

## Alabama Rules of Civil Procedure

### V. DEPOSITIONS AND DISCOVERY

#### Rule 30.

##### Depositions upon oral examination.

(a) *When depositions may be taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons and complaint upon any defendant or other mode of service under Rule 4, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; special notice; videotaping or other equivalent technology; procurement of documents and things; deposition of organization.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the circuit where the action is pending and more than one hundred (100) miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the (thirty-) 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice,

and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The testimony at a deposition may be recorded on videotape, or by other equivalent technology, in addition to the stenographic record. Any such deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. If the deposition is to be so recorded, the notice given pursuant to subdivision (b)(1) of this rule shall designate the person before whom the deposition shall be taken, the manner of recording, and the reason why such recording is necessary or desirable, and include other provisions to assure that the recorded testimony will be accurate and trustworthy and that the witness will be treated fairly. The party requesting videotaping or recording by other equivalent technology will bear the expense associated with such videotaping or recording. Any party may, at its own expense, obtain a copy of the recording. These expenses may be taxed as costs at the conclusion of the action, if appropriate. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of subdivisions (e) and (f) of this rule.

(5) The notice to a party deponent may be accompanied by a request that the party, at the taking of a deposition, produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of Rule 26(b). If the request accompanies the summons and complaint or is new, the party deponent may, within 45 days, serve upon the party taking the deposition, written objection to inspection or copying of any or all of the designated materials; otherwise, the deponent must serve any such objection within 14 days. If objection is made, the party taking the deposition shall not be entitled to inspect the materials except pursuant to an order of the court. The party taking the deposition may move at any time for an order under Rule 37(a) with respect to any objection to the request or any part thereof, or any failure to produce or permit inspection as requested.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1), and 45(a), a deposition taken by telephone is taken in the circuit and at the place where the deponent is to answer questions propounded to the deponent.

(c) *Examination and cross-examination; record of examination; oath; objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial under the Alabama Rules of Evidence, except that Rule 103 and Rule 615, Ala.R.Evid., which deal with trial procedure, are not applicable to pretrial discovery. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and may be videotaped or recorded by other equivalent technology in accordance with subdivision (b)(4) of this rule.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the circuit where the deposition is

being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to witness; changes; signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within thirty (30) days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by officer; exhibits; copies; notice of filing.*

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect

and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to attend or to serve subpoena; expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney fees.

(dc) *District court rule.* Rule 30 applies in the district courts in those instances when a deposition on oral examination is permitted by Rule 26(dc). The reference to "circuit" in Rule 30(b)(7) is changed to "district." The provisions of Rule 30(b)(4) do not apply in the district courts absent a stipulation in writing by the parties or court order.

[Amended eff. 10-1-95; Amended eff. 1-1-96; Amended eff. 8-1-2004.]

### **Committee Comments on 1973 Adoption**

Subdivision (a). This section deals with when a deposition may be taken and sets forth procedure for depositions shortly after commencement of the

action. See Tit. 7, § 474(1), Code of Ala., wherein depositions by plaintiff within 30 days of commencement of the action were permitted upon leave of court. Certain situations for early depositions without leave are provided for in Rule 30(a) but deponent has certain protection under Rule 30(b)(2) such as the inadmissibility of the deposition if he was unable to retain counsel for the deposition.

Subdivision (b). This is a mixed bag of procedural requirements. Rule 30(b)(1) is similar to Tit. 7, § 474(7), Code of Ala. and requires “reasonable notice” to other parties to the action. It further requires notice to other parties as to the contents of a subpoena duces tecum. This is a departure in that present Alabama practice does not permit the use of a subpoena duces tecum in conjunction with the deposition of a non-party under Tit. 7, § 474(1), Code of Ala. See *Ex parte Thackston*, 275 Ala. 424, 155 So.2d 526 (1963).

Rule 30(b)(2). See Note 1 above dealing with early depositions without leave of court. This is broader than formerly available under Tit. 7, § 474(1), Code of Ala.

Rule 30(b)(3). This section relates only to the date upon which the deposition is to commence. This compares favorably to the last sentence of Tit. 7, § 474(7), Code of Ala.

