

## **Alabama Rules of Criminal Procedure**

### **Rule 16. Discovery.**

#### *Rule 16.6. Depositions.*

(a) **WHEN TAKEN.** Whenever, due to the exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial, the court may, upon motion of the party offering the witness and notice to all other parties, order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the time and place of the deposition.

(b) **NOTICE OF TAKING.** The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court, for cause shown, may extend or shorten the time or change the place for taking the deposition. The office having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless the defendant engages in disruptive conduct and, after being warned by the court that continued disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in disruptive conduct. A defendant not in custody shall have the right to be present at the examination upon request, subject to such terms and conditions as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with the subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition.

(c) **PAYMENT OF EXPENSES.** Whenever a deposition is taken at the instance of the state, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of taking the deposition, the court may direct that the expenses of travel and subsistence of the defendant and the defendant's attorney incurred in attending the examination and the cost of the transcript of the deposition be paid by the state.

(d) **HOW TAKEN.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions, except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a defendant without the defendant's consent, and (2) the scope and manner of examination and cross-examination shall be the same as would be allowed at trial. The state shall make available to the

defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed that is in the possession of the state and to which the defendant would be entitled at trial.

(e) USE. At trial or at any hearing, a part or all of a deposition, so far as otherwise admissible under the Alabama Rules of Evidence, may be used as substantive evidence if the witness is unable to be present or to testify at the hearing because of death or mental illness or infirmity, or is absent from the hearing and the proponent of the statement has been unable to procure the witness's attendance by process or other reasonable means, or the witness gives testimony at the trial or hearing inconsistent with that witness's deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it that is relevant to the part offered and any party may offer other parts.

(f) OBJECTIONS TO DEPOSITION TESTIMONY. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) DEPOSITION BY AGREEMENT NOT PRECLUDED. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

[Adopted eff. 1-1-96.]

**Committee Comments Adopted  
Effective December 1, 1997**

Rule 16.6 was adopted by the Alabama Supreme Court following the passage of Act No. 95-719, 1995 Ala.Acts. Act No. 95-719, codified at § 12-21-264, Ala.Code 1975, authorized the Court to adopt procedural rules governing the taking of, and, in the event of an appeal, the transcribing of, videotape depositions of victims and witnesses who are unavailable for criminal trials. Section 12-21-264 authorizes the taking and use of depositions, including videotaped depositions, by the state or the defendant, of a victim or a witness who is unable to attend a criminal trial because of medical reasons or other exceptional circumstances. Act No. 95-719, however, specifically provides that such depositions are not available in prosecutions for sexual offenses and exploitation involving children, i.e., prosecutions pursuant to Title 15, Chapter 25.

The Act eliminated the requirements of prior law that depositions be limited to written questions, be taken only when a witness resided out-of-state or

more than 100 miles from the place of trial, and only after obtaining the written request of the defendant.

Pursuant to § 12-21-264, the moving party must pay all costs associated with the taking of a deposition or the videotaping of a deposition.