

**Rule 21. Depositions****21.01 When Taken**

The court may order that the testimony of a witness be taken by oral deposition before any person authorized to administer oaths, and that any designated book, paper, document, record, recording or other material, not privileged, be produced at the same time and place if all of the following circumstances exist:

(a) there is a reasonable probability that the testimony of the prospective witness will be used at hearing or at trial under any of the conditions specified in Rule 21.06, subd. 1;

(b) a charging document has been filed; and

(c) the requesting party has filed a motion and provided notice of the motion to the parties.

The order must also direct the defendant's presence at the deposition, and if the defendant is disabled in communication, direct the presence of a qualified interpreter.

**21.02 Notice of Taking**

The party or person at whose request the court ordered the deposition must give to every other party reasonable notice of the time and place for taking the deposition.

The notice must state the name and address of each person to be examined. Unless the court directs otherwise, the notice must be served personally on the defendants. The notice must inform the defendant of the requirement to personally attend the deposition. A copy of the court order must be attached to the notice.

An officer having custody of any of the defendants must be notified of the time and place set for the deposition, produce the defendant at the examination, and keep the defendant in the presence of the witness during the examination.

On motion of a party served with notice of the deposition, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

**21.03 Expenses of Defendant and Counsel; Failure to Appear**

**Subd. 1. Expenses.** If a defendant cannot afford travel, meals, and lodging expenses for the defendant and defense counsel's attendance at the examination, the court must direct payment of their expenses at public expense.

**Subd. 2. Failure to Appear.** If, after having received notice, a defendant who is not confined fails to appear at the examination without reasonable excuse, the deposition may be taken and used as though the defendant had been present.

**21.04 How Taken**

**Subd. 1. Oral Deposition.** Depositions must be taken upon oral examination, with accommodation for those who are disabled in communication.

**Subd. 2. Oath and Record of Examination.** The witness must be sworn, and a verbatim record of the testimony of the witness must be taken.

The testimony must be taken stenographically and transcribed unless the court directs otherwise.

If the court orders recording of the deposition testimony by other than stenographic means, the order must designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at that party's own expense.

**Subd. 3. Scope and Manner of Examination - Objections - Motion to Terminate.**

(a) The defendant's deposition cannot be taken without that defendant's consent.

(b) The scope and manner of examination and cross-examination must be the same as that allowed at trial. Each party possessing a statement of the witness being deposed must make it available to the other party for examination and use at the deposition if the other party would be entitled to it at trial.

(c) The person taking the deposition must record all objections made during the examination to the qualifications of the person taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, or any other objection to the proceedings. Objected-to evidence is taken subject to the objections.

(d) On motion of a party or of the deponent during the deposition, and on a showing that the examination is being conducted in bad faith, or in a manner that annoys, embarrasses, or oppresses the deponent or party or elicits privileged testimony, the court that ordered the deposition may order the person conducting the examination to stop taking the deposition. The court may also limit the deposition by one or both of the following:

(1) restricting its subject matter;

(2) requiring that the examination be conducted with no one present except persons designated by the court.

On demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to move for the order.

**21.05 Transcription, Certification and Filing**

When the testimony is transcribed, the person who took the deposition must certify that the witness was duly sworn and that the deposition is a verbatim record of the witness's testimony. The person must then secure the deposition, noting the title of the case and "Deposition of (here insert name of witness)." The person must promptly file the deposition under seal with the court. The deposition must not be unsealed or disclosed except by court order.

On a party's request, documents and other things produced during the examination of a witness, or copies of them, must be marked for identification and annexed as exhibits to the deposition, and may be inspected and copied by any party.

If the person producing the exhibits requests their return, the person taking the deposition must mark them, and, after giving each party an opportunity to inspect and copy them, return the exhibits to the parties producing them. The exhibits may then be used as if annexed to the deposition.

(Amended effective July 1, 2015)

**21.06 Use of Deposition**

**Subd. 1. Unavailability of Witness.** A part or all of a deposition may be used as substantive evidence at the trial or hearing to the extent it would be otherwise admissible under the Rules of Evidence if:

(a) the witness is dead or unable to be present or to testify at the trial or hearing because of a physical or mental illness or infirmity; or

(b) the party offering the deposition has been unable to obtain the attendance of the witness by subpoena, order of court, or other reasonable means.

**Subd. 2. Inconsistent Testimony.** A deposition may be used as substantive evidence at the trial or hearing to the extent it would be otherwise admissible under the Rules of Evidence if the witness:

(a) testifies inconsistently with the deposition; or

(b) persists in refusing to testify despite a court order to do so.

**Subd. 3. Impeachment.** Any deposition may also be used by any party to contradict or impeach the deponent's testimony as a witness.

A deposition may not be used if it appears that the party offering the deposition caused the deposed witness's absence, unless part of the deposition has previously been offered by another party.

#### **21.07 Effect of Errors and Irregularities in Depositions**

**Subd. 1. As to Order or Notice.** All errors and irregularities in the order or notice for taking a deposition are waived unless the objecting party promptly serves a written objection on the party giving the notice.

**Subd. 2. As to Disqualification of Officer.** Objection to taking a deposition because of a disqualification of the person taking it is waived unless made before the taking of the deposition begins, or as soon as the grounds for disqualification become known or could be discovered with reasonable diligence.

**Subd. 3. As to Taking of Deposition.** Objections 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 that might have been obviated or removed if presented at that time.

Errors and irregularities occurring at the deposition that might be remedied if promptly presented are waived unless timely objected to at the deposition.

**Subd. 4. As to Completion and Return of Deposition.** Errors and irregularities in the transcription of the testimony, or in the way the deposition is prepared, recorded, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the person taking the deposition under these rules, are waived unless a motion to suppress the deposition or some part of it occurs with reasonable promptness after a party discovers the defect, or with due diligence might have done so.

#### **21.08 Deposition by Stipulation**

The parties may by written stipulation provide that a deposition may be taken before any person, at any time or place, upon any notice, and in any manner, and that it may be used like other depositions. These rules, unless inconsistent with the stipulation, govern the taking of the deposition.

#### ***Comment - Rule 21***

*The requirement that a qualified interpreter be present for defendants disabled in communication is based upon Minn. Gen. R. Prac. 8 and Minnesota Statutes, sections 611.31 to 611.34.*

*The deposition may be taken before any person authorized to administer oaths designated by the order. If the deposition is taken outside the State of Minnesota, this would include any person authorized to administer oaths by the laws of Minnesota or of the state where the deposition is taken. See Moore v. Keeseey, 26 Wash.2d 31, 173 P.2d 130 (1946).*

*Notice must normally be personally served on the defendant. But, in cases where the defendant is unavailable and time is of the essence, the court may order that notice be served on the defendant's attorney instead of the defendant. These rules do not deal with the constitutionality of the use of a deposition at trial when the defendant has not been personally notified.*

*Rule 21.05 does not require that the deposition be submitted to and signed by the witness. It requires only that the person before whom the deposition is taken certify that the deposition is a true record of the testimony given by the witness. Any dispute over the accuracy of the record must be dealt with under Rule 21.07, subd. 4 (completion and return of deposition).*