The Presentation of Expert Testimony via Live Audio-Visual Communication

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As part of a national effort to improve efficiency in court procedures, the American Bar Association has recommended, on the basis of a number of pilot studies, increased use of current audio-visual technology, such as telephone and live video communication, to eliminate delays caused by unavailability of participants in both civil and criminal procedures. Although these recommendations were made to facilitate court proceedings, and for the convenience of attorneys and judges, they also have the potential to save significant time for clinical expert witnesses as well. The author reviews the studies of telephone testimony that were done by the American Bar Association and other legal research groups, as well as the experience in one state forensic evaluation and treatment center. He also reviewed the case law on the issue of remote testimony. He then presents data from a national survey of state attorneys general concerning the admissibility of testimony via audio-visual means, including video depositions. Finally, he concludes that the option to testify by telephone provides a significant savings in precious clinical time for forensic clinicians in public facilities, and urges that such clinicians work actively to convince courts and/or legislatures in states that do not permit such testimony (currently the majority), to consider accepting it, to improve the effective use of scarce clinical resources in public facilities.

The legal system in the United States has rarely been noted for being innovative, particularly in procedural matters. Although at times in our history courts have taken the initiative in areas of social change, such as the during the civil rights revolution in the 1960s, courts in general have been suspicious of departures from traditional methods of arriving at their decisions. Despite the communications revolution sweeping the rest of the country, the judicial system as a whole has been reluctant to abandon the personal confrontations characteristic of court proceedings, and also resistant to permitting recording of such proceedings. This latter tradition is perhaps best exemplified by the continuing prohibition of recording hearings before the Supreme Court. Many states still statutorily prohibit recording of court proceedings, however, and even in states which permit such reporting, many individual judges continue to refuse to permit it in their courts.

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The same resistance to technology has also existed in the case of presentation of evidence. This resistance has been somewhat less pronounced in the case of civil courts than with criminal courts, perhaps because the economic focus in most civil cases has made the legal participants more sensitive to cost-effective practices. In addition, the use of out-of-town experts whose schedules often interfere with court appearances is more common in civil cases, making the use of taped depositions and even testimony more common.

The latest innovation is the use of live testimony provided through telephone or audio-video hookups. Such practices were pioneered in sparsely populated areas in the western United States.[1] The major impetus for the establishment of the procedure was the savings in time and money involved for administrative law judges, who spend a great amount of their time in travel. Where great distances are involved, and weather often delays travel, as much as 30 percent of such judges' time may be wasted in travel. Telephone hearings eliminate the delays and much of the time lost through travel.

Legal Studies of Audio-Visual Testimony

In 1977, attorney L. F. Haeberle examined the legal issues arising from the use of telecommunication in civil courts.[2] He pointed out that many courtrooms already used electronic amplification of witnesses' voices, and that voices over telephones are legally no different. He argued that there are no rules requiring that the trier of fact must see the witness, and cited studies showing that seeing a witness may actually be distracting. Because the California rules of evidence provided for a continuance if evidence is unavailable *and* all reasonable efforts have been made to obtain it, he suggested that telephone testimony could be interpreted as one reasonable type of attempt to provide such evidence when a witness is not able to be physically in court. He proposed taking depositions by telephone. As with actual testimony, there is no problem if both parties stipulate; but even if there are objections, it can be done with specific procedural rules. He argued that direct witness testimony over the telephone should also be admissible if the witness cannot be present, again citing procedures to satisfy due process objections. Where documents must be used, they can be provided to all parties in advance. Where the witness must use gestures, picturephones could be used (written in 1977).

In the late 1970s, a number of researchers began to examine existing practices in the area of telephone hearings. Corsi and Hurley with the Fair Hearing Project began with a study of telephone hearings for unemployment insurance appeals in California.[3] Before 1970, these cases often required split hearings, where each party would testify separately before different decision-makers, thus preventing a single judge from hearing both sides of a case. Procedures were therefore devised by the California Unemployment Insurance Appeals Board, which called for one of

the parties to be at the same location as the hearing officer if at all possible. All relevant documents were to be exchanged before the hearing. The Project surveyed all 116 administrative law judges about their experience with the experiment; 104 responded. Of those, only one reported holding no telephone hearings; 85 percent reported holding at least 25 hearings, and 47 percent reported holding over 75. Responses to attitudinal questions showed that 30 percent had been initially skeptical; but that after experience, many negative and neutral attitudes shifted to positive, and very few shifted to negative. At the time of the survey, 68 percent reported positive feelings about telephone hearings, 10 percent neutral, and 22 percent negative. Even those who were negative favored telephone hearings under certain circumstances.

