

USING DEPOSITIONS AT TRIAL

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This article explores and discusses *when and how* depositions may be used at trial. Generally speaking, *when* depositions may be used at trial is governed by Rule 32 of the Alabama and Federal Rules of Civil Procedure.¹ Because our system of justice has a strong preference for hearing live witnesses, depositions may only be used as evidence at trial under those circumstances set out in Rule 32. Otherwise, parties must call to the stand the people they wish to serve as witnesses. Of course, if a witness changes his testimony, a deposition may always be used to impeach.

While Rule 32 governs *when* a deposition may be used, evidence law – in our case the Alabama Rules of Evidence – controls what questions and answers in a deposition are relevant and admissible. Just because Rule 32 says you can use a deposition, does not mean that everything in the deposition is admissible. Evidentiary law still serves as a gatekeeper to exclude evidence which is not relevant or which is too prejudicial.

After determining that a deposition can be used at trial and that certain questions and answers are relevant and admissible, the question of *how* to use the deposition arises. This is the point where science ends and art takes over. The art of using a deposition at trial requires a lawyer to focus on objectives and goals. For example, is the lawyer's objective in using the deposition to refresh the witnesses recollection, highlight critical deposition testimony or destroy a witness' credibility? Depending on the objective, the deposition would be used in very different ways.

¹ This article focuses on the Alabama Rules of Civil Procedure. However, except for a few minor exceptions, Alabama Rule 32 is identical to Rule 32 of the Federal Rules of Civil Procedure and the Alabama Supreme Court "has adhered to the decisions of the federal courts which construe this rule." Century Plaza Co. v. Hibbett Sporting Goods, Inc., 382 So. 2d 7, 10 (Ala. 1980).

Finally, one should always keep in mind that most jurors are totally unfamiliar with the deposition process. Jurors identify with witnesses (“There but for the grace of God go I”), not lawyers. When we fail to explain what we are doing with a deposition, they do not understand the significance. When we beat witnesses over the head with previous inconsistent statements, they may miss the point all together. Even worse, all they may see is some lawyer being mean and abusive to a witness who understandably has forgotten what happened 5 years ago. However, when done right, effective use of depositions at trial can be devastating.

I. RULE 32 – NUTS AND BOLTS

The fundamental purpose of Rule 32 is to make otherwise objectionable testimony admissible. Depositions are, by definition, hearsay. They are out-of-court statements. Without Rule 32, it would be very difficult to use them.

Rule 32(a) cures the hearsay problem with the following language:

At the trial . . . 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

If, however, a party was not present or represented at the deposition and had no notice of the deposition, the deposition cannot be used over that party’s objection at trial. See Chamlee v. Johnson-Rast & Hays, 579 So. 2d 580, 583 (Ala. 1990) (affirming trial court’s refusal to permit use of deposition where parties objecting were not “notified of the deposition, were not parties to the lawsuit at the time the deposition was taken, and were not otherwise represented at the deposition.”);

Withers v. Mobile Gas Serv. Corp., 567 So. 2d 253, 254 (Ala. 1990).

In determining whether a deposition may be used at trial, it is important to differentiate between parties and non-parties. If the deposition is of a party, then generally speaking it can be used. If the deposition is of a witness, then generally speaking it can not, except for the limited purposes of impeachment,²to refresh recollection, and under those conditions set out in Rule 32(a)(3).

A. Parties

Rule 32(a)(2) provides:

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) . . . 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.*

If your adversaries' deposition testimony is relevant and admissible, you can use it. It matters not that your adversary is sitting at the table right next to you. You need not call them to the stand or give any other reason for why you want to read their testimony to the jury. Just do it.

If your adversary is a corporation, be careful. Just because you may take a deposition of an employee of a company, does not mean you can use that deposition at trial. In Slade v. City of Montgomery, 577 So. 2d 887 (Ala. 1991), the Alabama Supreme Court affirmed a trial judge's

² The depositions of parties and non-parties alike may always be used to contradict or impeach the deponent's trial testimony. Rule 32(a)(1) provides:

Any deposition may be used by any party for the purpose of contradicting of impeaching the testimony of deponent as a witness. . . .

decision refusing to permit a plaintiff to read to the jury the deposition of a city employee. The Supreme Court stated:

However, at no time did [the plaintiff] ever file a notice to take a deposition naming the city itself as the deponent as provided in Rule 30(b)(6). Furthermore, neither of the notices to take the deposition contained a description of the matters upon which examination was requested as provided in Rule 30(b)(6). Therefore, we find that the deposition of [the city employee], which [plaintiff] insists was improperly excluded from evidence by the trial court, was not the deposition of the City of Montgomery . . . and was properly excluded from admission.

Id. at 890.

