

AMENDMENT TO RULE 30 OF THE FEDERAL RULES OF  
CIVIL PROCEDURE

AUGUST 2, 1995.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. MOORHEAD, from the Committee on the Judiciary,  
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1445]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1445) to amend Rule 30 of the Federal Rules of Civil Procedure to restore the stenographic preference for depositions, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## PURPOSE AND SUMMARY

H.R. 1445 will amend rule 30(b) of the Federal Rules of Civil Procedure to restore the stenographic preference for the taking of pretrial depositions.

## BACKGROUND AND NEED FOR THE LEGISLATION

The present law took effect on December 1, 1993 over the objection of the Judiciary Committee and the House of Representatives. When the Judicial Conference testified in 1993 in favor of this change they could not provide the Subcommittee on Courts and Intellectual Property a single justification for the change in law. Legislation was introduced to try and stop the change from taking place. That bill passed the House but not the Other Body and the change of law took effect automatically through the Rules Enabling Act.

From 1970 to December 1993, Rule 30(b) of the Rules of Civil Procedure permitted depositions to be recorded by nonstenographic means but only upon court order or with the written stipulation of the parties. The change in Rule 30(b) that occurred in December 1993 altered that procedure by eliminating the requirement of a court order or stipulation, and afforded each party the right to arrange for recording of a deposition by nonstenographic means.

Depositions recorded stenographically historically have provided an accurate record of testimony which can conveniently be used by both trial and appellate courts. Under present law, video or audio recordings that are to be introduced at trial must be transcribed according to Rule 32(c). The cost of this duplicating process will outweigh any cost savings gained by using audio or video tapes. The Subcommittee also heard testimony regarding two studies undertaken by the Justice Research Institute which concluded that a stenographic court reporter is the qualitative standard for accuracy and clarity in depositions, and that a court reporter using a computer-aided transcription is the least costly method of making a deposition record.

The Committee believes that, at this time, the case has not been made to allow either party, without stipulation by the other party or leave of court, to take depositions exclusively by audio or video tape. The Committee is in receipt of a letter from Mr. Norman J. Chachkin, Director of Litigation of the NAACP Legal Defense and Education Fund, Inc. dated July 18, 1995 stating that the "Legal Defense Fund does not object to H.R. 1445 \* \* \*".

## HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held hearings on June 16, 1993 and May 11, 1995. On May 11, 1995 testimony was received from the following witnesses: The Honorable Ann Claire Williams, Judge, United States District Court for the Northern District of Illinois; the Honorable J. Phil Gilbert, Chief Judge, United States District Court for the Southern District of Illinois; Paul Friedman, Deputy Associate Attorney General, United States Department of Justice; William K. Slate II, President and Chief Executive Officer, American Arbitration Association; Gary M. Cramer, Registered Professional Reporter, Na-

tional Court Reporters Association; Neal R. Gross, President and Chief Executive Officer, and Neal R. Gross & Company, Inc. on behalf of the American Association of Electronic Reporters and Transcribers (AAERT).

Testimony at the Subcommittee hearing both in 1993 and in May of this year raised concerns about the reliability and durability of video or audio tape alternatives to stenographic depositions. There also was information submitted suggesting that technological improvements in stenographic recording will make the stenographic method cost-effective for years to come.

#### COMMITTEE CONSIDERATION

On May 16, 1995, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 1445, by a voice vote, a quorum being present. On July 12, 1995 the Committee met in open session and ordered reported the bill H.R. 1445 without amendment by a voice vote, a quorum being present.

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

#### COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1445, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 18, 1995.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary, House of Representatives,  
Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1445, a bill to amend Rule 30 of the Federal Rules of

Civil Procedure to restore the stenographic preference for depositions, as ordered reported by the House Committee on the Judiciary on July 12, 1995. CBO estimates that enacting H.R. 1445 would not result in any significant cost to the federal government. Because enactment of H.R. 1445 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would restore a requirement that depositions in federal civil cases must be recorded by stenographic means unless both parties to the case agree in writing to some other form of recording testimony or the court orders that such nonstenographic means be used. Based on information from the Administrative Office of the United States Courts, we expect that enacting H.R. 1445 would not necessarily result in fewer nonstenographic depositions being taken. Rather, it would create an additional procedural step that would have to be followed before using nonstenographic methods, such as audio tape or video tape. This bill would not affect the current requirement that all depositions be transcribed if they are to be introduced at trial.