All the respondents felt that they could obtain all the evidence via telephone hearings necessary to arrive at a decision. The judges rated telephone hearings as slightly less fair and as protecting due process slightly less than in-person hearings, but as better than split hearings. The majority of judges felt that they could assess credibility of witnesses almost as well on the telephone as in person. A majority of the judges said that telephone hearings required more preparation time than live hearings, because of the need to review all the documents before the hearing.

Based on their experience with intrastate hearings in California, the Fair Hearing Project then devised a more complex pilot study of telephone hearings in New Mexico in 1978.[4] State officials and legal aid attorneys had realized in 1976 that the large distances involved in appeal hearings on Aid for Families with Dependent Children (AFDC), food stamps, and unemployment insurance might make telephone hearings useful. The Project asked three questions: (1) Are due process requirements met in telephone hearings? (2) Are telephone hearings cost-effective? (3) Is the quality of the hearing affected by the use of telephone testimony? The Project staff trained hearing officers and modified the formats of the hearings. Initially, all the participants except the hearing officer were in one place. Research staff administered questionnaires to all participants immediately after the hearings and after the decisions were made. Cases were assigned to telephone or live hearings based on several criteria, which varied with the type of hearing. Also, lawyers from the University of New Mexico law school and legal aid staff were introduced into some of the hearings. Because the choice of hearing type was not random, no formal data were reported. The authors observed that although there were technical difficulties with some of the phone equipment and lines, all the participants generally favored the telephone hearings because of the convenience for them. At the end of the pilot project, most hearing officers were positive about telephone hearings, although most still preferred live hearings whenever possible. No telephone hearing had to be reheard because of due process problems.

As a result of the pilot study, the au-

thors concluded that the experience with telephone testimony had been positive enough to warrant extending it statewide. They also felt that a methodologically sound research design had been devised to measure the effects of both telephone versus live hearing and lawyer-present versus lawyer-absent conditions.

After the pilot study in 1978, the Project followed up with a full-scale study of unemployment insurance (1,000 cases) and welfare (AFDC and food stamps) administrative appeals (100 cases) in New Mexico.[5] Over 50 percent of the hearings were held by telephone. The researchers contacted, in person or by telephone, 399 of the unemployment and 52 of the welfare appellants. Three research questions were addressed: (1) Did telephone hearings meet due process standards? (2) Did the use of the telephone affect the quality of the hearing? (3) Are telephone hearings cost-effective? Hearing officers were initially apprehensive or hostile to telephone hearings; but as the study progressed, most accepted or even preferred the telephone hearings. By the end of the study, there were no significant differences in the outcomes of telephone versus in-person hearings for either unemployment or welfare appeals. For unemployment hearings, all participants preferred the telephone mode, although the differences were not statistically significant. Participants in welfare hearings had no preferences between telephone and in-person hearings.

When transcripts were submitted for peer review, panels of experts could not tell transcripts of telephone from in-person hearings. Because New Mexico is the fifth largest state in area but sparsely populated, hearing officers spent nearly 25 percent of their working time in travel for in-person hearings. The researchers concluded that even taking into account the costs associated with establishing a special telephone network for hearings, it would save significant officer time.

In 1979 the State Bar of Michigan formed a Legal Energy Conservation Task Force to study ways to increase efficiency in courts.[6] The judge who reported the study results commented that he preferred a personal conference for the first status conference in a case; but thereafter, status conferences were set up via telephone. The study found that telephone conferencing permitted more conferences to be heard in a given period of time, with no loss in efficacy.

As part of the Economic Litigation Pilot Project in 1977, the Los Angeles County Superior Court ruled that all arguments in law and motion matters were to be held via telephone, with some exceptions.[7] Attorneys were permitted to appear in person if they desired; but most were readily converted when they heard how easy it is to appear by telephone. All telephone conferences were scheduled for Friday mornings. The author of the report, a judge, found after more than 400 hearings, that they avoided multiple in-court hearings and afforded greater flexibility in scheduling. The use of telephones permitted conveniences such as having a clerk research a point and give the judge the citation

during the hearing, which could not be done during formal in-person hearings. Telephone hearings saved attorneys' travel time, thus saving money for the attorneys and their clients. Some attorneys complained that they couldn't "get their adrenalin flowing" or read the judge's expression over the telephone; but the study's author argued that such matters are less significant in brief motion hearings. Although concentrating on motion hearings, the judge gave examples of the use of telephones for matters other than motion hearings, including an expert witness testifying by phone from Connecticut when he was unable to travel to Los Angeles.