Rule 30(b)(4). Propriety of less expensive procedures in some instances is recognized but, since inaccuracy may result, a court order protecting the parties is required. Further, videotape may be attempted as a method of recording by “other than stenographic means.”

Rule 30(b)(5). As is true under Alabama practice, a subpoena duces tecum is not available as to a party. Section 12-21-2, Code of Ala., is limited to persons not parties. Note, however, that this paragraph differs from the Federal Rule which incorporates Rule 34 without making clear what time limits are intended. The provisions of Rule 30(b)(5) are intended to operate within the requirement of reasonable notice set forth in Rule 30(b)(1). This subparagraph makes clear that production of documents and other things needed as a basis for the examination of a party may be requested in the notice of taking of a deposition of a party, just as a subpoena duces tecum under Rule 45(d) may be used for a non-party deponent. Rule 34, rather than this rule, should be used where the primary purpose is inspection of the documents rather than the examination of the witness.

Rule 30(b)(6). This provision gives a party the option of designating the subject matter upon which he seeks discovery in the notice of deposition of an organizational party. In that event, the organizational party, such as a corporation, must designate managerial level employees to testify on the subject matter in the notice. Employees below the managerial level may be designated if they consent to testify. This burden is analogous to the duty already incumbent upon an organizational party in answering of interrogatories. See Tit. 7, § 480, Code of Ala. When a non-party organization is served with a subpoena containing a subject matter description, the subpoena must advise the organization of its duty to designate. Of course, the subject matter designation is not required in discovery from organizations and regular deposition procedure is available when the natural person having the information is known to the party seeking discovery.

Subdivision (c). Examination and Cross-Examination. The first sentence, permitting direct and cross-examination is comparable to Tit. 7, § 474(3), Code of Ala. The remainder is similar to Tit. 7, § 474(11). One change lies in the former provision for transcription unless all parties agree otherwise. Now, transcription occurs when one party requests it. The fact of the request could become relevant when the court taxes costs of transcription of a useless deposition.

Subdivision (d). Limiting or Terminating a Deposition. Similar procedure was available under Tit. 7, § 474(10).

Subdivision (e). Submission to Witnesses. This is similar to Tit. 7, § 474(13), Code of Ala. One difference is found in provision for filing of an unsigned deposition by a reporter, when the witness has had thirty days in which to sign and has not yet done so. On motion, justifiable refusal to sign may be shown.

Subdivision (f). Certification and Filing. Part of this section is similar to Tit. 7, § 474(14). In addition, flexible procedure is created for substitution of originals on deposition exhibits. This subparagraph differs in form only from Federal Rule 30(f)(1). Problems with the terminology in existing Rule 30(f)(1) are discussed at 8 Wright & Miller, *Federal Practice and Procedure*, § 2114 (1970). The provisions of this Rule are intended to eliminate the ambiguities contained in the present Federal Rule.

Subdivision (g). Failure to Attend. Penalties are provided when a party relies on the setting of a deposition and is not notified of its postponement or cancellation. This section is quite similar to Tit. 7, § 474(15), Code of Ala.

The Rule does not state that mere notice to another party's attorney without a subpoena to the other party, is sufficient to require that party's attendance at his deposition. However, Rule 5(b) authorizes service on the party through his attorney and Rule 37(d)(1) authorizes sanctions when a party fails to appear at his deposition "after being served with a proper notice." Consequently, notice to the attorney rather than subpoena to the party is the proper method of securing the attendance of a party at his deposition.

Finally, the rule does not speak to the unsealing of depositions. Rule 30(f)(1) requires the officer to seal the deposition. Unless a court, through protective order, requires otherwise, depositions should be immediately opened by the clerk at the time of filing. See *Burnham Chem. Co. v. Borax Consolidated, Ltd.*, 7 F.R.D. 341 (D.C.Cal.1947); 8 Wright & Miller, *Federal Practice and Procedure, Civil*, § 2119 (1970).