Nonstenographic methods are generally less expensive than stenographic means for recording depositions. Because CBO expects that H.R. 1445 would not cause any significant change in the use of the various means of recording depositions, we estimate that enacting this bill would result in no significant cost to the federal government.

Because this bill would not apply to state law, enacting H.R. 1445 would have no impact on state court procedures.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JAMES J. BLUM  
(For June E. O'Neill, *Director*).

AGENCY VIEWS

COMMITTEE ON RULES  
OF PRACTICE AND PROCEDURE,  
JUDICIAL CONFERENCE OF THE UNITED STATES,  
*Washington, DC, April 28, 1995.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary, House of Representatives,*  
*Washington, DC*

DEAR CHAIRMAN HYDE: I write to advise you of the concern of the Advisory Committee on Civil Rules of the Judicial Conference on the proposed amendments to Civil Rule 30(b) contained in H.R. 1445. The legislation would require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. It would undo amendments to Rule 30(b) that took effect on December 1, 1993.

Present Rule 30(b) permits the party taking the deposition to record it by sound, sound-and-visual, or stenographic means. No court order or mutual consent is required. The rule, as amended, effectively removes impediments to parties who want to take advantage of newer, more efficient, and less-expensive recording technologies. It regulates only the recording of oral depositions, most of

which never are used at trial. It does not regulate the manner in which courtroom proceedings are recorded.

The 1993 amendments to Rule 30 were adopted by the Supreme Court and transmitted to Congress only after the completion of a careful deliberative process, which included substantial public input. The 1993 amendments were originally considered in 1988 by the Advisory Committee on Civil Rules. A draft rule was published for public comment in September 1989, followed by public hearings in early 1990.

The draft proposal was modified in light of the comments, which disclosed potential problems with reliance at trial on tape-recorded testimony absent a written transcript. Another draft was published for public comment in August 1991, which generally required a written transcript of any deposition that was used in court. That proposal received hundreds of comments and was discussed at public hearings held in late 1991 and early 1992.

After further consideration, the present amendments to Rule 30 were approved in turn by the Advisory Committee, the Standing Rules Committee, and the Judicial Conference. On April 22, 1993, the Supreme Court adopted the rule without further revision and transmitted it to Congress. It took effect seven months later when Congress took no action.

Many of the criticisms voiced against the 1993 amendments to Rule 30 came from court reporters urging that video and audio tape recordings were unreliable and difficult to use at trial. The Advisory Committee was unanimous that these concerns were adequately dealt with in the revised draft.

Rule 30, as amended, contains safeguards to assure the integrity and utility of any tape or other non-stenographic recording, including the following:

- (1) the officer presiding at the deposition must retain a copy of the recording unless otherwise ordered by the court or provided for by stipulation;
- (2) the presiding officer must state certain identification information at the beginning of each unit of recording tape or other medium;
- (3) any distortion of the appearance or demeanor of deponents or counsel by camera or recording techniques is expressly prohibited; and
- (4) the court retains the authority to require a different recording method if the circumstances warrant.

The rule also permits any other party to designate an additional method (including stenographic means) to record the deposition at their expense. Finally, the rule requires the parties to furnish a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or in a motion hearing.

The changes to Rule 30 were developed after full consideration of competing interests and policies regarding use of stenographic versus non-stenographic methods of recording depositions. The amendments allow the parties to decide which recording method will be used in a particular case and are designed to facilitate use of modern technology, while ensuring an accurate evidentiary

record. The Advisory Committee is unaware of any problem with the operation of the rule as amended.

I urge you to consider opposing the undoing of the 1993 amendments to Civil Rule 30(b).

Sincerely yours,

PATRICK E. HIGGINBOTHAM,  
*U.S. Court of Appeals.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1445 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

H.R. 1445 would amend paragraphs (2) and (3) of Rule 30(b) of the Federal Rules of Civil Procedure.