In federal court for the eastern district of Pennsylvania, telephone conferencing is used for argument and disposition of discovery matters, arguments on relatively simple contested motions to dismiss, or for summary judgment and settlement discussions.[8] When the procedures were first tried, judges would usually initiate the procedures; but with increasing experience with the process, attorneys began to request telephone conferencing as well. Telephone hearings saved travel time, and permitted unexpected gaps in judges' schedules to be filled in quickly. Arguments on the telephone also tended to be considerably shorter than when made in person. There were problems as well: it was more difficult to make a formal record, because the lack of recording equipment, and the reporter had difficulty in hearing all the parties clearly in some cases. No mention was made of expert witness testimony.

The New Mexico Court of Appeals has been using telephone conferencing for motion hearings since 1978.[9] Hearings last an average of 10 minutes, as opposed to 20 to 30 for live hearings. In addition, the large distances involved in New Mexico cost attorneys and clients significant amounts of time in travel. Motion judges usually initiate the call, and speaker phones permit the three-judge panel to hear a motion.

DeFoor and Sechen[1] surveyed Florida court administrators to determine the extent of telephone testimony. They found that telephone testimony was used in administrative hearings in 16 of 20 judicial circuits. Such use began as early as 1976 and was pioneered by enthusiastic judges because of the long distances involved. Statewide administrative procedures were frequently heard on the telephone. The respondents were favorable to telephone hearings, citing savings in time and money. No statewide rules governing telephone procedures exist yet, but a 1982 state law required establishment of such rules. Witness testimony, if permitted, is limited. The authors concluded that telephone testimony is best for nonevidentiary matters but argue that it is also well suited for witness testimony. They question whether telephone hearings should require stipulation of all parties and raised concerns about the parties' rights to confrontation, but they pointed out that studies show that lying may be better detected without visual distractions and concluded that telephone testimony is here to stay and that with the advent of closed-circuit video may ultimately

result in the restructuring of court procedures.

As court congestion and delays grew in the late 1970s, the American Bar Association's Action Commission to Reduce Court Costs and Delay and the Institute for Court Management undertook a joint study to provide information to judges and attorneys unfamiliar with the use of telephone hearings.[10,11] Forty judges in New Jersey and Colorado who had used telephone hearings for pretrial motions in civil cases were questioned as to their experiences. Preliminary results indicated that acquisition of the equipment was insufficient without integration of the procedure into the work routines and habits of the judges. Telephone conferencing was used in all locations and in all types of courts; it was used less frequently in criminal cases, but some judges used it for motion hearings or to take guilty pleas. Expert witness testimony was taken in child custody hearings, civil commitment cases, and small claims court. Motions that were dispositive of cases were less frequently heard by telephone than procedural motions. Telephone hearings tended to be scheduled more flexibly than personal appearances. Judges reported no significant changes in hearings conducted by telephone on issues of counsel's preparation, relevancy of counsel's arguments, judge's preparation, judge's control over the proceedings, judge's ability to use questions, or the care with which proceedings were scheduled. Most judges said that the telephone hearings were shorter. Judges who used telephones said that the relatively small expenses of purchasing equipment and installing conference lines were worthwhile in terms of more effective and speedy resolution of cases. Most of the judges surveyed had started using the telephones on their own; the degree to which they used telephones seemed to depend on their length of use—the longer they used them, the more uses they discovered.

After their study of judicial response to telephone hearings, the Action Commission then contacted attorneys to find out what they thought would be appropriate use of telephone hearings.[12] They indicated more acceptance of telephone hearings to address procedural issues than substantive issues, such as expert witness testimony. There were moderate correlations among attorneys who had and had not used telephone hearings concerning three factors that might be affected by telephone testimony: the ability of the judge to understand evidence, the ability to present effective oral arguments, and the ability to answer judge's questions. The authors then surveyed attorneys who had participated in telephone hearings in their previous field study.[13] Eighty-four percent of those attorneys were satisfied with the telephone hearings, because it saved between one and four hours travel time per hearing, reduced waiting time, and thus saved expenses—up to $1.5 million per year in New Jersey.

