

## Alabama Rules of Civil Procedure

### V. DEPOSITIONS AND DISCOVERY

#### Rule 27.

##### Discovery before action or pending appeal.

(a) *Before action.*

(1) PETITION. A person who desires to perpetuate that person's own testimony or that of another person or to obtain discovery under Rule 34 or Rule 35 regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it, (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 34 or Rule 35 from the persons named in the petition.

(2) NOTICE AND SERVICE. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least thirty (30) days before the date of hearing the notice shall be served in the manner provided in Rule 4(c) for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(c), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) ORDER AND EXAMINATION. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order

designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 34 and specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 35(a). The discovery may then be taken in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

(4) USE OF DEPOSITION. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in this state in accordance with the provisions of Rule 32(a) and (b).

(b) *Pending Appeal.* If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 34 or Rule 35 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in paragraph (3) of subdivision (a) of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

(c) *Perpetuation by Action.* This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(dc) *District court rule.* Rule 27 does not apply in the district court.

[Amended eff.10-1-95; Amended eff. 4-16-2010.]

**Committee Comments, as Amended  
Effective April 5, 1988**

This rule superseded Code of Alabama 1940, Title 7, §§ 491-505. The rule is similar to the statute—compare Rule 27(a)(1) with Title 7, § 492—in requiring that the petition state the facts which the petitioner desires to establish by the proposed testimony. The statute was interpreted as requiring “a narrative of the testimony to be given by the witness.” *American Life Insurance Co. v. Powell*, 259 Ala. 70, 78, 65 So.2d 516 (1953). The rule is intended to be somewhat more liberal and to permit the facts to be stated in a brief, generalized form, as distinguished from a particularized and detailed statement of the proposed testimony.

As is true of the corresponding federal rule, the primary purpose of Rule 27, like that of the state statutes it superseded, is to perpetuate testimony rather than to make discovery.

See 8 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2071 (1970).

However, this rule has been modified to allow limited discovery under Rules 34 and 35 for the purpose of perpetuating evidence pursuant to those rules. This rule permits production and inspection under Rule 34 and physical or mental examination under Rule 35, whether or not testimony is perpetuated. See Vermont Rule 27; 8 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2074 (1970). The discovery permitted under Rule 27(a) and (b) is expressly limited to that available under Rule 34 and Rule 35. Thus, the modifications from Federal Rule 27 do not contemplate any other method of “discovery” before the filing of an action or pending appeal.

**Committee Comments to October 1, 1995,  
Amendment to Rule 27**

The amendment is technical. No substantive change is intended.

**Note from the reporter of decisions:** The order amending Rule 27(a)(2), Alabama Rules of Civil Procedure, effective April 16, 2010, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 3d.