

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion of an interlocutory proceeding, 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) 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 Mississippi Rules of Evidence.

(2) The deposition of a party or of anyone 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 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 deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor 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 so used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court has been dismissed 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. A deposition previously taken may also be used as permitted by the Mississippi Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receive 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) [Abrogated].

(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 the 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 the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereof 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 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, endorsed, 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.

[Amended effective January 10, 1986; March 1, 1989.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 32 was amended by providing that the deposition of a medical doctor may be used by any party for any purpose. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective January 10, 1986, Rule 32 was amended by deleting references to the Mississippi Rules of Evidence; and Rule 32(c) [Effect of Taking or Using Depositions] was abrogated. 478-481 So. 2d XXIII (West Miss. Cas. 1986).

Advisory Committee Notes

M.R.E. 801(d)(1)(A) defines a prior inconsistent statement given under oath as non-hearsay. M.R.E. 801(d)(1)(A) applies when a witness testifies at trial in a manner that is inconsistent with a previous sworn statement. The previous sworn statement, which may have been made during a deposition, is non-hearsay, and is admissible at trial, assuming no other evidentiary rule bars its introduction. See Craft v. State, 656 So. 2d 1156, 1164 (Miss. 1995).

M.R.E. 804(b)(1) permits the introduction of deposition testimony by a witness who is unavailable at trial. Though the deposition of the unavailable witness need not have been taken in the same proceeding as that in which it is offered, the party against whom the deposition testimony is being offered, must have had an opportunity and similar motive to develop the testimony. See Naylor v. State, 759 So. 2d 406, 410-11 (Miss. 2000).

If a deposition is offered into evidence at trial, the offering party's attorney is responsible for providing the court with a written transcript of the deposition. In addition, if an audio or video recording of the deposition is played for the jury at trial, the offering party must also provide the court with a true and correct copy of such audio or video recording. If the entire deposition is not admitted into evidence, the attorneys for both parties should ensure that the court reporter is given an accurate record indicating the specific portions of the deposition that are introduced into evidence at trial. Such record should refer to the page and line numbers of the written transcript of the deposition. In addition, the attorneys for both parties should ensure that the court reporter complies with M.R.A.P. Appendix III, governing the manner in which trial transcripts are to be prepared and filed.

~~*Rule 32(a) is not consistent with M.R.E. 804(a) because Rule 32(a) authorizes the use of certain witness depositions at trial for any purpose even though not all such witnesses are defined as "unavailable witnesses" pursuant to M.R.E. 804(a). Pursuant to M.R.E. 804(b), former testimony of a witness is not excluded as hearsay if the witness is unavailable. M.R.E. 1103 provides that any court rule that is inconsistent with the Mississippi Rules of Evidence is repealed. Generally, deposition testimony may be excluded if the witness is not "unavailable" pursuant to M.R.E. 804(a). See, e.g., Parmenter v. J & B Enterprises, Inc., 99 So. 3d 207, 219 (Ms. Ct. App. 2012) (court affirmed trial court's exclusion of deposition testimony by the plaintiff's clinical psychologist because plaintiff failed to demonstrate the witness was unavailable as required by M.R.E. 804(b)(1)). A deposition admissible pursuant to M.R.C.P. 32 does not have to meet the requirements for admissibility pursuant to M.R.E. 804.*~~