

Rule 15. Depositions.

Colorado Court Rules

Colorado Rules of Criminal Procedure

Chapter 29. The Colorado Rules of Criminal Procedure For All Courts of Record In Colorado

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

As amended through Rule Change 2014(5) effective March 24, 2014

Rule 15. Depositions

- (a) **Motion and Order.** The prosecutor or the defendant may file a motion supported by an affidavit any time after an indictment, information, complaint, or summons and complaint is filed requesting that the deposition of a prospective witness be taken before the court. The court may order that a deposition be taken before the court if a prospective witness may be unable to attend a trial or hearing and it is necessary to take that person's deposition to prevent injustice. The court shall identify the witness and fix the date and time for the deposition in the order and shall give every party reasonable notice of the time and place for taking the deposition. For good cause shown, the court may reschedule the date and time for the deposition.
- (a.5) **Deposition by Stipulation Permitted.** The prosecution and defense may take a deposition before a judge by stipulation.
- (b) **Subpoena of Witness.** Upon entering an order for the taking of a deposition, the court shall direct that a subpoena issue for each person named in the order and may require that any designated books, papers, documents, photographs, or other tangible objects, not privileged, be produced at the deposition. If it appears, however, that the witness will disregard a subpoena, the court may direct the sheriff to produce the prospective witness in court where the witness may be released upon personal recognizance or upon reasonable bail conditioned upon the witness's appearance at the time and place fixed for the taking of deposition. If the witness fails to give bail, the court shall remand him to custody until the deposition can be taken but in no event for longer than forty-eight hours. If the deposition be not taken within forty-eight hours, the witness shall be discharged.
- (c) **Presence of Defendant.** The defendant shall be present at the deposition unless the defendant voluntarily fails to appear after receiving notice of the date, time, and place of the deposition.
- (d) **Taking and Preserving Depositions.** Depositions shall be taken and transcribed as the

court may direct and upon completion shall be lodged with the clerk of the court.

- (e) **Use.** At the trial, or at any hearing, a part or all of a deposition may be used, so far as otherwise allowed by law or by stipulation.
- (f) **Copies of Deposition to Defendant.** If the deposition is taken at the instance of the prosecution, a transcribed copy of it shall be furnished without cost to the defendant promptly upon the defendant's request.

History. Entire rule amended and adopted May 25, 2006, effective July 1, 2006.

Case Notes:

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

This rule limits taking of depositions in a criminal proceeding to those situations where the prospective witness "may be unable to attend a trial or hearing". *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

Primary purpose of subdivision (e) is to safeguard the confrontation rights of the criminally accused by limiting the use of deposition testimony to narrowly defined situations of unavailability. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Trial court has great discretion in determining whether to allow the taking of deposition testimony under this rule. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

A Colorado court does not have authority under this rule to order a deposition of a person outside of its jurisdiction. Trial court was in error in granting a motion to depose a witness residing in Mexico. The rule specifically provides that the deposition must be taken in the court's presence. It also logically follows that, since the rule requires the court to subpoena the witness who is to be deposed, the court may not order a deposition of any person who may not be legally served a subpoena. The provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which extends a court's jurisdiction to persons in other states, applies only within the United States and only to other states that have enacted the same law. Thus, in ordering the deposition of a person in Mexico, the district court was proceeding without jurisdiction. *People v. Arellano-Avila*, 20 P.3d 1191 (Colo. 2001).

This rule does not allow taking of depositions for purely discovery purposes, be it in-state or out-of-state. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

"Unavailability" determined at time of trial. Unavailability within the context of subdivision (e) is to be determined at the time of trial in light of the circumstances then existing. The mere granting of a pretrial motion to depose a witness

accords no presumption of unavailability at the time of trial. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983); *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

Showing required before deposition admitted. Before a deposition is admitted into evidence, the proponent of the deposition must make some showing, by evidence or stipulation, that the witness's inability to testify at trial is due to sickness or infirmity. Mere inconvenience or passing discomfort does not satisfy the unambiguous provisions of the rule. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Affidavit not essential to motion. The purpose of the affidavit requirement in section (a) is to ensure that the court has sufficient information to decide the merits of the motion, i.e., whether a witness might be unable to attend the trial. Where the court is thoroughly informed of the facts supporting the motion by other means, and defendant does not dispute these assertions, the lack of an affidavit is not fatal. *People v. Hernandez*, 899 P.2d 297 (Colo. App. 1995).

Lack of finding of unavailability may not constitute deprivation of rights. Where prosecution uses depositions of witnesses at trial, and the defendant was present with counsel and granted full rights of cross-examination at the time of the taking of the depositions before a judge, the defendant is not deprived of his right to confront the witnesses at the trial where the depositions are used without a finding of unavailability of the deponents when it is a matter of his counsel's trial strategy. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

Applied in *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Cross References:

For depositions in specific circumstances, see § 18-6.5-103.5 (victims or witnesses who are at-risk adults), § 18-6-401.3 (victims of child abuse), and § 18-3-413 (children who are victims of sexual offenses), C.R.S.