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## Due Process Implications of Telephone Hearings: The Case for an Individual Approach to Scheduling Telephone Hearings

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

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Allan A. Toubman  
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This Abstract and the Article which will follow examine the due process implications of conducting unemployment compensation fair hearings, in whole or in part, by telephone. The Article brings together preexisting and new material on the use of telephone hearings. It includes a historical perspective on the evolution of the practice, a review of federal due process considerations, a review of state case law, and the results of a telephone hearing practices survey in California and Maine. Based on this review, the Article makes recommendations for the appropriate use of telephone hearings.

I. DEVELOPMENT OF TELEPHONE HEARINGS

Prior to the use of the telephone, when parties were situated in locations remote from the hearing site, separate hearings were conducted for each party, frequently by different hearing officers. This system was unsatisfactory in that it allowed for only an indirect opportunity to confront opposing witnesses and neither side had the advantage of knowing the testimony of the other side prior to giving testimony. The hearing officer who rendered the decision was thought to be often inclined toward the position of the party whose testimony he heard. Telephone hearings were viewed as a desirable alternative to this type of system.

In recent years, the use of the telephone hearing procedure has expanded dramatically and is now used to some extent in all jurisdictions. The trend in many states is toward increasing use of telephone hearings without regard to simply geographical factors. The reasons for this trend are primarily economic, but also include concerns for the personal security of the hearing officer. Economic factors include hearing

officer time lost to travel and rental of outstation hearing facilities. Telephone hearings, however, involve their own costs. Telephone charges for multi-party conference calls can be substantial. Also, nonappearance rates, reopening, and appeal rates to higher authority may increase through the use of telephone hearings.

The judgment on the use of telephone hearings is complex because it requires consideration of many different factors: due process requirements, efficiencies of administration, travel costs, telecommunication costs, staff security and convenience, and dignity of the proceedings.

## II. DUE PROCESS CONSIDERATIONS

A "fair hearing" is required before the government can withdraw an entitlement to unemployment compensation.<sup>1</sup> The essential principles are notice and an opportunity for a hearing appropriate to the nature of the case.<sup>2</sup>

Whether telephone hearing provides an adequate opportunity for a hearing must be judged by balancing the three factors identified in *Mathews v. Eldridge*:<sup>3</sup>

- (1) the parties stake in the outcome of the hearing;
- (2) the likelihood of error when using a particular practice and to what extent would other procedures reduce the likelihood of error; and
- (3) the cost to the government of alternative procedures.

In *Shaw v. Valdez*<sup>4</sup> and *Cuellar v. Texas Employment Commission*,<sup>5</sup> two federal appellate courts applied the above tests to review unemployment compensation hearing practices. In *Shaw* the court found that the volume of cases did not provide an adequate justification for a lack of specific written notice. And in *Cuellar* the court rejected administrative convenience as justification for failing to issue a requested subpoena in the face of hearsay evidence.

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1. U.S. CONST. amend. V; Social Security Act, 42 U.S.C. § 503(a) (1988 & Supp. V 1993).

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

3. 424 U.S. 319 (1976).

4. 819 F.2d 965 (10th Cir. 1987).

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

If the justification for telephone hearings is primarily economic, the above cases indicate that agencies must also weigh the effect of telephone hearings on fundamental rights. These rights include representation, the ability to call witnesses and submit documents, and the right to subpoena involuntary witnesses.

### III. STATE COURT REVIEW OF TELEPHONE HEARINGS

State courts that have considered challenges to telephone hearings generally have upheld the practice, provided that there are unspecified procedural safeguards. Interestingly, although these courts may cite the federal due process balancing approach, as required by *Mathews*, they have not engaged in the detailed factual analysis found in *Shaw* or *Cuellar*. Instead, they often rely upon their own state common law.

Among the issues which state judiciaries have addressed include: whether credibility can be assessed adequately without the factfinder observing witness demeanor; whether the telephone hearing process interferes with a party's opportunity to present witness testimony or documentary evidence; and whether it is possible for the hearing officer to control a hearing so as to insure a clear and accurate record of the proceedings.

The courts have not been uniform in their treatment of challenges to telephone hearings. In some cases, courts have bypassed these issues completely, by finding that they were waived by failure of a party to timely object at the administrative level. On the other hand, courts also have elected to address certain of these issues notwithstanding the failure of a party to object. To a certain extent, the court's choice whether to address an issue for which there was not a timely objection appears to depend upon an outcome-oriented analysis.

The common thread which weaves through all of the cases which address due process issues raised in telephone hearings is that the courts do not per se condemn the procedure of conducting telephone hearings as incurably defective on due process grounds. All courts appear to recognize the utility of the process and its potential to provide a fair hearing where such a hearing might not otherwise be available,

as, for example, in interstate appeals. The courts, however, also are universally in accord that if procedural safeguards are not attended, telephone hearings perhaps have greater potential to violate parties' due process rights than in-person hearings. The suggested form those procedural safeguards should take varies from jurisdiction to jurisdiction.

#### IV. CALIFORNIA AND MAINE SURVEY OF HEARINGS: OBJECTIVE DATA COMPARING TELEPHONE AND IN-PERSON HEARINGS

The authors in California and Maine needed statistical data on how parties exercised specific rights at lower-authority telephone and in person hearings. They designed a survey to measure and identify objectively the exercise of fundamental rights. These include rights to representation, voluntary witnesses testifying on their behalf, requests for subpoenas, documents submitted into the record, and cross examination. Over eight hundred surveys were completed by the presiding officers that heard the two party cases.

The survey disclosed marked similarities between the telephone practices of parties in Maine and California. In both states there were differences between telephone and in-person hearings. Both claimants and employers do not exercise their rights as often in telephone hearings compared to in-person hearings. In general there was less representation, fewer witnesses and documents, as well as fewer requests for subpoenas.

#### V. RECOMMENDATIONS

These findings should encourage other states to review their scheduling practices. Both federal and state case law require consideration of the specific needs of the parties. A decision to use a telephone hearing requires at the minimum that the agency consider the impact on the parties due process rights on a *case by case* basis. Failure to consider the facts of the case means that the cost is being used exclusively to justify a telephone hearing.

Similarly, these findings also should encourage reviewing courts to inquire whether the state made a good faith effort to determine the appropriateness of a telephone hearing. The courts would then be in a better position to engage in the calculus required by *Mathews* and demonstrated by the federal appellate courts in *Shaw* and *Cuellar*.

A decision to schedule a telephone hearing may be completely sustainable for a "follow the spouse" case in Montana, but it may not suffice for a complicated sexual harassment case in Delaware.