B. Non-Parties

Depositions of non-parties may only be used as evidence at trial when one of the conditions set forth in Rule 32(a)(3) is present. The conditions under which non-parties' depositions may be used are:

- the witness is dead;
- the witness is at a greater distance than one hundred (100) miles from the place of the trial or is out of state (unless it appears that the absence of the witness was procured by the party offering the deposition);
- the witness is unable to attend or testify because of age, illness, infirmity or imprisonment;
- the witness is a licensed physician or dentist;
- the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
- such "exceptional circumstances" exists 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.

“When a party seeks to introduce a deposition under any of the conditions set out in Rule 32 (a)(3), it is up to the trial court to determine if that condition exists.” Washington v. Massey Business Products, Inc., 576 So. 2d 181, 183 (Ala. 1991); see also Pugh v. State Farm Fire & Casualty Co., 474 So. 2d 629, 631 (Ala. 1985). From reading the cases, it appears that a lawyer’s representation to the court that one of the conditions exists is sufficient to justify the admission of a deposition. However, if the objecting party offers some evidence that the condition does not exist, then the burden shifts to the offering party to offer evidence showing it does. Washington, 576 So. 2d at 183; Pugh, 474 So. 2d at 631 (finding no error in admission of deposition testimony where State Farm attorney “advised the court” that witness was out-of-state and objecting party “presented no controverting evidence”).

Several Alabama Supreme Court decisions have applied and discussed Rule 32(a)(3). For instance, in Alabama Power Co. v. Taylor, 306 So. 2d 236 (Ala. 1975), the Alabama Supreme Court found the deposition of a witness admissible over the “vigorous” objection of Alabama Power. The witness had been subpoenaed, but failed to show for trial. The trial was in Baldwin County and at the time of trial the witness, a resident of Baldwin County, was either in Atlanta or Birmingham. Alabama Power asked that the trial be continued until the plaintiff’s could get the witness to trial so that he could be cross-examined by Alabama Power. The trial judge permitted the plaintiff’s to read the witness’ deposition to the jury. The Alabama Supreme Court affirmed, stating that: “As we perceive it, the very purpose of the rule is to prevent the need for a continuance.” Id. at 239.

In Drewes v. Bank of Wadley, 350 So. 2d 402 (Ala. 1977), the court gave some guidance as to what “illness” means in Rule 30(a)(3). In Drewes, the defendant bank offered and the court admitted the deposition testimony of the bank’s vice-president where the bank provided the trial

judge with a letter from the vice-president's psychiatrist stating that in his medical opinion if the vice-president had to appear in court and testify it would be "extremely detrimental to his continued recovery." Id. Affirming the trial court's decision to admit the deposition testimony, the Alabama Supreme Court held: "It is not necessary that a person be on his death bed to be 'ill'." Id.

II. HOW TO USE A DEPOSITION AT TRIAL -- THE ART OF ADVOCACY

Depositions may be used at trial in a number of different ways. For instance, the deposition of a party may be used as substantive evidence without the need for calling that party to the stand. If you have been fortunate enough to obtain admissions – that is, deposition testimony inconsistent with your opponent's position at trial – get ready to use it. Indeed, if it really hurts them, you may want to highlight the testimony in opening statements. You can do this by reading from the deposition or blowing up the deposition testimony for all to see.

By and large, the decision of *how* to use the deposition depends on what you are attempting to accomplish. For example, if you are seeking to "refresh" a helpful witness' recollection, one would want to use the deposition very gently. Alternatively, if the objective is to impeach and destroy credibility of a hostile witness, a lawyer should build the deposition into a solemn occasion on which everyone was present, the witness understood the importance of the occasion and testified truthfully. To do so, a lawyer needs to take the jury and the witness back to the day the deposition was taken, recreate what occurred and then show the jury how the witness testified very differently that day.

When one seeks to use a deposition as evidence, there is a “proper method” for getting the deposition testimony before the jury. As outlined by the Alabama Supreme Court in Century Plaza, that method is as follows:

The examining attorney would obtain the services of an individual who would act as the deponent; as the examining attorney read the questions from the deposition, the individual acting as the deponent would read the answers given by the deponent. When this method is used, the opposing party would have an opportunity to object to any irrelevant, immaterial or incompetent evidence. In no event, unless by agreement of the parties, should the deposition itself be admitted into evidence as an exhibit, whether the trial is before the court without a jury or before the court and a jury.

Century Plaza, 382 So. 2d at 11.

The lawyer deciding to use a deposition as evidence gets to choose who to play the part of the witness. Some thought ought to be given to who one chooses. Jurors naturally tend to identify with the person reading the answers as the witness. If the person is credible, jurors are more likely to believe the deposition testimony. If you want the witness to come off as a rogue, find a rogue to play the part.

You also do not need to read the whole deposition. Pick what you want, remembering that Rule 32(a)(4) and Rule 106 of the Alabama Rules of Evidence permit your opponent to introduce what you leave out. See Hargress v. City of Montgomery, 479 So. 2d 1137, 1139 (Ala. 1985). Indeed, seasoned trial lawyers will rub your nose in your omissions, asking the Court if they could share with the jury what you left out.