pa. Commw. Ct. 1987).

192. *Id.* at 193; see *supra* text accompanying notes 124–27.

193. *Eddy*, 533 A.2d at 193; *Hoover*, 509 A.2d at 963.

194. This practice is common in administrative hearings. It is not unusual for unrepresented parties to fail to realize the importance of certain documentary evidence until the hearing officer or administrative law judge brings it to their attention. Such a practice would be consistent with the decision in *Hoover*. See *Hoover*, 509 A.2d at 963.

granted a continuance in order to make arrangements with the telephone company to establish a four-party conference call.<sup>195</sup> In both cases, the court made clear its belief that properly promulgated regulations for telephone hearings may have obviated the need for a remand in either case.<sup>196</sup> Such regulations could have included a notice provision informing parties how such matters would be handled in the context of a telephone hearing.<sup>197</sup>

Of course, in order for regulations to address concerns of this type, they must be communicated successfully to the parties subject to them. The suggestion that regulations would cure all of the difficulties that might arise in the context of telephone hearings naively assumes that a regulatory authority will effectively anticipate them all. In practice, it is likely that regulations will be silent on a variety of circumstantial difficulties, which would then remain unaddressed until the next round of formal rulemaking. Informal policy making by the hearing authority, however, would provide the flexibility required to address the ever-changing landscape of telephone hearings.<sup>198</sup>

Another facet of possible evidentiary limitations in telephone hearings arises in the context of witness subpoenas. The Louisiana Supreme Court held that while, in general, telephone hearings might withstand due process challenges, the telephone hearing procedure should comport as nearly as possible with the in-person hearing procedure with regard to due process rights.<sup>199</sup> In *Schexnider v. Blache*,<sup>200</sup> the agency's telephone

195. As noted above, the court took judicial notice that telephone companies had the technical capability to implement such conference calls. *Eddy*, 533 A.2d at 193 n.5.

196. See *id.* at 193; *Hoover*, 509 A.2d at 963.

197. See *Eddy*, 533 A.2d at 193.

198. In fact, Pennsylvania promulgated regulations relating to telephone hearings, effective April 8, 1989. 34 PA. CODE §§ 101.121–.126 (1996). As might be expected, those regulations attempt to address the issues raised in the various Pennsylvania Commonwealth Court decisions, but do not address other foreseeable circumstances related to telephone hearings. For example, the regulations provide that documents that are not delivered to the hearing tribunal in advance of the hearing may only be admitted with the consent of all parties. *Id.* § 101.124(e). Such a regulation does not address a situation in which relevant documents may be discovered with insufficient time for delivery to the tribunal. Under the existing regulation, such documents may only be admitted to the record with the consent of all parties, thus giving the opposing party essential control of whether a relevant document will be admitted.

199. *Schexnider v. Blache*, 504 So. 2d 864, 867 (La. 1987).

200. 504 So. 2d 864 (La. 1987).

hearing instructions failed to inform parties regarding the procedure for subpoenaing witnesses. The instructions merely indicated that if a party wanted to include witnesses in the hearing, it was the party's responsibility to make sure that the witnesses were available at the party's telephone.<sup>201</sup> In *Schexnider*, the claimant had two witnesses who would not appear voluntarily and who therefore did not testify at the hearing. The court remanded the case, holding that "the plaintiffs' due process rights could only be protected sufficiently by an opportunity to subpoena the witnesses for the telephone hearing involved in this case."<sup>202</sup>

The *Schexnider* court, as well as the courts in *Eddy* and *Hoover*, made clear that it was not merely the idea of telephone hearings that resulted in findings of due process violations.<sup>203</sup> Rather, these courts found that the safeguards in place were insufficient to insure that the parties' due process rights would not be violated.<sup>204</sup> These courts clearly suggested that with such procedural safeguards, there would be no question as to whether telephone hearings violated due process.

#### *D. The Ability of the Hearing Officer to Control the Hearing*

No court has held flatly that a telephone hearing prevents the hearing officer from adequately controlling the hearing. The issue has seldom been raised in the reported cases; on at least two occasions, however, courts have dealt with some aspect of this issue.<sup>205</sup>

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201. *Id.* at 865.

202. *Id.* at 867.

203. *See id.* at 866; *Eddy v. Commonwealth Unemployment Compensation Bd. of Review*, 533 A.2d 191, 193 (Pa. Commw. Ct. 1987); *Hoover v. Commonwealth Unemployment Compensation Bd. of Review*, 509 A.2d 962, 963 (Pa. Commw. Ct. 1986) (citing *Knisley v. Commonwealth Unemployment Compensation Bd. of Review*, 501 A.2d 1180, 1182 (Pa. Commw. Ct. 1985)).

204. *See Schexnider*, 504 So. 2d at 866; *Eddy*, 533 A.2d at 193; *Hoover*, 509 A.2d at 963 (citing *Knisley*, 501 A.2d at 1182).

205. *See Dey v. Edward G. Smith & Assocs.*, 719 P.2d 1206, 1208 (Idaho 1986); *Chobert v. Commonwealth Unemployment Compensation Bd. of Review*, 484 A.2d 223, 225 (Pa. Commw. Ct. 1984).

In *Dey v. Edward G. Smith & Associates*,<sup>206</sup> the court remanded the case for an in-person hearing because, under the particular circumstances of the case, the telephone hearing did not provide a complete or orderly basis for the resolution of the dispute.<sup>207</sup> In *Dey*, the claimant was allowed unemployment benefits and the employer appealed; the hearing examiner conducted the appeals hearing by telephone. The hearing examiner issued a decision adverse to the claimant after the telephone hearing, and the claimant appealed to the Industrial Commission, requesting a hearing. Both the claimant and the employer asserted that additional evidence would be offered at the hearing. The Commission denied an additional hearing and summarily affirmed the ruling of the appeals examiner.<sup>208</sup>

On appeal from the Commission's decision, the Idaho Supreme Court recognized the usefulness of telephone hearings in a large array of cases.<sup>209</sup> In this case, however, the court found that there had been several telephone disconnections, and the proceedings were heated, argumentative, and repeatedly interrupted.<sup>210</sup> As a result, the court was unable to determine what was testimony, what testimony was lost, and the basis of the decision.<sup>211</sup> Thus, the *Dey* court's remand is understandable under the circumstances. If the court could not determine the basis for the appeals examiner's decision, the Commission must have been similarly unable to make such a determination. Thus, the court correctly found that the Commission abused its discretion in refusing an additional hearing.

Such problems with telephone hearings might be avoided if the hearing officer gives adequate instructions at the commencement of the hearing, together with admonitions or continuances if matters become so unruly that the hearing is no longer "fair." It is also true, however, that similar circumstances can attend in-person hearings. The tenor of the *Dey* court's decision suggested, however, that the problem with the record resulted from conducting the hearing by telephone.<sup>212</sup> The decision, however, does not suggest why the court might

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206. 719 P.2d 1206 (Idaho 1986).

