

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
1100 COMMERCE STREET ROOM 15C40  
DALLAS, TEXAS 75242

2/20/02

JANE J. BOYLE  
U S Magistrate Judge  
February 7, 2002

(214) 753-2393  
(Fax) 753-2397

**02-CV-B**

Judge David F. Levi  
United States District Judge  
Chair, Advisory Committee on  
Federal Rules of Civil Procedure  
501 I Street, 14th Floor  
Sacramento, California 95814

Professor Edward H. Cooper  
Reporter, Advisory Committee on  
Federal Rules of Civil Procedure  
312 Hutchins Hall  
Ann Arbor, Michigan 48109-4347

Dear Judge Levi and Professor Cooper:

Recently, in the course of researching numerous objections to litigation costs under Federal Rule of Civil Procedure 54(d)(1), it occurred to me that the relevant statutory authority, found in 28 U.S.C. § 1920 is outdated in many respects. Specifically, my law clerk, Tamara Reno, and I found that § 1920, which limits the trial court's discretion in taxing costs, contains no provision for videotaped depositions or electronically presented evidence despite the fact that lawyers are increasingly using these types of technology to introduce evidence at trial. Consequently, the courts have disallowed litigation costs associated with such technology because there is no statutory authorization for them in § 1920. This omission is not surprising in light of the fact that § 1920 has not been amended since 1978. Given the sweeping technological advancements that have occurred over the past twenty-four years, a reevaluation of the statute is warranted. I bring this matter to your attention in an effort to prompt discussion on potential amendments to the statute.

Section 1920 enumerates the following recoverable costs:

- (1) fees of the Clerk and Marshal;
- (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) fees and disbursements for printing and witnesses;
- (4) fees for exemplification and copies of papers necessarily obtained for use in the case;

- (5) document fees under § 1923...; and
- (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828....

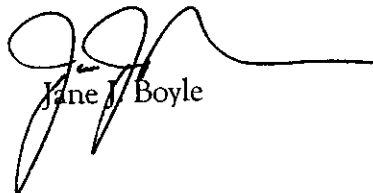
In accordance with the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987), the lower courts have strictly construed § 1920, allowing recovery of costs for only those items listed therein. For example, in *Arcadian Fertilizer, L.P. v. MPW Industrial Servs, Inc.*, 249 F.3d 1293 (11<sup>th</sup> Cir. 2001), the Eleventh Circuit disallowed costs for copies of video trial exhibits because § 1920(4) is limited to "copies of paper." *Arcadian*, 249 F.2d at 1296 (emphasis added) ("We read 'copies of paper' to mean reproductions involving paper in its various forms, and conclude that ... neither video exhibits nor computer animation are susceptible to this characterization."). Similarly, in *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512 (5<sup>th</sup> Cir. 2001), the Fifth Circuit disallowed costs for videotapes depositions because § 1920(2) is limited to "stenographic" transcripts. *Mota*, 261 F.3d at 529-30 (vacating award of costs because "[t]here is no provision [in § 1920] for videotapes of depositions").

While videotaped depositions are one example of costs that have been disallowed by courts due to the narrow scope of § 1920, certainly there are other costs associated with litigation technology that I have not listed here. Expanding § 1920(2) to allow recovery of costs for videotaped depositions and other forms of electronically presented evidence "necessarily obtained for use in [a] case" is consistent with present day litigation practices and with Rule 54's goal of shifting litigation costs (and not overhead expenses) to the unsuccessful litigant.

When I contacted Judge Fitzwater about this, he advised me that, although the issue I am raising involves possible statutory as well as rule changes, it would be appropriate to bring this matter to the attention of the Advisory Committee on Federal Rules of Civil Procedure so that it could consider whether any such changes should be recommended to the Standing Committee, to the Judicial Conference of the United States, or to appropriate Congressional committees. I respectfully urge you to consider this matter at the next appropriate juncture.

If you have any questions or comments, please do not hesitate to contact me or my law clerk, Ms. Reno at 214.753.2396.

Sincerely,



Jane J. Boyle

cc: Judge Sidney A. Fitzwater  
Prof. Daniel Capra  
Mr. John K. Rabiej

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D C 20544

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MILTON I. SHADUR  
EVIDENCE RULES

April 11, 2002

Honorable Jane J. Boyle  
United States District Court for the  
Northern District of Texas  
1100 Commerce Street, Room 15C40  
Dallas, Texas 75242

Dear Judge Boyle:

Thank you for your letter of February 7, 2002, suggesting a possible amendment to Civil Rule 54 or 28 U.S.C. § 1920. A copy of your letter has been sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
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WASHINGTON, D.C. 20544

02-CV-B

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May 29, 2002

Honorable Jane J Boyle  
15C40 Earle Cabell Federal Building  
and United States Courthouse  
1100 Commerce Street  
Dallas, TX 75242-1003

RE Action Taken by the Advisory Committee on Civil Rules

Dear Judge Boyle

Thank you again for your letter regarding the cost provisions in 28 U.S.C. § 1920 and Rule 54(d) of the Federal Rules of Civil Procedure. Your letter was considered by the Advisory Committee on Civil Rules at its May 6-7, 2002, meeting. After some discussion, the Committee agreed that this issue is better addressed through statutory revision than through the federal rulemaking process. The Committee felt that the question of taxable costs involves a substantive element and that it would be better not to take it on through the Rules Enabling Act if other approaches are possible. The Committee eventually resolved to refer your concerns to the appropriate Judicial Conference committee for further action.

We appreciate your interest in the federal rulemaking process and welcome any proposed amendments that you may have in the future.

Sincerely,



Peter G. McCabe  
Secretary



LEONIDAS RALPH MECHAM  
Director

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

PETER G McCABE  
Assistant Director

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D C 20544

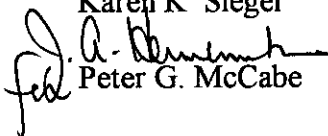
Office of Judges Programs

June 4, 2002

MEMORANDUM TO

Karen K Siegel

FROM

  
Peter G. McCabe

SUBJECT

*Referral of Magistrate Judge Jane J. Boyle's Request*

On February 7, 2002, then Magistrate Judge Jane J Boyle<sup>1</sup> (N D Texas), submitted a letter to Judge David Levi and Professor Edward Cooper, chair and reporter of the Advisory Committee on Civil Rules, suggesting that the costs provisions in 28 U S C § 1920 and Rule 54(d)(1) of the Federal Rules of Civil Procedure may be outdated because of the "sweeping technological advances that have occurred over the past twenty-five years[ ]" Consequently, Magistrate Judge Boyle opined that a "reevaluation of the statute is warranted" and brought the matter before the Civil Rules Committee "in an effort to prompt discussion on potential amendments to the statute"

At its May 6-7, 2002, meeting, the Civil Rules Committee agreed that Judge Boyle's concerns should be addressed through the legislative, rather than the federal rulemaking process. The Committee thereafter resolved to present Judge Boyle's proposal to the appropriate Judicial Conference Committee for its review and consideration.

I have attached a copy of Magistrate Judge Boyle's letter together with my letter to her apprising her of the Committee's decision.

Attachments

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<sup>1</sup>I understand that Magistrate Judge Boyle is now an Assistant United States Attorney with the U S. Attorney's Office in the Northern District of Texas