

MEMORANDUM

To: Gayle Holder, Director, Certification & Filing
Rebecca Matthews, Supervisor, Notary Unit

From: Haley Haynes

Date: September 9, 2008

Re: Telephonic Oath-giving by NC Notaries

It has come to my attention that court reporters have inquired with the Notary Unit regarding the appropriateness of giving oaths to deponents via the telephone. I have reviewed the unpublished opinion in *Rodriguez-Carias v. Nelson's Auto Salvage & Towing Service*, No. COA07-570 (March 18, 2008), which has been cited by attorneys who are seeking to persuade these court reporters that it is lawful and appropriate to give oaths over the telephone.

Position of the Department

It is the position of the Department of the Secretary of State that a North Carolina notary public must comply with the provisions of G.S. §10B-20(a), in accordance with the definitions in G.S. §10-B(3). A notary may not perform a notarial act if those requirements are not followed. Appearance of a witness by telephone does not comply with the definition of “personal appearance and appear in person before a notary” found in G.S. §10B-3(16); “personal appearance and appear in person before a notary” are defined as “an individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process” (emphasis added). A notary may not, therefore, perform a notarial act by administering an oath to a person telephonically.

G.S. 10B-20(c)(1) states in pertinent part:

(c) A notary **shall not perform a notarial act if any of the following apply:**

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness. (emphasis added).

G.S. §10B-3(11) defines “notarial act, notary act, and notarization” as “[t]he act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a).” The definition of “[o]ath” found in G.S. §10B-3(14) is “[a] notarial act which is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred:

- a. **An individual appeared in person before the notary.**
- b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
- c. The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear". (emphasis added)

The case which attorneys are citing as authority, *Rodriguez-Carias v. Nelson's Auto Salvage & Towing Service*, No. COA07-570 (March 18, 2008) is an **unpublished opinion**. Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure specifically states that

An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored . . . (emphasis added).

The unpublished *Rodriguez* opinion addresses a single facet of the mandates of the Rules of Civil Procedure regarding depositions. The opinion does not address any issues related to administration of oaths by a notary public in compliance with Chapter 10B of the General Statutes and Chapter 7B of Title 18 of the NC Administrative Code and it has no authority over the conduct of North Carolina notaries.

The purposes of the Notary Act include prevention of fraud and forgery. G.S. §10B-2. Therefore, it is the position of the Department of the Secretary of State is that notaries must follow the requirements of Chapter 10B of the General Statutes strictly in order to serve the purpose of prevention of fraud and forgery; therefore, telephonic administration of oaths by North Carolina notaries are prohibited and unlawful.

A WORD OF CAUTION: A notary is committing a CRIME when administering an oath without the person appearing in person before them (G.S. § 10B-60(c)(1)). Furthermore, a person who solicits, coerces, or in any material way influences a notary to administer an oath without the person appearing in person before them also commits a crime (G.S. § 10B-60(j)).

Please feel free to share this memo freely with those interested in this issue.