207. *Id.* at 1208.

208. *Id.* at 1207.

209. *Id.* at 1208.

210. *Id.*

211. *Id.*

212. The court remanded the case in order to create a "complete and orderly" record, specifically ordering that the hearing be held before the Industrial Commission, and not by telephone. *Id.*

have reached such a conclusion, apart from the technical possibility of disconnecting one or more teleconferencing parties.<sup>213</sup> *Dey* articulates no reason for believing that telephone hearings are more susceptible to disorder than in-person hearings. The true issue in *Dey* was not that the telephone hearing violated any specific due process rights, but rather, that the record of the hearing was insufficient for a reasonable review.

The court in *Chobert v. Commonwealth Unemployment Compensation Board of Review*<sup>214</sup> did not condemn the practice of conducting administrative hearings or examining of witnesses by telephone conference call.<sup>215</sup> In a hearing where neither party was represented by counsel, and the referee telephoned an employer witness for testimony without advance notice to the claimant, however, the court held that the hearing did not comport with fundamental fairness.<sup>216</sup>

The problem addressed in *Chobert* is one more common to telephone hearings than to in-person hearings, i.e., the problem of witnesses using documents as the basis of their testimony, sometimes without the court's or parties' knowledge. If a witness testifies in person, all involved can observe whether he is referring to documents and can effectively determine what those documents are and what ought to be done with them. The opposing party has the opportunity to view the documents and cross-examine the witness about them. In *Chobert*, however, it was apparent that a telephonic witness was testifying with reference to documents.<sup>217</sup> It might have been useful had the hearing officer cautioned the witness to testify only to the best of his recollection and not to refer to any document without informing the hearing officer and the parties. If the witness were unable to testify from recollection, the hearing could have been continued and the witness given the opportunity to submit the document to which he was referring for distribution to the parties and the hearing officer. Proper treatment of the document or documents could have taken place at the continued hearing, thereby rendering the court's concerns moot.

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213. Hearing participants, from time to time, become disorderly, necessitating censure and even continuance of the hearing. For example, when the issue and the personalities are such that the parties' mere presence together results in aggressive contentiousness, the presiding officer is compelled to bring the parties under control in order to create a reviewable record.

214. 484 A.2d 223 (Pa. Commw. Ct. 1984).

215. See *id.* at 225.

216. *Id.*; see *supra* text accompanying notes 71–79.

217. *Chobert*, 484 A.2d at 224.



No cases have been found in which a court has pointedly addressed the questions of how to ensure that a telephone witness is testifying without undetected reference to documents or coaching. Those questions, raised by appellants and often bypassed by courts,<sup>218</sup> are more meaty than the previously discussed demeanor question. The courts have not addressed in any meaningful way how the issues of sequestration of witnesses, suspected coaching, or even an impostor witness may effectively be addressed.

### III. SURVEY OF IN-PERSON AND TELEPHONE HEARINGS

An important dimension of this research lies in the comparison of in-person with telephone hearings. We wished to learn if a measurable difference existed from a procedural, as well as an outcome-based, standpoint between in-person and telephone hearings. We developed a process whereby two-party separation cases in Maine and California were surveyed in a period of just over a year and the results compiled and analyzed. The areas of inquiry focused on the opportunities to submit evidence, the opportunities for representation, the opportunities for confrontation, default rates, and outcomes. We chose Maine and California as the survey states because we administer appeals programs there and have direct access to and control over information gathering and reporting activities. Additionally, because of the significant differences in the states' geographic, economic, and demographic characteristics, similarities in the survey outcomes would tend to validate the results.

#### *A. Telephone Policy*

Both Maine and California grant a party permission to appear by telephone in limited and carefully defined circumstances.<sup>219</sup> In both states, hearings are scheduled in a location

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218. See, e.g., *Casey v. O'Bannon*, 536 F. Supp. 350, 353 (E.D. Pa. 1982).

219. CAL. CODE REGS. tit. 22, § 5041(c) (1995). Maine has adopted an unpromulgated policy for telephone hearings.

near to the place of filing of the claim. If the claimant has relocated to a place distant from where the claimant last worked and the employer is a party to the appeal, the employer will be allowed to appear at the hearing by telephone and is typically not required to travel a significant distance to the hearing site. In Maine, the general rule is that, if a party is situated more than thirty miles from the hearing site, the party will be permitted to appear by telephone. California has adopted the same policy for parties more than fifty miles from the hearing site. If the claimant worked at an employer's establishment that is in the vicinity of the hearing site, the employer will be required to appear in person, even though its headquarters, including its personnel office, is located elsewhere. In interstate cases, the claimant will always be in a distant location and will always be scheduled to appear by telephone.

Both Maine and California allow exceptions to the general policy that parties who are located in the vicinity of the hearing site must appear in person. Both states have restrictive policies regarding continuances.<sup>220</sup> Thus, a party who requests a continuance because she may be seriously inconvenienced by appearing in person could be granted a telephone hearing as an alternative. For example, if a witness critical to the employer's case is scheduled to be out of town on the hearing date, a telephone hearing may be granted in lieu of a continuance. If, however, that individual is not a critical witness, then another individual would be required to appear in person on behalf of the employer. Similarly, if a claimant has a job interview in another city on the hearing date, the claimant would usually be allowed to appear by telephone. Also, both states will set telephone hearings in remote locations where there are not enough cases to fill a calendar and where a case would otherwise be delayed beyond thirty days. Both states will also set a case for a telephone hearing where it is known that a participant might present a serious security risk, but this circumstance is extremely rare.

In both states, key staff screen requests for telephone hearings pursuant to preexisting guidelines. A telephone hearing will be granted only where such a hearing is clearly the more desirable procedure, given all the circumstances of the

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220. Both states have adopted unpromulgated policies for the consideration of continuance requests.

particular situation. With the exception of interstate hearings, cases that fall within these guidelines may still be heard in person if the case involves substantial documentation or numerous witnesses. Of course, parties who wish to appear in person have the option of doing so, even if they are located beyond the designated distance from the hearing site.

All of these guidelines are limited by the information available to the staff at the time of scheduling the cases. For instance, a case falling within the guidelines may be set for a telephone hearing, but at the hearing many documents and witnesses may be presented. The hearing officers have discretion to continue such cases at a later time as they do in in-person hearings.

### *B. Methodology*

In Maine and California, we surveyed all two-party separation cases, that is, cases involving a voluntary quit or a discharge<sup>221</sup> in which both the claimant and the employer were parties, between October 30, 1994, and January 13, 1995. Cases heard during the week between Christmas and New Year's Day were not surveyed because we believed the default rate would be abnormally high.