In his introduction to a special section on telecommunications in the University of Miami Law Review, Judge DeFoor[14] concluded that "Only the particular insulation of the judiciary can ac-

count for its late entry into the technological age." He said that even without enabling legislation or rules, judges have on their own begun using the telephone in court to save time. As technology continues to improve, Judge DeFoor predicted that teleconferencing centers will be established in a growing number of locations, and television will become as important in courts as telephones are now. The American Bar Association issued a separate pamphlet recommending the use of such testimony.[15]

All the studies and reports from the legal community recommended the use of telephone testimony in cases in which all parties can not be present at a hearing, and for the convenience of the legal professionals. Few, however, included the convenience of witnesses among the major advantages of such hearings. One has only to review the language on standard subpoenas to be reminded that courts expect witnesses, both material and expert, to be available at the court's pleasure.

Courts are, however, typically sensitive to the schedules of busy professionals, and will often try to schedule expert testimony to fit in with the experts' schedules. It is also true, however, that much of this concern is for the costs to attorneys and their clients, which is involved if experts are forced to wait to testify, with the meter running. In most states, the majority of private expert psychiatric testimony is presented in civil cases, because few states provide payment at reasonable private rates for evaluations in criminal cases.

In the case of the salaried state employees who provide the great majority of evaluations for the courts in criminal cases, most courts (and state administrators) consider expert testimony to be part of the clinician's job. Little effort is therefore put forth to protect such clinicians (chiefly psychiatrists in most jurisdictions) from spending a significant part of their time waiting in courtrooms to testify. Neither courts nor attorneys generally have to pay for state experts' time, and the economic incentive for efficiency is therefore also lacking for the court.

Because the criminal law has been the most concerned with procedural protections for defendants, criminal courts have traditionally been the most resistant to procedures that prevent in-person confrontation of witnesses through cross-examination. Thus, most of the judicial experience with telephone testimony has been in civil cases.

Case Law on Audio-Visual Testimony

Objections have been raised by some attorneys that telephone testimony violates the confrontation clause of the Sixth Amendment, because a witness cannot be directly observed. DeFoor and Sechen[1] argue, however, that visual observation may actually distract fact-finders, and make it more difficult to detect false testimony. The issue has been litigated over the past 25 years, beginning with the U.S. Supreme Court's decision in *Douglas v. Alabama*,[16] in which it held that its previous decisions interpreting the confrontation clause held that a primary interest secured by that

clause is the right to effective confrontation. The Court concluded that cross-examination may be effective even in the absence of physical confrontation.

In *Kansas City v. McCoy,*[17] the Missouri Supreme Court cited *Douglas* in holding that testimony in a criminal case by an expert witness over live two-way television did not violate the Sixth Amendment. In arriving at its decision, the court was able to view the videotapes of the proceedings. The court also held that the presence of the television cameras in the courtroom did not violate the defendant's due process rights to communicate privately with his attorney, because these conversations were neither broadcast nor recorded on the video tape.

Citing a number of cases in which videotaped depositions from expert witnesses had been accepted at trial, a Florida appeals court ruled that if written depositions could be accepted at trial, then there could be no valid objection to the admission of a videotaped deposition done with the defendant present.[18]

In *Slattery v. California Unemployment Insurance Appeals Board,*[19] the state appeals court cited administrative rules in which the Board had provided for conference telephone testimony as "an imaginative attempt to solve the due process problems which inhere in the simultaneous hearing concept." A Florida appeals court subsequently ruled[20] that although the Florida Administrative Code did not explicitly provide for telephone hearings, neither did it prohibit them. The defendant had not objected to the telephone testimony at the time (and in effect had asked for them, because he had not wanted to travel to Florida for the live hearing). Citing *Slattery*, the court held that telephone conferencing had previously been upheld, and that it did not violate defendant's rights.

In dicta in a civil case in which one of the trial attorneys was unable to be present in person, a Florida appeals court judge suggested that the attorney could have listened to the deposition via telephone and suggested questions to his substitute during the deposition.[21] The same court approved the use of telephone testimony used to argue for the issuance of a writ of *habeas corpus.*[22] The court reasoned that although state law did not explicitly provide for such testimony, it cited the significance of the process and the need for speed in deciding that more formal procedures were not required. The appellant also argued that the judge's oral issuance of the writ over the telephone violated due process; but the court held that it was not required to reach that issue to dispose of the appeal, and chose not to address it.

