

Rule 32. Using Depositions in Court Proceedings

(a) USING DEPOSITIONS.

(1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the law of evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (9).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the law of evidence.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 25 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) Limitations on Use.

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(C)(ii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party.* Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and, if required, filed in this court or any federal- or state-court action may be used in a later action

involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the law of evidence.

(9) *Videotape Deposition of Physicians or Experts.* A videotape deposition of a treating or consulting physician or of any expert witness may be used for any purpose, unless otherwise ordered by the court for good cause, even though the witness is available to testify, if the notice of that deposition specified that it was to be taken for use at trial.

(b) **OBJECTIONS TO ADMISSIBILITY.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) **EFFECT OF TAKING OR USING DEPOSITIONS.** A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part of it for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this does not apply to the use by an adverse party of a deposition under Rule 32(a)(3). At the hearing or trial, any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.

(d) **WAIVER OF OBJECTIONS.**

(1) *To the Notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the Officer's Qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the Taking of the Deposition.*

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To completing and Returning the Deposition.* An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made

promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(e) FORM OF PRESENTATION. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

COMMENT TO 2017 AMENDMENTS

This rule is substantially similar to *Federal Rule of Civil Procedure 32*, as amended in 2007 and 2009, but maintains the following local distinctions: 1) subsection (a)(4) refers to a distance of 25 miles instead of 100 miles; 2) subsection (a)(8) refers to actions in the Superior Court as well as actions in state or federal courts; 3) subsection (a)(9) addresses the use of videotaped depositions of physicians and other experts; 4) references to the Federal Rules of Evidence are replaced with "the law of evidence"; 5) section (c), entitled "Effect of Taking or Using Depositions," retains provisions that were eliminated from the federal rule when the Federal Rules of Evidence were adopted; and 6) the provisions contained in section (c) of the federal rule appear in section (e) of the Superior Court rule.

COMMENT

Largely identical to *Federal Rule of Civil Procedure 32* except that subparagraph (a)(3) refers to a 25 mile rather than 100 mile distance. Subparagraph (a)(4) is an amendment and covers the videotape depositions of expert witnesses. It is intended that such depositions will not be taken until after opposing parties have had the opportunity to obtain relevant discovery. Subparagraph (a)(5) parallels (a)(4) of the Federal Rule, but is revised so as to refer explicitly to previous actions either in the Superior Court or in any other state or federal court. Reference to the Federal Rules of Evidence has been deleted from paragraph (a). In addition, paragraph (c) was retained by this Court after its federal counterpart was eliminated upon the adoption of the Federal Rules of Evidence. Paragraph (e) is identical to paragraph (c) of *Federal Rule of Civil Procedure 32*.