In California, we surveyed those cases heard by the Central Sacramento Office of Appeals. That office's service area includes the Napa and lower Sacramento Valleys and a portion of the northern Sierra. The population and economy of this area is expanding and is dominated by manufacturing, agriculture and food processing, government, commercial and financial services, and tourism. The area is generally representative of the California economy as a whole. The Central Sacramento office has ten out-station hearing sites across its service area, as well as a multi-room hearing complex at its Sacramento headquarters. This office also hears most of California's interstate appeals. In Maine, we surveyed all two-party separation cases statewide. Maine is sparsely populated with 1.25 million people, stretches 400 miles south to north and has over 3500 miles of Atlantic shoreline.

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221. A voluntary quit occurs when the claimant initiates the separation from employment. Conversely, a discharge occurs when the employer creates the separation.

We attached a copy of the survey form to the front of each case folder. The registration staff entered the case number on the form. The hearing officer to whom the case was assigned was responsible for completing the bulk of the survey form and noting the appearances of the parties and the manner by which the parties appeared, that is, in person or by telephone. If a party failed to appear, the hearing officer so noted the information. The survey also asked whether the decision was favorable, unfavorable, or whether the appeal was dismissed because the appellant failed to appear at the hearing.

The hearing officers were also asked to record the age of the case, but we later realized that more than ninety percent of the cases surveyed were heard within thirty days of the appeal. We therefore concluded that the age of the case was not a statistically significant factor, and those results were not compiled.

The hearing officers also noted whether the claimant or the employer were represented at the hearing, and whether the representative was an attorney or a non-attorney. The officer recorded the number of witnesses who testified at the hearing for both the claimant and the employer, in addition to the parties themselves. We asked the hearing officers to record the number of witnesses added after the start of the hearing. We believed that in the case of a telephone hearing, a party might call a witness to the telephone to testify when it became apparent to the party that the witness's testimony could be helpful. That option generally would not be available in an in-person hearing. The officer also recorded the number of documents in addition to the agency documents that were transmitted with the appeal that each party offered. Furthermore, the officer noted the number of subpoenas that the claimant and the employer requested and whether a party cross-examined an opposing witness. Finally, higher-authority appeals from surveyed cases were tabulated.

#### IV. MAINE SURVEY RESULTS

##### *A. Outcomes (Appendices III and IV)*

In Maine, of the 208 in-person cases surveyed,<sup>222</sup> 129 involved claimant appellants. The claimant prevailed in fifty-nine cases

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222. The survey instrument used in Maine is printed in Appendix I, *infra* p. 461.

(44%). In telephone hearings, eighty-seven involved claimant appellants. The claimants prevailed in twenty-three cases (26%).

Of the seventy-nine employer in-person appeals, the employers prevailed in twenty-four cases (32%). And of the thirty-four employer telephone appeals, the employers prevailed in eleven cases (32%).

Dismissals occurred in eighteen cases (9%) for in-person hearings and six cases (5%) for the telephone hearings. The dismissals were roughly evenly divided between claimants and employers.

### *B. Representation (Appendices V and VI)*

Attorney or non-attorney representation was higher for both claimants and employers in in-person hearings than it was in telephone hearings. In thirty-four cases (16%) claimants had in-person representation, compared to six cases (5%) in telephone hearings. Employers had a similar rate of representation as claimants: thirty-four employers (15%) were represented at in-person hearings. At twelve cases (10%), employers had a relatively consistent rate of representation in telephone hearings—it did not drop as much as it did for claimants.

### *C. Non-Party Witnesses (Appendices VII Through X)*

In tabulating the results, we aggregated the total number of witnesses for the sample. For instance, at in-person hearings, claimants called fifty-two witnesses (25%). In telephone hearings, by contrast claimants called only nine witnesses, or in 7% of the hearings.

Employers called significantly fewer witnesses in telephone hearings than in in-person hearings. At in-person hearings, the employers called eighty-four witnesses (in roughly 40% of these hearings, on average) while at telephone hearings they called twenty-six witnesses (roughly averaging 21% of telephone hearings).

Administrative law in Maine provides that the agency issue subpoenas as a ministerial duty; it does not have discretion to refuse to issue them.<sup>223</sup> There are some obvious limitations on out-of-state subpoenas. Nevertheless, the use of subpoenas was limited significantly by telephone hearings. Claimants at in-person hearings issued subpoenas against thirty-three witnesses (on average, roughly 16% of cases). At telephone hearings, five witnesses were subpoenaed (4%). Employers requested subpoenas less frequently in both instances. At in-person hearings, nine subpoenas were issued (4%). No subpoenas were requested in the 121 telephone hearings.

#### *D. Introduction of Documents at Hearing (Appendices IX Through XII)*

Use of documents was noticeably reduced in telephone hearings. As noted above, the use of documents during telephone hearings requires more preparation and hearing time. Using the same convention of aggregating the number of documents, the survey found that claimants submitted eighty-one documents in in-person hearings (averaging 39% of the hearings) and thirty-one documents in the telephone hearings (averaging 25%). The decline was even more noticeable in employers' practice, however. At in-person hearings, they submitted 222 documents (an overwhelming 106% of the hearings if averaged), but at telephone hearings, the number declined to forty-three documents (averaging 35% of the hearings).

#### *E. Cross-Examination*

Cross-examination rates were essentially the same for in-person and telephone hearings. Between 42% and 45% of claimants and employers took advantage of cross-examination during both in-person and telephone settings.

There was a material difference between in-person and telephone hearings in developing the evidence. In-person hearings

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223. ME. REV. STAT. ANN. tit. 5, § 9060(1) (West 1989); ME. REV. STAT. ANN. tit. 26, § 1082(8) (West 1988).

have more witnesses, subpoenas, and documents in every category of case. The parties do not bring as many live witnesses and written statements to a telephone hearing. Both claimants and employers are more likely to bring additional evidence to in-person hearings.

## V. CALIFORNIA SURVEY RESULTS

In California, we surveyed a total of 581 cases,<sup>224</sup> 313 of which were telephone hearings and 278 of which were in-person hearings. Two hundred sixty-three of the telephone hearings were interstate cases.

### A. Outcomes (*Appendices III and IV*)

In California, of the 278 in-person cases surveyed, 181 involved claimant appellants, and of those, 127 were decided on the merits. The claimant prevailed in 32% of these total cases, but prevailed in 47% of cases actually decided on the merits. Of the 313 telephone hearings surveyed, 223 involved claimant appellants, and 178 of these were decided on the merits. The claimants prevailed in only 24% of these total cases (30% on the merits), a substantially lower rate.

Ninety-seven of the in-person hearings involved employer appellants, and sixty-eight of these cases were decided on the merits. The employer prevailed in 41% of these total cases (58% on the merits). Ninety-one of the telephone hearings involved employer appellants, and sixty-six of these were decided on the merits. The employer prevailed in 46% of these total cases (64% on the merits).

California experienced a higher rate of appeals from decisions in telephone hearings than did Maine. The in-person appeal rate was 13.3%, while the telephone hearing rate was 16%. Projected on a statewide basis, this difference is significant in terms of the absolute numbers of higher-authority appeals that might be generated if all lower-authority cases were heard by telephone.

