

**STATE OF TENNESSEE**  
**OFFICE OF THE**  
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**NASHVILLE, TENNESSEE 37243**

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Opinion Number 01-059

Oaths for Telephone Depositions to be used in the Courts of Tennessee

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**QUESTIONS**

1. Under what circumstances, if any, may a court reporter in Tennessee administer the oath to a deponent located in another state during a deposition conducted by telephone?
2. Under what circumstances, if any, may a court reporter in Tennessee administer the oath to a deponent located in Tennessee during a deposition conducted by telephone?
3. Under what circumstances, if any, may a court reporter in Tennessee administer the oath to a deponent appearing visually by video teleconference, and does the state in which the witness is located impact said oath?
4. May an attorney licensed in Tennessee administer the oath to a deponent as an Officer of the Court, when the deposition is conducted in another state and the court reporter is located in Tennessee and covering the deposition by telephone or video teleconference?

**OPINIONS**

1-3. Because the Tennessee Rules of Civil Procedure could be interpreted to require that the person administering the oath be in the physical presence of the deponent, that is the safer practice, unless, of course, the parties agree or the court orders otherwise.

4. An attorney for one of the parties may not administer the oath to a deponent.

**ANALYSIS**

It is assumed for purposes of this opinion that all of the outlined factual situations pertain to the taking of depositions for use in the courts of Tennessee. Also, for purposes of this opinion, we see no difference between a deposition conducted by telephone and one conducted by video teleconference. The same analysis applies to both.

Rule 28.01 of the Tennessee Rules of Civil Procedure, in pertinent part, provides:

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

Rule 28(a) of the Federal Rules of Civil Procedure differs substantially from Rule 28.01 of the Tennessee Rules of Civil Procedure only in the last sentence. The last sentence of the Federal Rule provides: “The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.” While this provision is not contained in Rule 28.01 of the Tennessee Rules of Civil Procedure, it seems to be implicit therein when reading Rule 28 in conjunction with Rules 29, 30, 31 and 32 of the Tennessee Rules.

A court may order the manner and procedure by which a deposition may be taken by telephone. An example of this is contained in a pre-trial order in the case of *In re Orthopedic Bone Screw Products Liability Litigation*, 1995 WL 925667 (E.D. Pa.). A copy of said order is attached. However, usually telephone depositions are conducted by stipulation and agreement of the parties. While there does not appear to be any Tennessee case dealing with the taking of depositions by telephone, the federal courts and the courts of other states have considered this issue.

In *Aquino v. Auto Service Industry Association*, 93 F. Supp. 2d 922 (N.D. Ill. 2000), the court held telephone depositions of out of state witnesses to be inadmissible due to the fact that the notary or court reporter was not in the presence of the deponent during the deposition. Federal Rules of Civil Procedure 28(a), 30(b)(7) and (c). The court acknowledged that while the telephone depositions taken in this case were probably not in strict compliance with the federal rules, the parties are permitted to agree to modify the procedures for taking the depositions. Federal Rules of Civil Procedure 29. The parties could also seek a court order modifying the rules pursuant to Rule 26 of the Federal Rules of Civil Procedure. Because the parties could not agree and the Plaintiff Aquino did not request court intervention and because the defendant promptly objected to the manner of taking the depositions, they were ruled inadmissible. 93 F. Supp. 2d at 924.

In *Clone Component Distributors of America, Inc., et al. v. Texas*, 819 S.W.2d 593, 597-599 (1991), the court held that the requirement that the deposition be taken “before a person authorized to take oaths was satisfied by the court reporter’s being in the vocal and aural presence of the deponent through the use of the telephone.” 819 S.W.2d at 598. Accordingly, the court determined that the deponent need not be in the physical presence of the court reporter administering the oath.

The Tennessee Courts have not considered the issue of whether the deponent must be in the physical presence of the court reporter. The issue is whether “the place where the examination is held” means the place where the deponent is located, or the place where the questioner is located. The federal rule is clear that depositions are to be taken in the district and at the place where the deponent answers questions. Fed. R. Civ. P. 30(b)(7). However, the Tennessee Rules of Civil Procedure are not as clear on the issue of whether the place of the examination is where the deponent or the questioner is located. Because of the lack of clarity on this point, it appears that unless the parties agree or the Court orders otherwise, the safer practice would be to have the court reporter and the oath administered at the place where the deponent is located.

Depositions shall be taken before: “(1) A hearing examiner; (2) A judge, clerk, commissioner, or official reporter of a court; (3) A notary public; or (4) Before other such persons and under other circumstances authorized by law.” Tenn. Code Ann. § 24-9-135. Depositions shall not be taken before: “(1) A party to the action; (2) A relative, employee or attorney of one (1) of the parties; (3) Someone with a financial interest in the action or its outcome; or (4) A relative, employee, or attorney of someone with a financial interest in the action or its outcome. For the purposes of this subdivision, ‘employee’ or ‘relative’ does not include an employee or relative of the attorney of one (1) of the parties.” Tenn. Code Ann. § 24-9-136(a). Depositions taken in violation of Tenn. Code Ann. § 24-9-136 are void and a criminal penalty is imposed. Therefore the statutory requirement cannot be waived and mandatory compliance is required.

Tenn. Code Ann. § 24-9-136 was enacted as Chapters 741 & 2 of the Public Acts of 2000. It therefore clarifies and specifically defines those persons who are disqualified for interest as provided under Rule 28.03 of the Tennessee Rules of Civil Procedure. In pertinent part, Rule 28.03 of the Tennessee Rules of Civil Procedure provides:

... no deposition shall be taken before a person who is a relative (within the sixth degrees computed by the Civil law) or employee or attorney or counsel of any of the parties, or who is a relative (within the sixth degree computed by the civil law) or employee of such attorney or counsel, or who is financially interested in the action.

Tenn. Code Ann. § 24-9-136 is later in time than the 1996 amendment to rule 28.03 and is controlling to the degree that there are inconsistencies between the statute and the rule. *Johnny Ray Baker, Sr., et al. v. American Paper and Twine Company*, 2000 WL 64144, 2 (Tenn. Ct. App.).

The taking of depositions by telephone in Tennessee is permitted by Rule 30.02(7) of the Tennessee Rules of Civil Procedure which allows the parties to stipulate in writing that the deposition be taken by telephone. The Court may also order the deposition be taken by telephone. Rule 30.02(7) was added in 1984. The federal rule while similar to the Tennessee rule is more exhaustive and explicit. It

provides that the parties may stipulate in writing or the Court may order “that a deposition be taken by telephone or other remote electronic means. For purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.” Fed. R. Civ. P. 30(b)(7).

The Advisory Commission Comment to the 1984 Amendment to Rule 30.02 of the Tennessee Rules of Civil Procedure recognizes there are occasions when great distances and modest funds would favor a telephone deposition. The Commission also recognizes that in many instances a telephone deposition may not be preferable from a tactical standpoint. Nonetheless, according to the Commission, the 1984 Amendment expressly allows a telephone deposition “upon oral examination by stipulation or order; probably because it has been implicitly permissible by stipulation under Rule 29.”

Rule 29 of the Tennessee Rules of Civil Procedure provides:

Unless the court specifically orders otherwise, the parties may by written stipulation signed by all parties or counsel (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

Finally, it is important to remember that Tenn. Code Ann. § 24-9-136 overrules Rule 32.04(2) of the Tennessee Rules of Civil Procedure, to the extent that objections to those persons disqualified under the statute cannot be waived and may be made at anytime. *Baker v. American Paper and Twine Co.*, *supra*. Rule 32.04(2) provides that: “objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.”

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