

RULE 81. DEPOSITIONS IN PENDING CASE

- (a) **Depositions To Perpetuate Testimony:** A party to a case pending in the Court who desires to perpetuate testimony or to preserve any document, electronically stored information, or thing must file an application pursuant to these Rules for an order of the Court authorizing the party to take a deposition for such purpose. Such depositions may be taken only where there is a substantial risk that the person or document, electronically stored information, or thing involved will not be available at the trial of the case, and must relate only to portions of the testimony or document, electronically stored information, or thing that are not privileged and are material to a matter in controversy.
- (b) **The Application:**
- (1) *Content of Application:* The application to take a deposition pursuant to paragraph (a) of this Rule must be signed by the party seeking the deposition or the party's counsel, and must show the following:
- (A) The names and addresses of the persons to be examined;
 - (B) the reasons for deposing those persons rather than waiting to call them as witnesses at the trial;
 - (C) the substance of the testimony that the party expects to elicit from each of those persons;
 - (D) a statement showing how the proposed testimony or document, electronically stored information, or thing is material to a matter in controversy;
 - (E) a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition by the persons to be examined;
 - (F) the time and place proposed for the deposition;
 - (G) the name of the officer or reporting company before whom the deposition is to be taken;
 - (H) the date on which the petition was filed with the Court, and whether the pleadings have been closed and the case placed on a trial calendar;

- (I) any provision desired with respect to payment of expenses, fees, and charges relating to the deposition (see paragraph (g) of this Rule, and Rule 103); and
- (J) if the applicant proposes to video record the deposition, the application must so state, and must show the name and address of the video recorder operator and of the operator's employer. (The video recorder operator and the officer before whom the deposition is to be taken may be the same person. See subparagraph (2) of paragraph (j) of this Rule.)

The application must also have annexed to it a copy of the questions to be propounded, if the deposition is to be taken on written questions. See Form 15 (Application for Order To Take Deposition To Perpetuate Evidence) shown in the Appendix.

- (2) *Filing and Disposition of Application:* The application may be filed with the Court at any time after the case is docketed in the Court, but must be filed at least 45 days prior to the date set for the trial of the case. In addition to serving each of the other parties to the case, the applicant must serve a copy of the application on the persons who are to be examined pursuant to the application, and must file with the Clerk a certificate showing such service. The other parties or persons must file their objections or other response, with the same number of copies and with a certificate of service thereof on the other parties and the other persons, within 15 days after service of the application. A hearing on the application will be held only if directed by the Court. Unless the Court determines otherwise for good cause shown, an application to take a deposition will not be regarded as sufficient ground for granting a continuance from a date or place of trial theretofore set. If the Court approves the taking of a deposition, it will issue an order including the name of the person to be examined, the time and place of the deposition, and the name of the officer or reporting company before whom it is to be taken. If the deposition is to be video recorded, the Court's order will so state.

- (c) **Designation of Person To Testify:** The party seeking to take a deposition may name, as the deponent in the application, a public or private corporation or a partnership or association or governmental agency, and must designate with reasonable particularity the matters on which examination is requested. The organization so named must 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 such person will testify. The persons so designated must testify as to matters known or reasonably available to the organization.
- (d) **Use of Stipulation:** The parties or their counsel may execute and file a stipulation to take a deposition by agreement instead of filing an application. Such a stipulation must be filed with the Court, and must include the same information as is required in items (A), (F), (G), (I), and (J) of Rule 81(b)(1), but does not require the approval or an order of the Court unless the effect is to delay the trial of the case. A deposition taken pursuant to a stipulation must in all respects conform to the requirements of these Rules.
- (e) **Person Before Whom Deposition Taken:**
- (1) *Domestic Depositions:* Within the United States or a territory or insular possession subject to the dominion of the United States, depositions must be taken before an officer authorized to administer oaths by the laws of the United States (see Code section 7622) or of the place where the examination is held, or before a person appointed by the Court. A person so appointed has power to administer oaths and to take such testimony.
- (2) *Foreign Depositions:* In a foreign country, depositions may be taken:
- (A) before a person authorized to administer oaths or affirmations in the place in which the examination is held, either by the law thereof or by the law of the United States;
- (B) before a person commissioned by the Court, and a person so commissioned will have the power, by virtue of the commission, to administer any necessary oath and take testimony; or

- (C) pursuant to a letter rogatory or a letter of request issued in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. (Part 3) 2555.