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224. The survey instrument used in California is printed in Appendix II, *infra* p. 464.

### *B. Representation (Appendices V and VI)*

Persons representing claimants and employers in California generally were not attorneys. Claimants were represented in only a tiny fraction of surveyed cases, in six of the 278 in-person hearings (2%), and in three of the 313 telephone hearings (1%). Employer representation was markedly greater. They were represented in fifty-nine of the in-person cases (21%) and in sixty-six of the telephone cases (21%). Based on these figures, it appears that representation was not significantly affected by the hearing format.

### *C. Non-Party Witnesses (Appendices VII Through X)*

As in Maine, the format of the hearing had a significant impact on whether parties called witnesses to testify. In the in-person hearings, thirty-three witnesses testified on behalf of claimants (averaging 12%) but only eight were called to testify at telephone hearings (averaging 3%). Employers brought seventy-four witnesses to the in-person hearings (averaging 27%) but only forty-seven to the telephone hearings (averaging 15%).

### *D. Introduction of Documents at Hearing (Appendices IX Through XII)*

Survey results for document introduction also paralleled those in Maine. Claimants introduced 105 documents at in-person hearings while employers introduced 108 documents. By contrast, claimants introduced only twenty-six documents at telephone hearings while employers submitted eighty-one.



*E. Cross-Examination*

As in Maine, the hearing format did not affect whether parties exercised their right of cross-examination. Claimants cross-examined at forty of the in-person hearings and in forty-three of the telephone hearings. Employers exercised their right to cross-examine in sixty-two of the in-person hearings and in fifty-nine of the telephone hearings.

## VI. OBSERVATIONS FROM SURVEY RESULTS

Administrative fair hearings are structured to assure that parties have a full opportunity to state their cases and that the outcome of the hearing is correct under the law, given the facts of the case.<sup>225</sup> It seems clear from the compiled data that parties avail themselves of these procedural devices with less frequency in telephone hearings than in in-person hearings. This conclusion is true notwithstanding the fact that the cases heard by telephone were screened carefully before the telephone hearing was granted.

A survey result of some concern is that claimants were less likely to prevail in telephone hearings than at in-person hearings. It could be argued that the telephone hearings presented a different mix of cases. A notable feature of the California results is that eighty-four percent of the surveyed telephone hearings were interstate cases, which in our experience generally involve voluntary leaving issues. California's voluntary quit statute, however, does not have a connection with work provision, a factor that should militate strongly in favor of claimants in this type of case.<sup>226</sup> Moreover, only ten percent of the surveyed telephone hearings in Maine were interstate cases, yet in both states claimant success rates dropped sharply in telephone hearings.

The similarity in survey outcomes between the two states would seem to discount the possible difference in the mix of

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225. See, e.g., CAL. UNEMP. INS. CODE § 1951 (West 1986).

226. CAL. UNEMP. INS. CODE § 1256 (West 1986 & Supp. 1996). Many interstate cases involve voluntary quits to follow a spouse. Such a separation is for good cause under this statute and thus entitles the claimant to benefits under this statute. *Id.*

cases as a significant factor in accounting for the disparity in outcomes. Instead, it suggests that the telephone hearing format, with its diminished opportunities for claimants to present their cases, accounts for this result. If so, this would trigger the second prong of the *Mathews v. Eldridge* test, that is, that telephone hearings may increase the risk of an erroneous deprivation of benefits.<sup>227</sup> While the mix of cases may be a minor factor, the data indicate that, as a group, telephone hearings offer different procedural characteristics from an evidentiary standpoint. Considering the totality of the communication, both the quantity of the evidence and the quality of the testimony are diminished in telephone hearings. The data do not warrant a conclusion that telephone hearings are unfair to claimants. They do, however, point to a trend, driven by procedural characteristics, favoring one group over another. This trend underscores the importance of establishing individualized standards for scheduling hearings by telephone.

If the loss of procedural protections and the disparity in outcomes in telephone hearings are present where cases are carefully screened, it seems likely that these differences would be magnified if there were no screening criteria or if the telephone format were employed strictly for economic purposes. This consideration raises the third prong of the *Mathews v. Eldridge* test, that is, what administrative gain or economic benefit, if any, is realized in telephone hearings. In Maine and California, where geographical separation of the parties is the primary criterion for granting a telephone hearing, the benefit is clear. It permits both parties to be heard at the same time by the same hearing officer and for the parties to hear and respond to one another. If telephone hearings were employed as a general practice, economic factors would be the primary means of justifying the result. The economic benefit would be two-fold: no loss of hearing officer time and travel costs, and no rental costs for out-station hearing facilities. In return, however, other costs increase. Lengthy, long distance, telephone conference calls are expensive. Additionally, since the entire administrative record must be duplicated and mailed to the parties prior to the hearing, staffing and postage costs increase. There are also additional equipment costs for duplicating as well as for telecommunications equipment. Telephone hearings, at least in California, also result in more higher-authority

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227. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

appeals and thus higher cost. Although it was beyond the scope of this project to measure with precision the economic factors involved in telephone versus in-person hearings, we suspect that any real savings resulting from telephone hearings would be elusive and difficult to identify. It is therefore logical to conclude that there is insufficient administrative economic justification for an across-the-board implementation of telephone hearings as replacement for in-person hearings.

## VII. RECOMMENDATIONS

The due process balancing test is not only for use by the courts. It must be applied in each instance or decision that requires determination of whether to hold a hearing in person or by telephone. An agency that thoughtfully applies the balancing test will produce the best result for both the parties and the agency. Due process problems causing fundamental unfairness to any party will usually be avoided with close attention to details.

Telephone hearings do not, *ipso facto*, violate due process of law. Properly structured, they can provide for a "meaningful opportunity" to be heard. They do not fatally impair the fact finder's ability to make demeanor credibility determinations. Nor do they necessarily impede the ability of the hearing officer to control the hearing. The Maine and California surveys establish, however, that telephone hearings reduce the number of documents and witnesses and may therefore interfere with the parties' rights to present witnesses and other evidence. That result may be a function of the screening process that Maine and California use for setting cases for hearing by telephone. It also may be a function of the telephone hearing process which inhibits parties from exercising their rights to present evidence on their behalf. Telephone hearings also seem to diminish slightly the parties' satisfaction with the proceedings, as the appeal rate for telephone hearings is somewhat higher than for in-person hearings. Telephone hearings may be a less satisfactory means of finding the truth.

Telephone hearings clearly have their place in present-day unemployment compensation appeals. They are a highly desirable alternative to the split hearing procedure of an earlier era. They are also useful in particular situations in which the

hearing might otherwise be delayed or in which an in-person hearing might be unduly burdensome to one or both of the parties.