Paragraph (2) restores a requirement that depositions in federal civil cases must be recorded by stenographic means unless both parties to the case agree in writing to some other form of recording or the court orders that such non stenographic means be used. The party taking the deposition shall bear the cost of the transcription. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

Paragraph (3) restates present law and contains conforming amendments.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**RULE 30 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**Rule 30. Depositions Upon Oral Examination**

(a) \* \* \*

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) \* \* \*

[(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

[(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person

taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.】

*(2) Unless the court upon motion orders, or the parties stipulate in writing, the deposition shall be recorded by stenographic means. The party taking the deposition shall bear the cost of the transcription. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.*

*(3) With prior notice to the deponent and other parties, any party may use another method to record the deponent's testimony in addition to the method used pursuant to paragraph (2). The additional record or transcript shall be made at the party's expense unless the court otherwise orders.*

\* \* \* \* \*

## DISSENTING VIEWS

H.R. 1445 would overturn Rule 30(b) of the Federal Rules of Civil Procedure—which allows the party taking a deposition to determine whether to record by sound, sound and visual, or stenographic means—and restore pre-1993 procedure requiring the stenographic recording of depositions (in the absence of a stipulation or court order to the contrary). We oppose this legislation because it represents an unwarranted intrusion into the Judiciary's legitimate rulemaking authority and would unnecessarily increase legal costs and make it more difficult for the poorest members of our society to have access to justice.

As a general matter we, in Congress, should defer to the judicial branch regarding the promulgation of court rule. Pursuant to the Rules Enabling Act, court rules are developed and proposed according to a carefully considered set of procedures.<sup>1</sup> In a letter to the Committee, Judge Patrick Higginbotham, Chair of the Civil Rules Committee of the Judicial Conference, described the process pursuant to which Rule 30(b) was approved:

The 1993 amendments to Rule 30 were adopted by the Supreme Court and transmitted to Congress only after the completion of a careful deliberative process, which included substantial public input. The 1993 amendments were originally considered in 1988 by the Advisory Committee on Civil Rules. A draft rule was published for public comment in September 1989, followed by public hearings in early 1990. . . [The final] proposal received hundreds of comments and was discussed at public hearings held in late 1991 and 1992.<sup>2</sup>

By contrast, H.R. 1445 was considered pursuant to a far more abbreviated process, with only two witnesses testifying at the May 11, 1995 hearing.<sup>3</sup>

Moreover, in our view the Judiciary had good reason to adopt Rule 30(b) in 1993. By allowing the party noticing a deposition to choose from a variety of techniques, Rule 30 (b) permits the free market to decide which reporting method is the most desirable and cost effective. A number of studies have established that electronic court reporters and transcribers generally charge less for com-

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<sup>1</sup> See 28 USC §§ 2071–77.

<sup>2</sup> Letter from the Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, Judicial Conference of the United States, to the Honorable Henry J. Hyde, Chairman, House Committee on the Judiciary (April 28, 1995) (on file with the House Committee on the Judiciary).

<sup>3</sup> The two witnesses testified concerning H.R. 1445 at the May 11, 1995 hearing were the National Court Reporters Association (who supported the bill) and the American Association of Electronic Reporters and Transcribers (who opposed the bill).

parable services than stenographic reporters.<sup>4</sup> For example, a landmark study conducted by the Federal Judicial Center for the U.S. Judicial Conference concluded the audio-based recording method provides significant cost savings over stenographic recording:

The average annual cost of one audio-based court reporting system in federal district court is \$18,604, compared to \$40,514 for a corresponding official stenographic court reporting system. Projecting those costs over six years, the average cost of an audio-based court reporting system is about \$125,000, compared to about \$275,000 for the official court reporting system.<sup>5</sup>

Since the United States Treasury funds the courts as well as the Department of Justice (the most frequent party to litigation), these savings can be expected to be passed on to taxpayers generally as well as parties to depositions.

Even more importantly, competition and free choice in the reporting market allow the poorest members of our society greater access to the court system. In a letter to Senators Biden and Heflin last Congress, a broad coalition of civil rights and liberties groups expressed support for Rule 30(b):

[permitting taped depositions under Rule 30(b)] make[s] one of the most useful but most expensive forms of discovery accessible to litigants of modest means. Instead of paying \$500 to \$1,000 per day for the original and a copy of a court reporter's transcript of a deposition, they could pay a few dollars for a blank audio- or video-tape and arrange for a typist to make a written record at far less expense . . . [Proposals to overturn Rule 30(b) keep] the expense of litigation unnecessarily high . . . thereby limiting the number and nature of civil rights cases which can be brought and interfering with the policy of Congress in encouraging the private enforcement of the civil rights laws.<sup>6</sup>

Further, although supporters of H.R. 1445 assert that using video and audio tapes to record depositions is less accurate than traditional stenography, the weight of evidence is to the contrary. Of the 20-some studies conducted on this subject in the last twenty years, the vast majority have demonstrated that non-stenographic

<sup>4</sup>Memorandum from National Center for State Courts regarding Literature Review of Electronic Court Reporting Methods (March 15, 1994) (on file with the House Committee on the Judiciary).

