

**UNIFORM AUDIO-VISUAL DEPOSITION
[ACT] [RULE]***

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TABLE OF CONTENTS

Prefatory Note..... 1
Section 1. [Authorization of Audio-Visual Deposition]..... 5
Section 2. [Use]..... 6
Section 3. [Notice]. 6
Section 4. [Procedure]..... 6
Section 6. [Standards]. 9
Section 7. [Uniformity of Application and Construction]. 9
Section 8. [Short Title]..... 9
Section 9. [Time of Taking Effect]..... 9
[Section 10. [Repeal]. 10

UNIFORM AUDIO-DEPOSITION [ACT] [RULE]

Prefatory Note

The use of audio-visual depositions (e.g. videotape) is expanding in both state and federal courts. Thus, uniformity in rules and standards for the taking and use of audio-visual depositions is most desirable to assure commonality of procedure and compatibility of media and equipment.

In 1970, the Federal Rules of Civil Procedure were amended to permit recording of depositions by other than stenographic means (FRCP 30(b)(4)). The Federal Judicial Center has commenced projects in Pittsburgh, Philadelphia, Cleveland, and Detroit in 1970 and in New York City in 1975 that include studios and court installations for the recording and use of videotape depositions.

At the time the drafting committee began its work, 12 states had adopted the substance of the federal rule. Thirteen additional states expressly permitted audio-visual depositions under their own standards. Twenty-five states did not specifically authorize audio-visual depositions. Nonetheless, some courts have ruled that it is within the general power of the trial court to authorize audio-visual depositions. *State of Vermont v. Arthur H. Moffitt*, 133 Vt. 366; 340 A.2d 39 (1975); *Blumberg v. Dornbusch*, 139 N.J. Super. 433; 354 A.2d 351 (1976); and *Bailey v. Sears, Roebuck & Company* (Court of Appeals of the State of California 5th Appellate District, 53124, Superior Court No. 137438).

Three states had adopted definitive provisions to encourage audio-visual depositions. They are Nebraska, Ohio, and Wisconsin.

In addition to the projects of the Federal Judicial Center, bar associations in a number of cities have established studios for taking audio-visual depositions. The equipment for such studios is available at modest cost. A number of law firms have established their own studios. The equipment is portable and can be set up readily in a conference room or library and playback equipment is set up easily in courtrooms. Commercial services are available in most cities at prices comparable to stenographic services. The tapes, discs, or other media are usable over and over again. There is no developing or processing. The deposition can be played back immediately, showing exactly what has been recorded. An audio cassette of the audio portion can be made simultaneously to provide a convenient and exact record of the verbal portion of the deposition. The Federal Judicial Center has prepared and periodically updates a manual setting forth comprehensive guidelines and suggestions for taking videotaped depositions.

The Special Committee was aided substantially in its efforts by the assistance of Judge Joseph F. Weis, Jr., Circuit Judge, United States Court of Appeals, Third Circuit; Judge James L. McCrystal, the Court of Common Pleas, Erie County, Sandusky, Ohio; Joseph C. Richmond, National Bureau of Standards, Department of Commerce; John Shepard and Joseph Ebersole of the Federal Judicial Center; James D. Hawkins, Executive Director, and Harry Foster, Director, National Shorthand Reporters Association; and Eldon L. Boisseau, representing the American Bar Association.

Experience with this new technology was described by Judge Weis in 1973 in a seminar for newly appointed judges:

“I first became interested in the use of videotape in the courts while a member of the bench of the Court of Common Pleas, the court of general trial jurisdiction of Pennsylvania. At my suggestion, the Allegheny County Bar Association decided to purchase cameras and viewers and offer them at reasonable rental fees to members of the Bar for use in taking depositions. Three years ago I was appointed to the United States District Court in Western Pennsylvania and soon thereafter was privileged to begin work on the pilot project of the Federal Judicial Center to experiment with the use of videotape in the presentation of depositions during trials.

“During the past 12 months, approximately 25 videotape depositions have been taken by the use of the facilities in our courthouse. About 5 of these have been used in actual trials. Additionally, some depositions have been taken by outside organizations for use at our trials.