In determining whether to conduct a hearing by telephone, economic savings, if any, are not alone sufficient to be determinative. Such savings cannot compensate fully for the loss of opportunity for the parties to present their cases most effectively. Consideration of economic factors, without more, could be a violation of due process. We recommend that, as a matter of policy, telephone hearings should not be employed or condemned universally in any jurisdiction. The telephone hearing should be limited on a case-by-case basis to those situations in which it is clearly the preferable format as determined after consideration of the factors set forth below:

1. **THE COMPLEXITY AND GRAVITY OF THE ISSUE.** Is the issue a relatively simple one, such as an able and available case involving disqualification for only one week, or a complex fraud case with the possibility of a large overpayment and lengthy disqualification? The seriousness of the consequences of an erroneous decision militates against a telephone hearing in the latter case.
2. **THE EXPECTED NUMBER OF WITNESSES.** Are the one or two parties going to be the only witnesses, or are there likely to be several witnesses offering testimony for each party? The difficulty of controlling a hearing with multiple witnesses suggests that in the latter case, a telephone hearing may not be suitable.
3. **THE EXPECTED NUMBER OF DOCUMENTS.** Many documents can lead to greater confusion both as to what documents are being referenced and as to whether a witness might refer to a document not part of the record. Even with few documents, it is prudent for an agency to establish a policy concerning when documents are to be submitted and distributed to other parties. It is obviously preferable for documents to be exchanged prior to the hearing, and developing a mechanism for doing so is important.

4. **LANGUAGE OR OTHER COMMUNICATION BARRIERS.** Although foreign language translators may be used in telephone hearings, experience shows that communication is, by and large, facilitated when the translator can see the witness and the witness can see the translator. The benefits and risks of other communication problems must also be carefully weighed.
5. **THE DISTANCE OF THE PARTIES FROM THE NEAREST HEARING LOCATION, TAKING INTO ACCOUNT CLIMATE CONDITIONS WHERE APPROPRIATE.** Where one party would be significantly burdened by appearing in person, all other things being equal, the agency must decide whether it will allow one party to appear in person and one by telephone. An appearance of unfairness may be avoided by requiring all parties to participate in the same manner, either in person or by telephone.
6. **THE COST OF IN-PERSON VERSUS TELEPHONE HEARING IN A PARTICULAR CASE, AND OVERALL.**

If cases are analyzed individually, some will emerge as obviously suitable for telephone hearing, while others will be equally obviously unsuitable for such a hearing. Individual examination of the above factors, however, will reduce significantly the number of cases inappropriately scheduled as either in-person or telephone hearings. The rights of the parties will be protected better if consideration of relevant factors takes place before a hearing is scheduled.

Once it has been determined that a case is suitable for scheduling by telephone, attention is drawn to the conduct of the hearing itself. An agency must have either formal or informal procedures that will insure that the due process concerns addressed in the case law are taken into consideration. For example, a hearing officer must take care to ascertain the identity of those participating. There should also be explicit pre-hearing instructions concerning sequestration of witnesses, reference to documents that are not part of the record, and coaching or other assistance by third parties. The hearing officer must be vigilant throughout the course of the hearing and admonish parties during the hearing if the hearing

officer suspects, for example, that a party is testifying with the assistance of a document not part of the record. The agency must also have a system in place for a pre-hearing exchange of documents, as well as alternative approaches in the event documents that have not been disseminated are offered in the course of the hearing. These types of issues reinforce the need to carefully pre-screen cases to determine their suitability for telephone hearings.

Agencies should keep an open mind about the use of telephone hearings. In the majority of cases, in-person hearings will be preferable. In a substantial number of cases, however, conducting a hearing by telephone will provide a convenient forum for all concerned and a result consistent with fundamental fairness. An all-or-nothing approach to telephone hearings runs the risk of mandating telephone hearings where they are not appropriate and denying such hearings in circumstances where they are appropriate. It would be an error to eliminate the application of sound and considered judgment in determining whether a case should be heard telephonically or in person.

## CONCLUSION

Telephone hearings began as a desirable alternative to conducting separate hearings when the parties were geographically distant from each other. Today there is a trend among the states to conduct hearings by telephone with increasing frequency and without regard to the location of the parties. The reasons cited for this trend are primarily economic. Although telephone hearings have their place in present-day unemployment insurance appeals, research conducted in conjunction with this Article has found that they result in a dissipation of procedural protections and a diminished evidentiary base. Telephone hearings should therefore be utilized in place of in-person hearings only in carefully defined circumstances.

Federal case law provides a due process framework to analyze the impact of diminished protections resulting from new procedures such as telephone hearings. Essentially, the test questions whether and to what extent the use of the new procedure increases the risk of an erroneous deprivation of an important private interest. If it does, courts examine the value and cost

of additional procedural safeguards. Federal courts have held that administrative economy or convenience alone is not a complete defense to a challenge based upon deprivation of due process.

State courts that have considered challenges to telephone hearings in unemployment compensation cases generally have supported the use of telephone hearings where they are conducted with sufficient procedural safeguards. In the context of demeanor credibility determinations, while many courts have expressed reservations in this area, no reported case flatly asserts that a hearing can be fair only if it is conducted face-to-face. An important component of this Article is a survey of several hundred cases, designed to compare in-person and telephone hearings at several points of inquiry. The surveys reveal that parties were much less likely to subpoena or call witnesses and introduce documentary evidence in telephone hearings than at in-person hearings. Both the quantity of the evidence and the quality of the testimony are diminished in telephone hearings. While the hearing format did not seem to affect outcomes for employers, claimants were less likely to prevail in telephone hearings than at in-person hearings. We suggest that the telephone hearing format, with its diminished opportunities for claimants to present their cases, accounts for this result. This is not to say that telephone hearings are fundamentally unfair to claimants. Properly structured, they can provide for a meaningful opportunity to be heard. These factors, however, underscore the importance of establishing individualized standards for scheduling hearings by telephone.

Cost savings alone are insufficient to justify a telephone hearing. Rather, all considerations bearing upon the rights of the parties must be taken into account when deciding whether to hear an unemployment compensation appeal by telephone.

# APPENDIX I MAINE SURVEY INSTRUMENT

CASE NUMBER

INTERSTATE

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## (1) APPEARANCES

CLT

CLT-TEL

EMP

EMP-TEL

DEPUTY

--	--	--	--	--

## (2) APPEALING PARTY

CLT

EMP

DEPUTY

--	--	--

## (3) HEARING AFTER FINDING OF GOOD CAUSE

CLT

EMP

N/A

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## (4) DECISION EFFECT ON APPELLANT

AFFIRMED

SET ASIDE

MODIFIED

DISMISSED

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## (5) TIME LAPSE OF CASE

30 DAYS

45 DAYS

OVER 45 DAYS

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## (6) REPRESENTATION

CLT ATT

CLT REP

EMP ATT

EMP REP

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(7) NUMBER OF ADDITIONAL WITNESSES

CLAIMANT	EMPLOYER

(8) NUMBER OF WITNESSES ADDED AFTER START OF HEARING

CLT	CLT TEL	EMP	EMP TEL

(9) SUBPOENAS

(A) NUMBER ISSUED

CLAIMANT	EMPLOYER

(B) NUMBER NOT ISSUED

CLAIMANT	EMPLOYER

(10) NUMBER OF DOCUMENTS OFFERED BY PARTIES

CLAIMANT	EMPLOYER

(11) DID PARTIES CROSS-EXAMINE?

