



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Telephonic Witnesses and Dependency Hearings

ORS 45.500 controls when telephonic testimony will be allowed in Oregon trial courts. Currently, ORS 45.400 prohibits witnesses from testifying telephonically when their testimony would be “outcome determinative,” or when the lack of physical appearance would result in substantial prejudice to one of the parties. The burden is on the party filing a motion to allow telephonic testimony to show good cause as to why the testimony should be allowed. Subsection (3), however, goes on to carve out several exceptions in which the court “may not allow the use of telephone testimony,” including “in any case” in which the issues a witness will testify to are outcome-determinative, or if a witness's testimony by telephone would result in substantial prejudice to a party in the proceeding.

A recent Oregon Court of Appeals decision interpreted ORS 45.400(3)(b) to prohibit a medical witness in a juvenile dependency hearing from testifying via telephone. The court pointed out that the “initial phrase of ORS 45.400—providing that the trial court ‘may order’ testimony by telephone—suggests an entrustment of discretion to the trial court, but the subsequent language in the statute largely or completely eliminates that discretion.”

Without amending the statute, the court’s holding risks allowing a party to effectively veto the use of telephonic testimony, as most witnesses offer testimony with the potential to be outcome determinative as to some aspect of the case. Rural counties, where it is improbable for witnesses to regularly travel to court to testify in hearings, will be most heavily impacted by this decision.

In preparing SB 131 as amended by the -2 amendments, the Department of Justice consulted with the Oregon State Bar, Oregon Trial Lawyers Association, Oregon District Attorneys Association, Oregon Public Defense Services and the Oregon Criminal Defense Lawyers Association. The resulting amendments attempt to recognize the basic philosophy that live, in-person testimony is always preferable whenever possible, but may not be available in all cases.

In order to utilize telephonic testimony, a party must first demonstrate the need to do so via a good cause standard based on factors including expense and unavailability of a witness, but assigning to the discretion of the court the decision to allow the testimony based on the potential for prejudice to the nonmoving party. This retains the most sensible approach – an investment in judicial discretion rooted in fairness in the procedural management of the courtroom.

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