A commission, a letter rogatory, or a letter of request must be issued on application and notice and on terms that are just and appropriate. The party seeking to take a foreign deposition must contact the United States Department of State to ascertain any requirements imposed by it or by the foreign country in which the deposition is to be taken, including any required foreign language translations and any fees or costs, and must submit to the Court, along with the application, any foreign language translations, fees, costs, or other materials required. It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and a letter rogatory, or both a commission and a letter of request, may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." A letter of request is addressed to the central authority of the requested State. The model recommended for letters of request is set forth in the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Evidence obtained by deposition or in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions within the United States under these Rules.

- (3) *Disqualification for Interest:* No deposition may be taken before a person who is a relative or employee or counsel of any party, or is a relative or employee or associate of such counsel, or is financially interested in the action. However, with the consent of all the parties or their counsel, a deposition may be taken before such a person, but only if the relationship of that person and the waiver are set forth in the certificate of return to the Court.

(f) Taking of Deposition:

- (1) *Arrangements:* All arrangements necessary for taking of the deposition must be made by the party filing the application or, in the case of a stipulation, by such other persons as may be agreed upon by the parties.

- (2) *Procedure:* Attendance by the persons to be examined may be compelled by the issuance of a subpoena, and production likewise may be compelled of exhibits required in connection with the testimony being taken. The officer before whom the deposition is taken must first put the witness on oath (or affirmation) and must personally, or by someone acting under the officer's direction and in the officer's presence, record accurately and verbatim the questions asked, the answers given, the objections made, and all matters transpiring at the taking of the deposition which bear on the testimony involved. Examination and cross-examination of witnesses, and the marking of exhibits, will proceed as permitted at trial. All objections made at the time of examination must be noted by the officer on the deposition. Evidence objected to, unless privileged, must be taken subject to the objections made. If an answer is improperly refused and as a result a further deposition is taken by the interrogating party, the objecting party or deponent may be required to pay all costs, charges, and expenses of that deposition to the same extent as is provided in paragraph (g) of this Rule where a party seeking to take a deposition fails to appear at the taking of the deposition. At the request of either party, a prospective witness at the deposition, other than a person acting in an expert or advisory capacity for a party, will be excluded from the room in which, and during the time that, the testimony of another witness is being taken; and if the person remains in the room or within hearing of the examination after such request has been made, the person will not thereafter be permitted to testify, except with the consent of the party who requested the person's exclusion or by permission of the Court.

(g) Expenses:

- (1) *General:* The party taking the deposition must pay all the expenses, fees, and charges of the witness whose deposition is taken by that party, any charges of the officer presiding at or recording the deposition other than for copies of the deposition, and any expenses involved in providing a place for the deposition. The party taking the deposition must pay for the original of the deposition; and, upon payment of reasonable charges therefor, the officer must also furnish a copy of the deposition to any party or the deponent. By stipulation between the parties or on order of the Court, provision may be made for any costs, charges, or expenses relating to the deposition.

- (2) *Failure To Attend or To Serve Subpoena:* If the party authorized to take a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the arrangements made, the Court may order the former party to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney in attending, including reasonable attorney's fees. If the party authorized to take a deposition of a witness fails to serve a subpoena upon the witness and the witness does not attend because of that failure, 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 former party to pay to the other party the reasonable expenses incurred by the other party and the other party's attorney attending, including reasonable attorney's fees.