CLAIMANT	EMPLOYER

(12) REASON FOR CONTINUANCE

CLT TO REVIEW DOC	EMP TO REVIEW DOC	INSUFF. TIME TO FINISH TESTIMONY	OTHER	N/A

(13) IF YOU COULD SCHEDULE CASE AGAIN, YOU WOULD DO IT:

THE SAME	IN PERSON	BY TELEPHONE

(14) WHY WOULD YOU CHANGE HOW THE CASE WAS SCHEDULED?

CREDI- BILITY	CONFRON- TATION	DOCUMENTS	WITNESS COACHING	OTHER	N/A

(15) SPECIAL HANDLING

# DOC(S) REC'D BEFORE HEARING	HOW SENT TO OTHER PARTY-MAIL/FAX	RECORD HELD OPEN FOR DOCS.	N/A

TO BE COMPLETED BY ADMINISTRATION

(16) COMMISSION APPEAL?

YES	NO

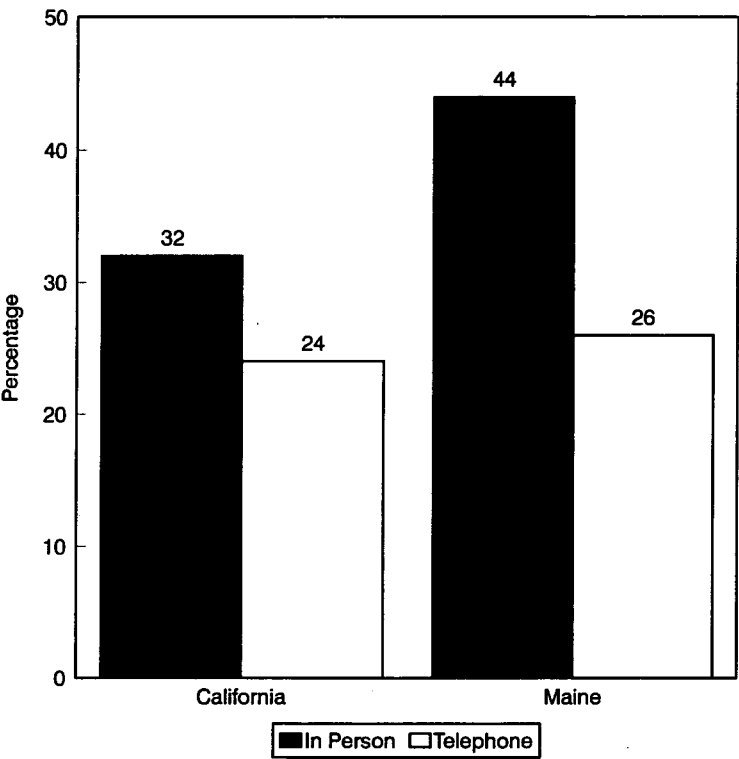
APPENDIX II  
CALIFORNIA SURVEY INSTRUMENT

CASE NUMBER \_\_\_\_\_ INTERSTATE (Y or N) \_\_\_\_\_

1. Appearances: (in person (ip); telephone (t); DNA)  
    \_\_\_ Clmt  
    \_\_\_ ER  
    \_\_\_ Dept
2. \_\_\_ Appellant (C or E)
3. \_\_\_ Reopening Request: \_\_\_ Clmt / \_\_\_ ER
4. \_\_\_ Decision: Effect on appellant (fav; unf; dis n/a)
5. \_\_\_ Time Lapse: Enter 30, 45, or 75
6. Representation: Attorney or Non-Attorney Rep (A or N)  
    \_\_\_ Clmt / \_\_\_ ER
7. No. of additional witnesses \_\_\_ Clmt / \_\_\_ ER
8. No. of witnesses added after start of hearing \_\_\_ Clmt / \_\_\_ ER  
    No. of subpoenas/SDT's issued/denied  
        issued/denied \_\_\_ / \_\_\_ Clmt \_\_\_ / \_\_\_ ER
9. No. of documents offered by parties: \_\_\_ Clmt / \_\_\_ ER
10. Did parties cross-examine (Y or N) \_\_\_ Clmt / \_\_\_ ER
11. Reason for continuance (if applicable)  
    \_\_\_ Allow Clmt to review documents  
    \_\_\_ Allow ER to review documents  
    \_\_\_ For additional testimony (insufficient time to finish)
12. If you could schedule case again, you would do  
    \_\_\_ the same  
    \_\_\_ in person  
    \_\_\_ by telephone
13. If you would change how case was scheduled, why?  
    \_\_\_ credibility  
    \_\_\_ confrontation  
    \_\_\_ documents  
    \_\_\_ witness coaching
14. Special Handling  
    \_\_\_ Documents Received Prior to Hearing  
    \_\_\_ How Sent to Other Party (Fax-F; Overnight Service-O;  
        Mail-M)
15. \_\_\_ Board Appeal (Y or N)