“Thus far I have presided over 4 trials in which videotape depositions were used. Three of them were jury trials and the one a non-jury proceeding. In each instance, the deposed witnesses were physicians who were not available for the trial for varying reasons. In addition, I presided over a moot jury trial in competition between the law school students at the University of Pittsburgh and Duquesne University, sponsored by the Academy of Trial Lawyers of Allegheny County. This trial was held in one of the courtrooms in our Federal Court and parts of the trial were videotaped to test the feasibility of this method of preparing a trial record and to uncover some problems which might be solved.

“The first case in which I presided in which videotape depositions were used provided a dramatic example of the difference between the traditional court reporter question and answer testimony and an audio-visual presentation. The case actually was tried twice. The first trial which used the stenographically recorded deposition of several out-of-town physicians ended in a hung jury. Before the second trial was held, the attorneys arranged to take videotaped depositions of the physicians and these were used at the second trial. It’s not possible to say if the first trial might have ended differently had video been used, but the second jury did come to a decision. I had the opportunity of hearing the dry reading of the deposition and comparing it with the video which revealed the idiosyncrasies and personalities of the witnesses, the mannerisms and methods of explaining things which added so much more interest and lasting impression.

“In the non-jury proceeding, the attorneys had decided to have a court stenographer take down the depositions as well as putting them on videotape. Again, I had the opportunity of contrasting the reading of a deposition with seeing the witness actually testify. I can tell you unequivocally that the difference between reading a cold page of testimony and seeing the witness is startling. The

videotape did affect my feelings toward certain points in the testimony of these doctors differently than the simple reading of the depositions had accomplished.”

There are a number of advantages to taking a deposition in this manner, rather than by stenographer. The use of an audio-visual deposition will provide:

1. A method of presenting deposition testimony superior to reading a transcript of a deposition into the record.¹
2. The presentation of visual and oral testimony of witnesses otherwise unavailable by reason of distance, illness, death, etc.¹
3. Alleviation of problems associated with scheduling witnesses, particularly medical experts, in a visual and oral form.²
4. Presentation of visual and oral evidence in logical progression without respect to scheduling requirements.
5. A shorter trial by enabling the judge to delete objectionable testimony before its presentation to the jury.
6. Immediate availability and greater accuracy than that inherent in stenographic transcriptions.
7. Opportunity to take on location thereby visually showing, for example, the surroundings in which an incident occurred.³

The time generator, a device that records the date and time in tenths of seconds, guarantees that the recording is a complete and faithful record of the deposition. The instant replay capability affords an opportunity to check the operability of the system at the outset and periodically during the taking of the deposition. Signal lights and decibel meters indicate power and operability. A complete reproduction of the recording can be made immediately and the simultaneous taking of an audio cassette assures the preservation of the verbal portion of the deposition. Just as the reporter's notes may sometimes be lost or misplaced, or the transcription misfiled, it is possible that the parties or the clerk of court may mishandle the audio-visual recording. The risk of loss or damage does not appear any more substantial than that inherent in the stenographic record. The parties may guard against even that unlikely possibility by a duplicate recording.

Many attorneys are accustomed to working with a stenographic transcript for trial preparation. To the extent this may be the case, the [Act] [Rule] permits any party to order, at his expense, the taking of a stenographic record. Also, a typed transcript in whole or part can be prepared by a party from the audio-visual record or the audio cassette recording. Finally, bracketed Section 1(c), if adopted by a state, permits the court to direct the preparation of a typewritten transcription either by a simultaneous stenographic recording or from the videotaped

¹ See *Malter v. Daniels*, 69 F.R.D. 579 (D. Ga. 1975); see also *Lamb v. Grove Seaways, Inc.*, 516 F.2d 1352, 1357 (Ft. 3) (2d Cir. 1975); *U.S. v. LaFatch*, 382, F. Supp. 360 (D.N.D. Ohio, 1974); *Mayor and Alderman of City of Savannah v. Palmerio*, 135 Ga. App. 147, 217 S.E. 2d 430 (1975).

² *State ex. Rel. Johnson v. Circuit Court of Milwaukee Cty.*, 61 Wis. 2d 1, 212 N.W. 2d 1 (1972).

³ See *Carson v. Burlington Northern Inc.*, 52 F.R.D. 492 (D. Neb. 1971).

recording. A flat requirement for a duplicate stenographic recording would double the cost, which for preservation of testimony or discovery purposes certainly is not necessary. Indeed, as attorneys become familiar with the new technology, they may find it more efficient to have transcribed only limited relevant portions of the audio track and rely upon the audio cassette and audio-visual recording to obtain an overview of the testimony given.