(h) Execution and Return of Deposition:

- (1) *Submission to Witness; Changes; Signing:* When the testimony is fully transcribed, the deposition must be submitted to the witness for examination and must be read to or by the witness, unless the examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make, must be entered on the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition must 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 30 days of its submission to the witness, the officer must 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; and the deposition may then be used as fully as though signed unless the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. As to correction of errors, see Rules 85 and 143(d).
- (2) *Form:* The deposition must show the docket number and caption of the case as they appear in the Court's records, the place and date of taking the deposition, the name of the witness, the party by whom called, and the names of counsel present and whom they represent. The pages of the deposition must be bound using a removable fastener. Exhibits must be carefully marked, and when practicable annexed to, and in any event returned with, the deposition, unless, on motion to the Court, a copy may be permitted as a substitute after an opportunity is given to all interested parties to examine and compare the original and the copy. The officer must execute and attach to the deposition a certificate in accordance with Form 16 (Certificate on Return) shown in the Appendix.
- (3) *Return of Deposition:* The deposition and exhibits should not be filed with the Court. Unless the Court orders otherwise, the officer must deliver the original deposition and exhibits to the party taking the deposition or that party's counsel, who must take custody of and be responsible for the safeguarding of the original deposition and exhibits. Upon payment of reasonable charges therefor, the officer also must deliver a copy of the deposition and exhibits to any party or the deponent, or to counsel for any party

or for the deponent. As to use of a deposition at the trial or in any other proceeding in the case, see paragraph (i) of this Rule. As to introduction of a deposition in evidence, see Rule 143(d).

- (4) *Electronic Records:* On the agreement of the parties, the requirements of paragraphs (h)(2) and (3) may be satisfied by retaining a copy of a deposition and any exhibits in electronic form.

(i) Use of Deposition: At the trial or in any other proceeding in the case, any part or all of a deposition, so far as admissible under the 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) The deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.
- (2) The deposition of a party may be used by an adverse party for any purpose.
- (3) The deposition may be used for any purpose if the Court finds:
 - (A) that the witness is dead;
 - (B) that the witness is at such distance from the place of trial that it is not practicable for the witness to attend, unless it appears that the absence of the witness was procured by the party seeking to use the deposition;
 - (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;
 - (D) that the party offering the deposition has been unable to obtain attendance of the witness at the trial, as to make it desirable, in the interest of justice, to allow the deposition to be used; or
 - (E) that such exceptional circumstances exist, in regard to the absence of the witness at the trial, as to make it desirable, in the interest of justice, 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 party offering the deposition to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts. As to introduction of a deposition in evidence, see Rule 143(d).

(j) Video Recorded Depositions:

- (1) *General:* By stipulation of the parties or on the Court's order, a deposition to perpetuate testimony to be taken upon oral examination may be video recorded. Except as otherwise provided by this paragraph, all other provisions of these Rules governing the practice and procedure in depositions apply.
- (2) *Procedure:* The deposition must begin by the operator stating on camera: (A) the operator's name and address; (B) the name and address of the operator's employer; (C) the date, time, and place of the deposition; (D) the caption and docket number of the case; (E) the name of the witness; and (F) the party on whose behalf the deposition is being taken. The officer before whom the deposition is taken must then identify himself or herself and swear the witness on camera. At the conclusion of the deposition, the operator must state on camera that the deposition is concluded. The officer before whom the deposition is taken and the operator may be the same person. When the deposition spans multiple units of video storage medium (tape, disc, etc.), the end of each unit and the beginning of each succeeding unit must be announced on camera by the operator. The deposition must be timed by a digital clock on camera which must show continually each hour, minute, and second of the deposition.
- (3) *Transcript:* If requested by one of the parties, the testimony must be transcribed at the cost of such party; but no signature of the witness is required, and the transcript should not be filed with the Court.
- (4) *Custody:* The party taking the deposition or the party's counsel must take custody of and be responsible for the safeguarding of the video recording together with any exhibits, and the party must permit the viewing of or must provide a copy of the video recording and any exhibits on the request and at the cost of any other party.

- (5) *Use:* A video recorded deposition may be used at a trial or hearing in the manner and to the extent provided in paragraph (i) of this Rule. The party who offers the video recording in evidence must provide all necessary equipment for viewing the video recording and personnel to operate the equipment. At a trial or hearing, that part of the audio portion of a video recorded deposition that is offered in evidence and admitted, or that is excluded on objection, must be transcribed in the same manner as the testimony of other witnesses. The video recording shall be marked as an exhibit and, subject to the provisions of Rule 143(e)(2), will remain in the custody of the Court.