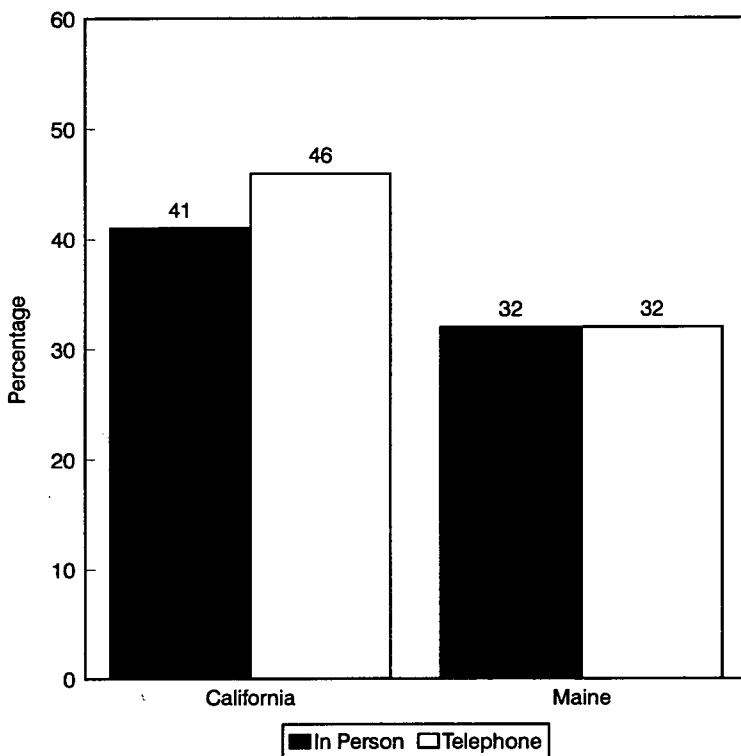
APPENDIX III

CLAIMANT  
REVERSAL RATES



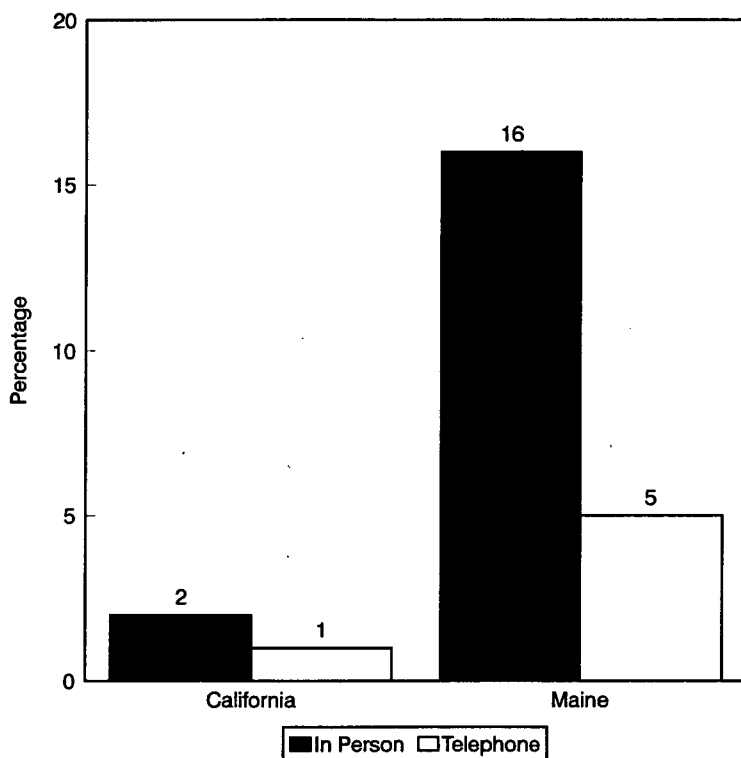
## APPENDIX IV

# EMPLOYER REVERSAL RATES



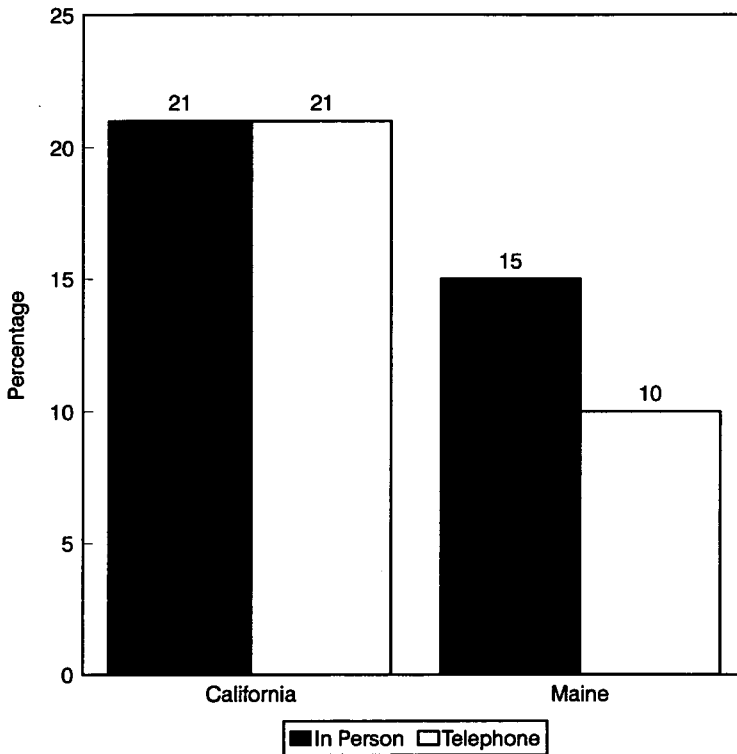
## APPENDIX V

# CLAIMANT REPRESENTATION



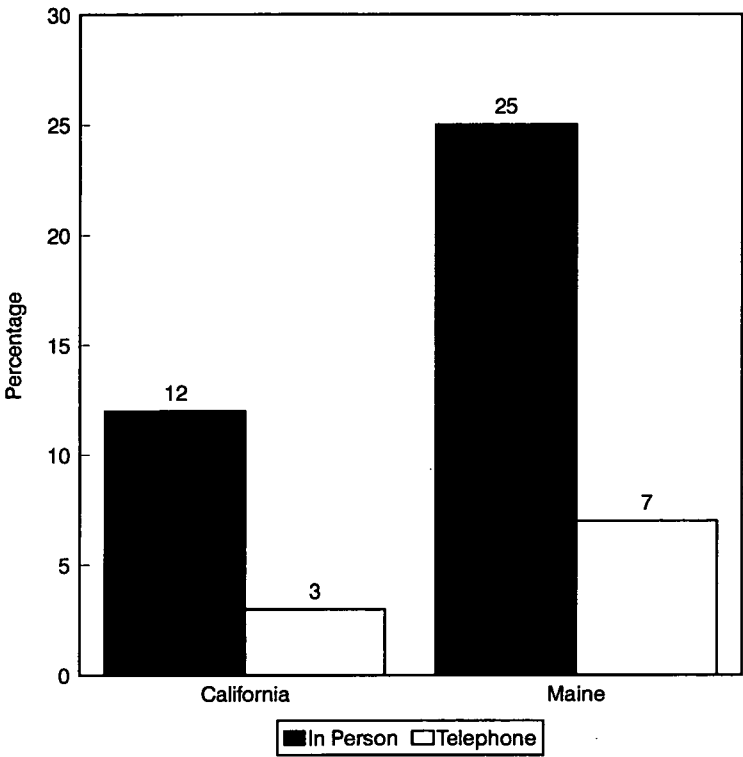
## APPENDIX VI

# EMPLOYER REPRESENTATION



APPENDIX VII

