

Alabama Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 32.

Use of depositions in court proceedings.

(a) *Use of depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Alabama Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Alabama Rules of Evidence.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the depositions; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the witness is a licensed physician or dentist; or (E) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce all of it which ought in fairness be considered with the part introduced, and any party may introduce any other parts. A deposition previously taken may also be used as permitted by the Alabama Rules of Evidence.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of this state or of the United States or of any other state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Subject to the provisions of subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) [Omitted].

(d) *Effect of errors and irregularities in depositions.*

(1) AS TO NOTICE. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving notice.

(2) AS TO DISQUALIFICATION OF OFFICER. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) AS TO TAKING OF DEPOSITION.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any

kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five (5) days after service of the last questions authorized.

(4) AS TO COMPLETION AND RETURN OF DEPOSITION. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(dc) *District court rule.* Rule 32 applies in the district courts in those instances when a deposition on oral examination or a deposition on written questions is permitted by Rule 26(dc).

[Amended effective October 1, 1995; January 1, 1996.]

Committee Comments on 1973 Adoption

Subdivision (a). Use of Depositions. This section is comparable to Tit. 7, § 474(4), Code of Ala. Note that Rule 32(a) clearly eliminates the possibility of certain technical hearsay objections which are based not on the contents of deponent's testimony but on his absence from court.

Rule 32(a)(2) is expanded to include the use of the deposition of a person designated by an organizational party in response to a subject matter description in a deposition notice.

Rule 32(a)(3) is quite similar to Tit. 7, § 474(4), Code of Ala., although the Alabama section's categories wherein use of a deposition is permitted appear to be much broader. The justification for the broad scope arose from the dual thrust of Alabama statutes regulating discovery. Earlier provisions for depositions were drawn only to cover situations wherein justification for other than live testimony at trial might have once existed. Subsequent deposition statutes were enacted for

the purpose of obtaining pretrial discovery. This latter discovery statute catalogued the instances wherein depositions in lieu of live testimony were permissible for discovery purposes and also for purposes of obtaining a deposition wherein other than live testimony at trial was justified under the older statutes. Hence, situations from both sets of deposition statutes were lumped into Tit. 7, § 474(4), Code of Ala. By way of example, a woman was entitled to be spared the embarrassment of a court appearance under Tit. 7, § 474(4)(c)(2) and *Ex parte Brooks*, 249 Ala. 606, 32 So.2d 534 (1947). Modern examples of such reluctance on the part of the distaff are sparse. Consequently, the less specific catalogue provided by Federal Rule 32(a)(3) is more appropriate for the purposes of these rules.

A detailed examination and comparison of the circumstances wherein a deposition was permitted to be used under Tit. 7, § 474(4), Code of Ala., and Federal Rule 32(a)(3) yields the conclusion that adoption of Federal Rule 32(a)(3) would not substantially alter prior practice with the possible exception of the situation arising when the witness is a doctor. This conclusion is based upon Federal Rule 32(a)(3)(E) and Alabama Rule 32(a)(3)(F) wherein a deposition may be used when it is in the interest of justice and under exceptional circumstances. In order to eliminate any possibility of alteration of the existing practice with respect to doctors, this rule differs from the Federal Rule in that a special section has been inserted to cover the situation when the witness is a doctor. The practitioner cannot assume that *Mobile Infirmary v. Eberlein*, 270 Ala. 360, 119 So.2d 8 (1960) is no longer applicable. In *Eberlein*, supra, the Court held that provisions governing the use of depositions in lieu of live testimony did not change the rule of law that when a witness whose deposition has been taken is personally present in court, at the trial, and is competent to testify, objection to the introduction of the deposition of the witness is well taken. These same results should obtain where a physician or dentist is under subpoena and has agreed to be “on call” and is presently available to the party resisting introduction of the deposition.

Rule 32(a)(4). The right to offer other parts of a deposition was protected in Tit. 7, § 474(4)(d). This section goes further to eliminate the necessity of retaking depositions already on file in another action involving the same subject matter and parties or their successors.

Subdivision (b). Objections. See Tit. 7, § 474(5), Code of Ala., for similar treatment.

Subdivision (c). Effect of Taking. See the substantially similar provisions of Tit. 7, 474(6), Code of Ala.

Subdivision (d). Errors & Irregularities. Rule 32(d)(1-4) are similar to Tit. 7, § 474(16), Code of Ala.

**Committee Comments to October 1, 1995,
Amendment to Rule 32**

Subdivision (a). This amendment conforms subdivision (a) to the present version of F.R.Civ.P. 32(a). It differs substantively from the former Ala.R.Civ.P. 32(a) at subparagraph (4) by eliminating the requirement that a prior action must have been dismissed before depositions from that action can be used in a later proceeding.

**Committee Comments to January 1, 1996,
Amendment to Rule 32**

Subdivision (a) was amended to change the reference therein from “rules of evidence” to “Alabama Rules of Evidence.” The clause “or for any other purpose permitted by the Alabama Rules of Evidence” was added to the end of subdivision (a)(1) for the reasons stated in the following committee comment to the 1980 amendment to F.R.Civ.P. 32(a)(1):

“Rule 801(d) of the Federal Rules of Evidence permits a prior inconsistent statement of a witness in a deposition to be used as substantive evidence. And Rule 801(d)(2) makes the statement of an agent or servant admissible against the principal under the circumstances described in the Rule. The language of the present subdivision is, therefore, too narrow.”

As amended, Rule 32(a)(1) is not abrogated or superseded by the Alabama Rules of Evidence, which are effective January 1, 1996.

The last sentence of subdivision (a)(4) was added for the reasons stated in the following committee comment to the 1980 amendment to F.R.Civ.P. 32(a)(4):

“The final sentence is added to reflect the fact that the Federal Rules of Evidence permit a broader use of depositions previously taken under certain circumstances. For example, [see] Rule 804(b)(1) of the Federal Rules of Evidence”

The amendment omits former subdivision (c) for the reasons stated in the following committee comment to the 1972 amendment to F.R.Civ.P. 32(c):

“The concept of ‘making a person one’s own witness’ appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one’s own witness is eliminated by Evidence Rule 607.... Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of evidence.”