While there have not been as yet any United States Supreme Court decisions concerning the constitutionality of the use of audio-visual depositions under the Fourth, Fifth, Sixth and Fourteenth Amendments, the rulings of state and lower courts to date have upheld the use of such depositions against constitutional challenges. *Paramore v. State of Florida*, 229 S.2d 855 (1969); *State v. Lusk*, 452 S.W. 2d 219 (Mo. 1970); *Illinois v. Ardella*, 49 Ill.2d 517, 296 N.E.2d 302 (1971); *Hendrick v. Swenson*, 456 F.2d 503 (9th Cir. 1972); *Vermont v. Moffit*, 133 Vt. 366 (1975); *State of California v. Moran*, 114 Ca. Rptr. 413, 39 Cal. App. 398 (1974), and *Kansas City v. McCoy*, 525 S.W.2d 336 (1975).

UNIFORM AUDIO-VISUAL DEPOSITION [ACT] [RULE]

Section 1. [Authorization of Audio-Visual Deposition].

(a) Any deposition may be recorded by audio-visual means without a stenographic record. Any party may make at his own expense a simultaneous stenographic or audio record of the deposition. Upon his request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

(b) The audio-visual recording is an official record of the deposition. A transcript prepared by an official court reporter is also an official record of the deposition.

[(c) On motion the court, for good cause, may order the party taking, or who took, a deposition by audio-visual recording to furnish, at his expense, a transcript of the deposition.]

Comment

Section 1(a) has its roots in Federal Rule 30(b)(4) which reads:

“The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his expense.”

However, this [Act] [Rule] (1) does not require a court order for the taking of an audio-visual deposition; (2) sets out uniform standards for recording, preserving, filing, and using the depositions rather than leaving it to individual orders; and (3) specifically designates the audio-visual recording as an official record of the deposition.

The provisions for audio-visual depositions contained in this [Act] [Rule] supplement, and are in addition to, the general provisions applicable to the taking and use of depositions. Those general provisions remain in effect, except as they may be repealed or modified under Section 9 to eliminate inconsistency.

Subsection (b) provides that the audio-visual recording is an official record of the deposition. If a typewritten transcript is prepared by an official Court Reporter, it too is an official record of the deposition. Both can be used by the parties for briefing, argument, and appeal. In the event of conflict between the two records, the court would have to resolve the

disparity, just as it might now, if the witness contended the stenographic transcription was inaccurate. Because the audio-visual recording is an exact recording, it would normally be relied upon to resolve any disparity; but, in rare circumstances, perhaps the stenographic transcription might be adopted by the court as a better recording.

Bracketed subsection (c) is available in those states where it is felt that the proponent of the deposition in certain circumstances should bear the expense of preparing a typewritten transcript. Because the added cost might well discourage the use of audio-visual depositions, the Special Committee felt that “good cause” should be shown to impose the cost on the proponent. The court can order the transcription to be made either by simultaneous stenographic recording or preparation of the transcript from the audio track of the videotape or from the audio cassette.

In many states, the bracketed provision may be considered unnecessary or counterproductive. Inasmuch as litigation is expensive, many forego judicial resolution of disputes. Omission of bracketed subsection (c) would minimize this problem compelling the party wanting the transcript to weigh the anticipated benefit against the cost to his client.

Section 2. [Use].

An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

Comment

This [Act] [Rule] does not expand the use of depositions; however, as is true with other depositions, the parties may wish to stipulate the use of an audio-visual deposition in a situation where its use is not authorized hereby. In such an event, an audio-visual recording is superior to the reading of a stenographic deposition, because it provides an exact visual and audio recording of the testimony. It has many of the attributes of live testimony and will be advantageous for taking of medical and other expert testimony where both delay and cost may be minimized substantially by an audio-visual recording.

Section 3. [Notice].

The notice for taking an audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio-visual means.

Section 4. [Procedure].

The following procedure must be observed in recording an audio-visual deposition:

(1) (Opening of Deposition.) The deposition must begin with an oral or written statement on camera which includes:

- (i) The operator's name and business address;
- (ii) The name and business address of the operator's employer;
- (iii) The date, time, and place of the deposition;
- (iv) The caption of the case;
- (v) The name of the witness;
- (vi) The party on whose behalf the deposition is being taken; and
- (vii) Any stipulations by the parties.