#### **Committee Comments to October 1, 1995, Amendment to Rule 30**

Subdivision (b). This amendment conforms subdivision (b) to F.R.Civ.P. 30(b) as it existed before the 1993 amendment to F.R.Civ.P. 30(b). It differs substantively from the former Ala.R.Civ.P. 30(b)(4) by including language calculated to encourage parties to agree to the electronic recording of depositions so that the usefulness of this alternative may be evaluated. It also incorporates a new paragraph dealing with depositions by telephone on court order. See Rule 30(b)(7).

Subdivision (f). This amendment conforms subdivision (f) to F.R.Civ.P. 30(f) as it existed before the 1993 amendment to F.R.Civ.P. 30(f). It allows for not filing a deposition. It also rewrites the portion of the former rule dealing with substitution of original documents for copies so that a witness may retain an original document. This improvement was added to F.R.Civ.P. 30(f) in 1980. The former Ala.R.Civ.P. 30(f), drafted in 1972, was drafted to achieve the same result because the earlier federal rule had been criticized for its failure to deal clearly with this point. Now that the federal rule has been clarified, the committee has replaced the text of the former Ala.R.Civ.P. 30(f) with the language from the federal rule for the sake of uniformity.

#### **Committee Comments to January 1, 1996, Amendment to Rule 30(c)**

At the end of the first sentence of subdivision (c), the reference to "Rule 43(b)" is replaced by the reference to "the Alabama Rules of Evidence." This

change was made for the reasons stated in the 1972 committee comments to F.R.Civ.P. 30(c):

“Existing Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of examination of adverse parties, officers, etc. These topics are dealt with in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g., privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.”

Because Rule 103, Ala.R.Evid., addresses trial procedures (e.g., timely objections and offers of proof) that are not necessarily applicable to pretrial discovery and because the comments to Rule 615, Ala.R.Evid., make it clear that Rule 615 is intended to apply only at trials and not to pretrial discovery, a provision was added stating specifically that these rules are not applicable to pretrial discovery.

### **Committee Comments to Amendment to Rule 30 Effective August 1, 2004**

In *Ex parte Wisconsin Physicians Service Insurance, Inc.*, 800 So.2d 588, 595 (Ala.2001), the Supreme Court “request[ed] the Standing Advisory Committee on Rules of Civil Procedure to consider proposing to this Court a rule setting standards to govern videotaped depositions; such a rule should address issues such as cost, methodology, and justification.” This amendment does that.

The provisions in the amended rule addressing the cost of depositions recorded on videotape or by other equivalent technology are self-explanatory; the committee, however, cautions the court to guard against one party’s imposing undue expenses on another for obtaining copies of the videotape or other recording. The amendment reverses the earlier requirement of the rule that “[t]he parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means.” Now, although the noticing party must state why videotaping “is necessary or desirable,” the norm will be that a deposition noticed for videotaping will proceed as noticed unless an objecting party moves for and obtains an order to the contrary.

Regarding methodology, the rule states only that “[a]ny such deposition be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial,” and that the noticing party “include [in the notice] other provisions to assure that the recorded testimony will be accurate and trustworthy

and that the witness will be treated fairly.” The concept of “fair treatment” is dependent upon appropriate methodology. The committee recommends the following: Unless physically incapacitated, the witness should be seated at a table or in a witness box, except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition should be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view should be changed only as necessary to record accurately the natural body movements of the witness or to portray exhibits and materials used during the deposition. Unless circumstances require otherwise, the camera angle should be level with the witness’s head. Sound levels should be altered only as necessary to record satisfactorily the voices of counsel and the witness. Eating or smoking or other use of tobacco products by witnesses or counsel during the deposition should not be permitted. Absent a court order to the contrary, at the option of the witness, the length of each session of a videotaped deposition may be limited to five (5) hours per day, excluding breaks and objections. Each witness, attorney, and other person attending the deposition should be identified on camera at the beginning of the deposition. Thereafter, only the deponent and demonstrative material used during the deposition should be shown on the videotape, unless any participant desires that an additional camera be focused on the attorney asking the questions, in which case that should be done. The participant desiring an additional camera should bear the cost of providing the additional camera. The court shall have the discretion as to whether and how the second videotape may be used. Any expense associated with using a second camera should not be taxed as costs.

**Note from the reporter of decisions:** The order amending Rule 30, Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.