The Wisconsin Supreme Court ruled[23] that telephone expert witness testimony in a civil jury trial was permissible in principle, but that when the defense was denied the opportunity to examine documents to which the witness referred in his testimony, the defendant's right to cross-examine effectively was violated.

The Virginia Supreme Court ruled that telephone hearings of the Roanoke school board did not violate the state's Freedom of Information Act, arguing that the legislature would have specifi-

cally barred such hearings if that had been its intent in passing the law.[24]

Although some attorneys, both in the literature and in our experience in Wisconsin, believe that they cannot cross-examine expert witnesses as effectively on the telephone as they can in person, there is a considerable research literature which demonstrates that in fact observers can distinguish false from true statements *more* accurately when only listening to those statements than when able to see as well as to hear the statements.[2,3] It appears from those studies that visual cues serve more to distract observers than to provide them with useful information.

More recently, the U.S. Supreme Court reexamined the issue of face-to-face confrontation of witnesses in *Coy v. Iowa*.[25] Coy was charged with two counts of sexual assault on juveniles. At the trial, the victims testified, as permitted by state statute, from behind a screen that prevented clear visual contact between them and the defendant, but permitted the defendant to see their outlines and to hear them. The trial court rejected the defense contention that such procedures violated the Confrontation Clause of the Sixth Amendment; Coy was convicted, and the Iowa Supreme Court affirmed. On appeal, a six-person majority of the U. S. Supreme Count held that the procedure did violate the Confrontation Clause. Justices O'Connor and White joined the majority opinion, but in a separate concurring opinion, emphasized that although they agreed that the right to confrontation was violated in the specific case before the court, the right to face-to-face confrontation is not absolute, but is simply the *preferred* method of ensuring the more basic right to cross-examination. Justices Blackmun and Rehnquist dissented, arguing that a literal reading of "face-to-face" is unnecessary, and that to require it would prevent states from experimenting with new methods of protecting victims of sexual assault. They also argued that the basic reason for the Confrontation Clause was to prevent *ex parte* affidavits, and that adequate cross-examination could be afforded for live witnesses without physical confrontation.

It is not clear at this point how this ruling would apply to the use of telephonic expert witness testimony. Wisconsin, like many other states, prohibits telephone testimony at a criminal trial, but permits it at a variety of pre- or posttrial procedures, which would include competency hearings and sanity hearings. Although the same confrontation arguments could be made with regard to such hearings, most states have permitted, without successful challenge, less rigorous protections for defendants at such hearings. In addition, in those states such as Wisconsin that require the consent of all parties before telephone testimony is permitted, there is an automatic potential protection for defendants built into the system.

The Wisconsin Experience

In 1981, a task force consisting of members of the Wisconsin Judicial Council, an advisory body to the legislature, and the Committee on Electronic

Technology in the Courts was appointed by the Chief Justice of the Wisconsin Supreme Court. After reviewing many of the studies presented above, its 1983 report[26] concluded that broader judicial use of readily available teleconferencing technology would permit better use of court time, significantly reduce the travel and waiting time of lawyers, witnesses and parties, and promote efficient case processing by allowing judicial hearings to be scheduled for times when all parties cannot conveniently come to the courthouse.

After considering this report, the Wisconsin Supreme Court adopted rules on October 29, 1987, permitting many judicial hearings to accept testimony via telephone or by closed circuit television.[27,28] The rules deal mainly with civil matters such as motion hearings and pretrial conferences; but the use of audio or visual testimony in certain criminal procedures was also permitted. These procedures include initial appearances and a variety of pretrial motions, but also explicitly include hearings on competency to proceed and jury trials. In all cases in which an official record is to be made of the proceedings, the court reporter must be in voice contact with all parties.

The original proposal by the Judicial Council had recommended that hearings should be permitted on the motion of any party to the case as long as the presiding judge approved. The Supreme Court rejected this recommendation, in favor of requiring that all parties to the case (including criminal defendants and lay litigants) must consent to the use of telephone hearings. Some judges have interpreted this ruling to mean that defendants who are either *de facto* or *de jure* incompetent to proceed may not consent to telephone hearings.