(2) (Counsel.) Counsel shall identify themselves on camera.

(3) (Oath.) The oath must be administered to the witness on camera.

(4) (Multiple Units.) If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera.

(5) (Closing of Deposition.) At the conclusion of a deposition, a statement must be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

(6) (Index.) Depositions must be indexed by a time generator or other method specified pursuant to Section 6.

(7) (Objections.) An objection must be made as in the case of stenographic depositions.

(8) (Editing.) If the court issues an editing order, the original audio-visual recording must not be altered.

(9) (Filing.) Unless otherwise stipulated by the parties, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits must be

filed forthwith with the clerk of the court.

Comment

A general guide of appropriate procedures is necessary and desirable to assure integrity of the recording and uniformity in procedures facilitating inter-and intra-state use of depositions.

However, provisions have been made for improved technology. For example, “audio-visual” recording is used rather than “videotape” because disc and other methods of recording may soon develop.

In paragraph (6), indexing is by “time generator or other method specified pursuant to Section 6” in anticipation that yet better techniques for indexing may be developed. The rules promulgated under Section 6 would specify the kind of time generator and the information (date, hour, minute, section, etc.) required, depending upon the evolving state of the art.

Paragraph (7) provides that objections will be handled in the same manner as for stenographic depositions. However, the Special Committee anticipates that, for ease of editing of objections and testimony ordered to be struck, the parties may frequently wish to stipulate that objections may be made immediately after the answer.

The [Act] [Rule] does not set out alternative methods of editing because improving technology may develop better techniques than those presently employed. Various techniques are currently used for editing, including (1) preparation of an edited copy omitting testimony that has been struck and (2) suppressing the audio, or audio-visual, display of any portion of the testimony struck. The integrity of the recording, regardless of the editing technique employed, requires that the original recording remain unaltered and thus paragraph (8) so provides.

No provisions are included for retention and storage of the recording by the clerk of court or its return at the conclusion of the proceedings. Local rules can best make provision for those matters. If the clerk of court has display equipment that cannot erase, free accessibility under his supervision would be appropriate. If not, controls should be developed by local rule or court order to preserve the integrity of the recording from inadvertent, or intentional, erasing or destruction of the recording. The videotape itself is reusable and normally should be returned to the party supplying it when the case is concluded.

Section 5. [Costs].

The reasonable expense of recording, editing, and using an audio-visual deposition may be taxed as costs.

Comment

It is anticipated that the total cost of employing an audio-visual deposition will be comparable to that of stenographic depositions and thus should be taxed in the same manner.

Section 6. [Standards].

[The [Supreme Court, Court Administrator, Clerk] may promulgate rules establishing standards for audio-visual equipment and guidelines for taking and using audio-visual depositions.] Incompatible audio-visual recordings must be conformed to the standards at the expense of the proponent. Both recordings are originals.

Comment

The purpose of the brackets is to provide flexibility to each state as to the means by which they will standardize the equipment and promulgate guidelines for its use. If state adoption is by court rule, the court should include in its rule standards for equipment and guidelines for its use or delegate that responsibility. If state adoption is by legislative enactment, the [Act] [Rule] should authorize the appropriate agency or official to establish state-wide standards and guidelines.

Many depositions will be taken in other states or other political subdivisions of the state. Uniformity thus is very important. Equipment standardization also needs to be compatible with display equipment used or available to the court. Uniformity in taking and using the recording will avoid problems in its use by various jurisdictions that otherwise might consider non-uniform techniques or procedures improper. The court or appropriate agency should coordinate its standards with other states by adopting in substance the standards and guidelines promulgated by the Federal Judicial Center, or other similar uniform standards.

Section 7. [Uniformity of Application and Construction].

This [Act] [Rule] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] [Rule] among states enacting it.

Section 8. [Short Title].

This [Act] [Rule] may be cited as the “Uniform Audio-Visual Deposition [Act] [Rule]”.

Section 9. [Time of Taking Effect].

This [Act] [Rule] shall take effect . . .

[Section 10. [Repeal].

The following acts and parts of acts are repealed:]

Comment

If state adoption is by court rule, the section is not necessary.