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BEFORE THE ARIZONA CORPORATION COMMISSION

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WILLIAM A. MUNDELL, Chairman
JIM IRVIN, Commissioner
MARC SPITZER, Commissioner

ARIZ CORP COMMISS
DOCUMENT CONTROL

In the Matter of

ELLIOT CROSBY d/b/a
ADVANCE SENIOR ESTATE
PLANNING; MARSHA CROSBY

Respondents.

DOCKET NO. S-03510A-02-0000

RESPONSE TO MOTION TO
PERMIT WITNESS TO TESTIFY
BY TELEPHONE

COMES NOW Elliot Crosby, by and through his counsel undersigned, and respectfully opposes the Commission's motion to permit witness respectfully opposes Commission' Counsel's motion to allow witness Terence Jones to testify by telephone. This response is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 12 day of January, 2004.

Arizona Corporation Commission

JONES, SKELTON & HOCHULI

DOCKETED

JAN 12 2004

By A. Melvin McDonald
A. Melvin McDonald
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Attorneys for Respondent Elliot Crosby

DOCKETED BY

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Crosby strenuously objects to any witness appearing and testifying by telephone. One of the most critical components of a witness' testimony is for a hearing officer to observe the demeanor of a witness. Factors which courts and juries consider in evaluating a witnesses credibility is "the witness' manner while testifying." Counsel would

1 have no way of knowing whether the witness was testifying from a script or had notes in
2 their possession. The court has no ability to observe the demeanor or manner while testifying
3 by a witness. In the recent Arizona Court of Appeals decision of *State v. Michael Moore*,
4 203 Ariz. 515, 56 P.3d 1099 (2002), this precise issue was presented in a criminal case.
5 In *Moore*, a judge with a busy trial schedule, over defendant's objection, gave telephonic
6 testimony. As the court noted in its decision:

7 Face-to-face, in court testimony serves several purposes: (1)
8 it "ensures the reliability of the evidence by allowing the trier
9 of fact to observe the demeanor, nervousness, expressions, and
10 other body language of the witness"; (2) it "impresses upon
11 the witness the seriousness of the matter and ensures that
12 statements are given under oath"; and (3) it "helps assure the
13 identity of the witness, that the witness is not being coached
14 or influenced during testimony, and that the witness is not
15 improperly referring to documents." *United States v. Hamilton*,
16 107 F.3d 499, 503 (7th Cir. 1997).

17 A copy of the case is attached for the court's perusal. As the court noted in its decision:

18 Telephonic testimony thwarts the purposes of the Confrontation
19 Clause in that the jury cannot "observe the demeanor,
20 nervousness, expressions, and other body language of the
21 witness." See *Hamilton*, 107 F.3d at 503. Thus, a witness
22 testifying over the telephone may refer to a scripted version
23 of the events instead of having to look the defendant and jurors
24 in the face while recounting the relevant events. Moreover,
25 telephonic testimony seriously impinges on a defendant's ability
26 to "confront and cross-examine his accusers face-to-face."
State v. Robinson, 153 Ariz. 191, 203, 735 P.2d 801, 813
(1987).

27 The court in *State v. Moore* expressly reversed the defendant's conviction
28 because the trial court admitted telephonic testimony. While the court expressly limited
29 its holding to "criminal cases" and expressly deferred and left undecided whether their
30 holding would extend to "... either the standards or desirability of telephonic testimony in
31 non criminal proceedings," the analysis in *Moore* should mandate live testimony rather than
32 telephonic testimony in this case. Based upon the foregoing, defendant respectfully urges
33 this court to deny the Commission's request for telephonic testimony.

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RESPECTFULLY SUBMITTED this 12 day of January, 2004.

JONES, SKELTON & HOCHULI

By A. Melvin McDonald
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Attorneys for Respondent Elliot Crosby

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