When it issued its ruling on telephone testimony, the Wisconsin Supreme Court also directed the Judicial Council to conduct a study of the effects of the ruling. It has implemented this charge through a questionnaire placed in the *Wisconsin Lawyer*, the magazine of the state bar association that is sent to every member of the bar. The Judicial Council is also currently studying procedures for transmission of legally relevant documents via facsimile machines (fax); questions on attorneys' experience with fax transmission were also included in the questionnaires. The results of this survey that are available at this time, 39 responses, demonstrate that 100 percent of the respondents found telephonic hearings were useful, had no significant disadvantages, and would use them again. Many commented that they wished that more proceedings could be handled by telephone. A majority of respondents were also favorable toward the use of fax machines to file documents with courts, although there were more criticisms of certain usages of this technology than of telephonic hearings.

Judges were also surveyed; all respondents were positive as to the value of the concept, but many complained that the telephone technology available to them was inadequate for acceptable communication among all parties, particularly court reporters; and they complained that funds were not available in

many counties to purchase adequate speaker phones. Several suggested that the Judicial Council provide specific suggestion as to the best equipment available.

After weighing the feedback from attorneys and judges, the Judicial Council recommended to the State Supreme Court that its original proposal be adopted, and telephone testimony be accepted "upon a showing by the proponent of good cause," rather than by consent of all parties. Their recommendation is pending before the Court at the time of this writing.

The Forensic Center at the Mendota Mental Health Institute in Madison, Wisconsin, is one of two state forensic facilities which perform evaluations for state criminal courts of defendants' competency to proceed.[29] The 205-bed facility has provided 306 such evaluations state-wide from January 1988 through December 1989.

After each competency evaluation, the presiding criminal court must hold a formal bench hearing to enable the judge to make a determination of the defendant's competency. For those found incompetent and committed to one of the two state forensic facilities, regular hearings are required to determine the defendant's progress toward competency. In addition, a hearing must be scheduled whenever the treating facility reports that a defendant has, in their opinion, regained competency.[30] Wisconsin statutes do not specify that competency examiners must have particular qualifications; evaluations at Mendota are team-based, and the reports are written by psychiatrists, psychologists, and social workers, all of whom have received training in evaluations through a formal series of seminars presented by the author. The evaluators submit written reports to the court for each hearing. Our experience at the Mendota Forensic Center over the past five years has been that judges have accepted the reports through stipulation by both attorneys in over 80 percent of cases, and thus no *viva voce* expert testimony has been necessary in those cases. Although exact records have not been kept, the experience at the other state inpatient forensic facility has been similar to ours, in that most of the hearings have been based on written reports rather than on oral testimony.

After the state supreme court ruled that all involuntarily committed mental patients, criminal as well as civil, have a qualified right to refuse treatment,[31] hearings became necessary if facility staff wished to treat patients with psychotropic medication without their written informed consent. The court decision contemplated that medication hearings would be held at the same time as competency hearings, but in practice they are still often held separately for a variety of logistical reasons. Although the supreme court did not specify the profession of those who would be qualified as experts to testify on patients' competency to make treatment decisions, and the criteria set forth do not require medical knowledge *per se*, most judges have required *viva voce* testimony from psychiatrists on this issue.[32]

One reason for this requirement was

that until the supreme court's decision, the criminal court judges had not been required to hear issues involving psychotropic medication, and most were quite unfamiliar with the risks and benefits of such treatment. In addition, the published opinion of the supreme court included a completely biased view of such medication, listing several pages of severe side effects with no mention of their frequency, and did not state anywhere that they had therapeutic benefits. Given this presentation, the trial court judges were understandably concerned about authorizing such treatment involuntarily, and many spent over an hour initially just learning about the medication from testifying psychiatrists.

Another reason for the significantly higher incidence of *viva voce* testimony was the greater interest by defense attorneys in challenging it. Although, as previously stated, most accepted reports on their clients' competency to proceed without challenge, some attorneys were as concerned by the supreme court's portrayal of the effects of medication as the judges were, and required testimony. In addition, although the defendants themselves were often passive about their competency to proceed hearings, they were almost by definition active in their desire not to receive medication, and thus frequently demanded hearings even if their attorneys did not disagree with the petitions for involuntary treatment.

Because it was anticipated that these hearings would require testimony more frequently than was the case with competency to proceed, and that psychiatrists would be required to testify in virtually every one, there were significant concerns about utilization of psychiatrists at the two state inpatient facilities that perform a significant percentage of initial competency evaluations, and to which all commitments for treatment to competency to proceed occur. As we have reported elsewhere,[32] our predictions about the significantly increased need for psychiatric testimony in medication hearings were accurate.