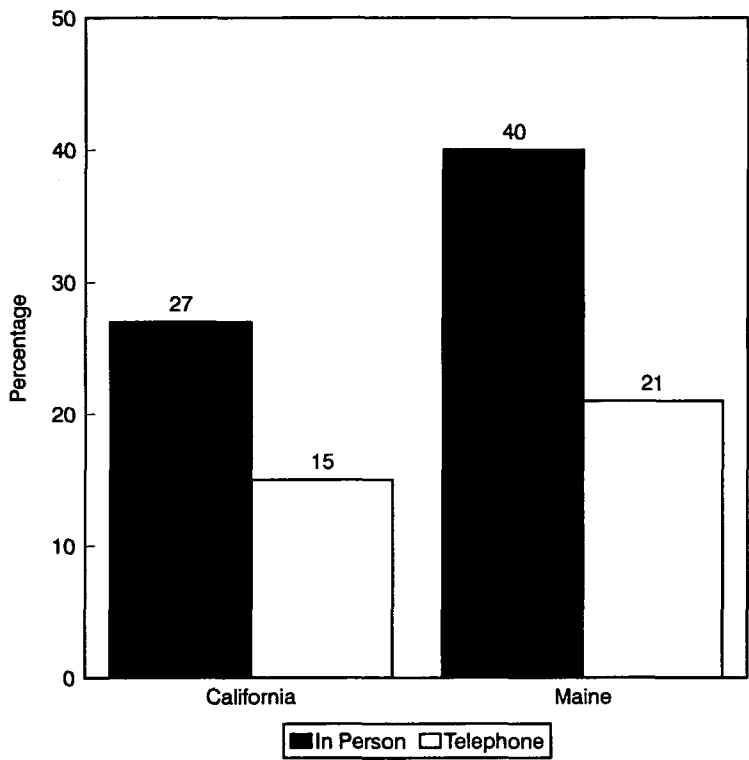
CLAIMANT  
WITNESSES





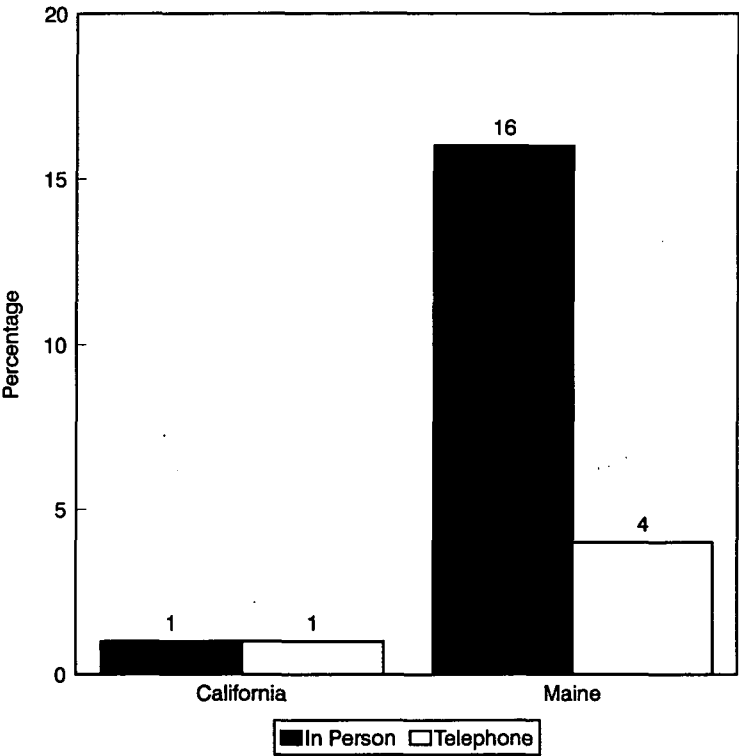
APPENDIX VIII

EMPLOYER  
WITNESSES



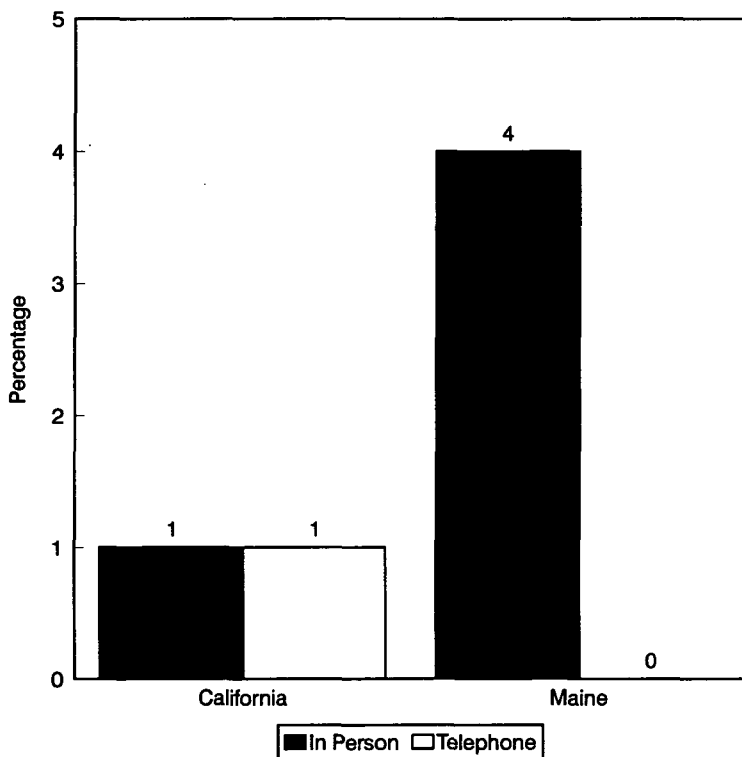
APPENDIX IX

CLAIMANT  
SUBPOENA



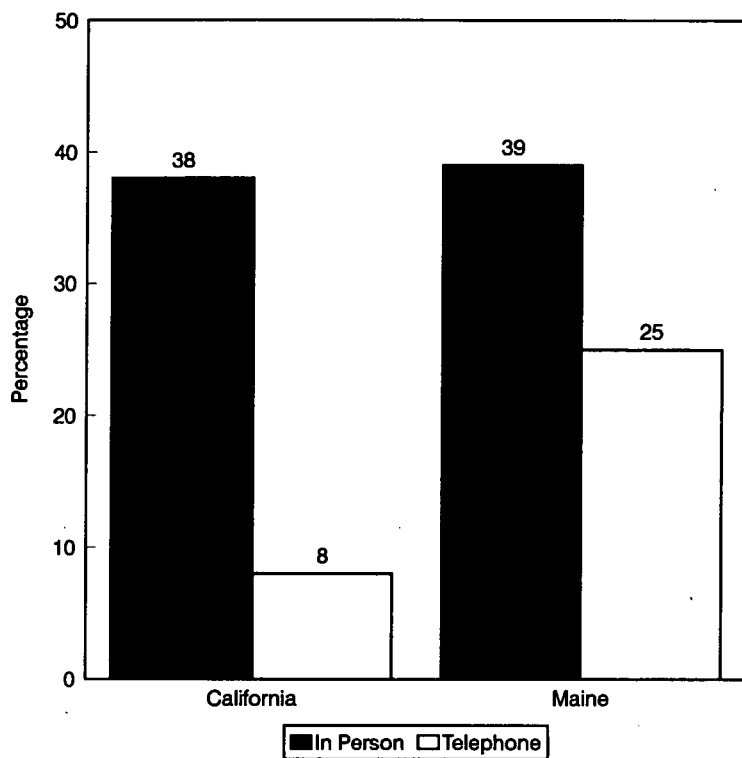
## APPENDIX X

# EMPLOYER SUBPOENA



## APPENDIX XI

# CLAIMANT DOCUMENTS



## APPENDIX XII

# EMPLOYER DOCUMENTS