<sup>5</sup>J. Michael Greenwood, Julie Horney, M. Daniel Jacobovitch, Frances D. Lowenstein, and Russell R. Wheeler, "A Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting", at xi (July 1983) (study performed on behalf of the Federal Judicial Center, on file with the House Committee on the Judiciary).

<sup>6</sup>Letter from Lawyers' Committee for Civil Rights Under Law, Women's Legal Defense Fund, American Civil Liberties Union, Puerto Rican Legal Defense and Education Fund, People for the American Way, NAACP Legal Defense and Educational Fund, and the National Association for the Advancement of Colored People to the Honorable Joseph R. Biden, Chairman Senate Judiciary Committee and the Honorable Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice (November 16, 1993) (on file with the Senate Judiciary Committee).

The NAACP Legal Defense Fund has subsequently withdrawn its opposition to overturning Rule 30(b) and indicated that the Lawyer's Committee for Civil Rights Under Law has done so also, however other civil rights' groups, such as the ACLU, have continued to express strong support for maintaining the rule. See letter from Norman J. Chachkin, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc. to George W. Koch (July 18, 1995); letter from Laura Murphy, Director and Diann Y. Rust-Tierney, Associate Director/Chief Legislative Counsel, American Civil Liberties Union to the Honorable John Conyers, Jr. (July 25, 1995) (on file with House Judiciary Committee, Minority).

sound and sound-and-visual methods were of equal or superior quality to stenographic recording.<sup>7</sup> Of particular significance is the Federal Judicial Center study which examined audio- and stenography-based systems in 82 civil and criminal cases, comparing transcripts from both methods and identifying discrepancies. This study found audio-based systems to be far more accurate than stenography-based systems:

The overall accuracy evaluation showed that the audio-based transcript matched the audiotape in 56 percent of the 5,717 discrepancies that did not represent discretionary deviations under project transcription guidelines. The steno-based transcript matched the tape in 36 percent of such discrepancies and neither transcript matched the tape in 3 percent of the discrepancies. The audiotape could not resolve the remaining discrepancies.<sup>8</sup>

It is also important to note that Rule 30 itself contains a number of safeguards to assure the accuracy and reliability of non-stenographic recording, including:

- (i) The officer presiding at the deposition must retain a copy of the recording unless otherwise ordered by the court or provided by stipulation;
- (ii) The presiding officer must state certain identification information at the beginning of each unit of recording tape or other medium;
- (iii) Any distortion of the appearance or demeanor of deponents or counsel by camera or recording techniques is expressly prohibited; and
- (iv) The court retains the authority to require a different method of recording if the circumstances warrant; and
- (iv) Any other party is permitted to designate an additional method (including stenographic means) to record the deposition at their expense; and
- (v) The parties are required to furnish a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or in a motion hearing.<sup>9</sup>

Significantly, in this letter on behalf of the Judicial Conference concerning H.R. 1445, Judge Higginbotham notes that “[t]he Advisory Committee [on Civil Rules] is unaware of any problem with the operation of . . . rule [30(b)] as amended.”<sup>10</sup>

<sup>7</sup>See Memorandum from National Center for State Courts regarding Literature Review of Electronic Court Reporting Methods, *supra* note 4 (15 reports found that electronic court reporting provided either cost benefits, quality benefits or both compared to stenographic recording [all but one of the reports were prepared by or for federal or state judiciaries and one was prepared on behalf of a private vendor of video court reporting systems]; 5 reports drew contrary conclusions [4 of these were commissioned and paid for by the National Court Reporters Association and one was prepared on behalf of the State of Hawaii Judiciary]).

<sup>8</sup>“A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting”, *supra* note 5, at xiv.

<sup>9</sup>See letter from the Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, Judicial Conference of the United States, *supra* note 2.

<sup>10</sup>*Id.*

Based on the foregoing, we must oppose H.R. 1445. Congress should not involve itself in rewriting the judicial rules, particularly when doing so will increase court costs and diminish access to justice.

JOHN CONYERS, JR.  
ROBERT C. SCOTT.  
MELVIN L. WATT.  
JOSÉ E. SERRANO.  
ZOE LOFGREN.