Testimony presented by telephone requires an average of 30 to 45 minutes of psychiatrist time, as opposed to an average of nearly eight hours when travel to court is counted, because our facility serves the entire state of Wisconsin. In addition, a number of hearings have been cancelled, rescheduled, or completed without testimony. In such cases, no clinical time was lost when the hearing were scheduled to be by telephone. The great majority of competency to proceed and medication hearings involving patients at our facility have been conducted by telephone, with few problems. The judge and both attorneys receive copies of the clinical report(s) well in advance of the hearings, and that documentation has usually been sufficient, in conjunction with the oral testimony. On a few occasions, hearings have had to be adjourned to permit transmission of additional records, particularly in the case of medication hearings. The recent availability of fax capability at both our facility and the court should prevent most of these postponements.

The option to testify by telephone has therefore been an unqualified benefit for

clinicians at our facility. Personal communications from private practitioners, however, indicate that their experience has been less favorable. For clinicians whose practices consist largely of scheduled psychotherapy sessions, the unpredictability of court schedules continues to cause problems even with telephone testimony. Although such clinicians do benefit by not having to waste time travelling to and from courts, they continue to face a choice between reserving time for testimony, and having to interrupt therapy sessions to testify. Because cases are frequently called later than scheduled, both problems often exist in an individual case. Also, such time lost usually represents a loss of income, because the testimony in civil commitment cases—the most frequent type of testimony for most private therapists— is not reimbursed. Private forensic psychiatrists, on the other hand, typically charge by the hour, and are thus less bothered by the time involved in travelling to court and waiting for their cases to be called. One private psychiatrist argued to a state committee evaluating the Wisconsin telephone testimony procedures that he felt that in-person testimony allowed him to make his points much more effectively.[33]

The National Survey

When I have presented data on our ability to testify by telephone in Wisconsin, a number of practitioners from other states have expressed considerable interest in the practice, and have inquired how they could go about obtaining permission to testify by telephone in their jurisdictions. As a preliminary effort to provide such information, I undertook a national survey to discover how many jurisdictions permit audio-visual testimony, and how widespread it is in those that permit it.

Methods

Questionnaires were sent to the office of the attorney general in each state; each was accompanied by a cover letter explaining the purpose of the survey and a stamped self-addressed envelope. The survey inquired into the admissibility of live telephone, live video, and taped video testimony in that jurisdiction's civil and criminal courts. Respondents were also asked about the frequency and effectiveness of such testimony.

Results

After the initial mailing to state attorneys general, responses were received from 22 jurisdictions. A follow-up mailing resulted in an additional six jurisdictions. Surveys were then sent to state court administrators in each remaining state; follow-up questionnaires and telephone contacts resulted in receipt of questionnaires from 49 of the 51 jurisdictions. Telephone contact with the law school in the remaining two jurisdictions completed the data collection.

All respondents indicated that videotaped depositions were admissible in court, although there were some restrictions in some states (Tables 1 and 2). The majority of respondents indicated that their statutes were silent on the topic of live telephone or video testimony. Some assumed conservatively that if such testimony was not explicitly au-

Table 1
Video Depositions Permitted?

	States				
Yes	AL	AK	AR	CT	DC
	FL	GA	HI	IA	ID
	IN	KS	KY	LA	MA
	MD	ME	MI	MN	MO
	MS	MT	NC	ND	NE
	NH	NJ	NV	NY	OH
	OK	OR	PA	RI	SD
	TN	VA	WA	WI	WV
	WY				
Sex only	UT				
Civil only	CA	CO	IL	NM	SC
	TX				
Criminal only	AZ				
?	DE				

Table 2
Video Deposition Approval

	States				
Judge	AL	AK	AR	AZ	CA
	CO	DC	FL	HI	IA
	ID	IL	IN	KS	KY
	LA	MA	ME	MN	MO
	MS	MT	NC	ND	NE
	NH	NV	OH	OK	PA
	RI	SC	SD	TN	UT
	VT	WA	WI	WV	
Counsel	AL	AR	DC	HI	IA
	LA	MO	ND	NY	OR
	SD	WA	WY		
Other	AR	LA	ND		
No one	NE	MD	MI	NM	

thorized by statute or court decision, then it was prohibited. Some respondents indicated that, although not explicitly authorized by statute, telephone testimony was occasionally permitted by some judges.

Audio-Visual Testimony

From the data returned, it appears that live video is permitted in the majority of jurisdictions, although it is seldom used in practice at this point (Tables 3 and 4). Live telephone testimony has yet to win acceptance in the majority of states (Tables 5 to 7).

Table 3
Video Testimony Permitted?

	States				
Yes	AK	AL	AR	FL	GA
	IA	ID	KS	KY	MA
	MI	MN	MO	MS	MT
	NC	OR	RI	TN	VT
	WI				
No	CA	DC	DE	HI	ME
	NE	NM	NY	SD	WA
	WA	WV	WY		
Sex	LA	NJ	OK	UT	
Civil	CO	IN	ND	OH	
Criminal	AZ	CT	IL	NV	VA
?	MD	NH	PA	TX	

Table 4
Video Testimony Conditions

Approval	States				
Judge	AZ	CO	CT	FL	IN
	KS	KY	MO	MN	MT
	NC	NJ	NV	PA	RI
	TN	VA			
Counsel					
Both	AL	AR	GA	ID	IL
	MA	MI	MS	ND	OR
Neither	AK				

Table 5
Telephone Testimony Permitted?

	States				
Yes	AK	AR	AZ	CO	FL
	GA	IN	KS	KY	MD
	MI	MT	NC	ND	NJ
	OR	VT	WA	WI	
No	AL	CA	CT	DC	DE
	HI	IA	ID	IL	LA
	MA	ME	MN	MO	MS
	NE	NM	NV	NY	OK
	RI	SC	SD	UT	VA
	WV	WY			
?	NH	OH	PA	TN	TX

Conclusions

All states responding to the survey currently permit depositions of expert witnesses to be taken by video. This

Table 6
Telephone Testimony Conditions—I

	States				
Civil and criminal	AK	AR	AZ	GA	KS
	KY	MI	MT	NC	ND
	NJ	OR	VT	WA	WI
Civil only	CO	DC	IN	MD	
Expert	AK	AR	AZ	CO	GA
	KS	KY	MD	MI	MT
	NC	NJ	OR	VT	WA
	WI				
Material	AK	AR	AZ	CO	GA
	KS	MD	MI	MT	NC
	OR	WA	WI		

Table 7
Telephone Testimony Conditions—II

Approval	States				
Judge	AK	AR	AZ	CO	DC
	GA	IN	KS	KY	MD
	MI	MT	NC	ND	NJ
	OR	VT	WA	WI	
Counsel	AR	DC	GA	KS	MI
	ND	NJ	OR	WI	
Other	AK	DC	ND	WI	WY

practice has been occurring across the country for a number of years, particularly in civil cases, and is relatively noncontroversial. Most responding states also permit live video testimony; but the lack of necessary equipment in all but a few larger cities and law firms has restricted the use of this option to a very small number of cases. Many respondents said that they were unaware of any live video testimony having occurred in their states.

It appears that, of the available audio-visual technologies, the increased use of live telephone testimony currently offers the most significant prospect for reducing professional time wasted in travel to, and waiting at, courts, particularly for public forensic psychiatrists. Despite the overwhelming research evidence, from pilot studies in a number of states and with a number of types of legal procedures, that telephone hearings save considerable time for courts and attorneys with very few disadvantages, a majority of states still do not explicitly permit expert witnesses to testify by telephone. Because, however, few states appear to have statutes or case law which explicitly *prohibit* telephone testimony, most judges probably have the authority to permit such testimony on a case-by-case basis, as long as neither party objects. Such informal arrangements have been occurring for a number of years across the country, as the initial studies in the legal literature have demonstrated.

Clinicians in states without enabling legislation or case law may therefore bring the possibility of telephone testimony to courts they serve, and perhaps convince them of the merits of the procedure. The data and research reported in this article have been presented here to facilitate that process. Public forensic clinicians may also want to work through their state departments of mental health to sponsor and support legislation explicitly permitting such testimony.

In many jurisdictions, the excessive costs in clinical time have prevented clinicians from petitioning courts, particularly in the area of right to refuse treatment.[34] The use of telephone testimony can alleviate much of the cost in time (and perhaps also some of the cost in delays, inasmuch as hearings involving expert witnesses are typically held more quickly by telephone than in person) associated with court hearings for men-

tal patients in the public sector, thus freeing up clinical time to devote to patient care.

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