

**22-3211. Depositions.** (1) If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material and that it is necessary to take the witness' deposition in order to prevent a failure of justice, the court at any time after the filing of a complaint or indictment may upon motion of a defendant and notice to the parties order that the witness' testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(2) If a witness is committed for failure to give bond to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may order that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(3) The prosecuting attorney may apply to the court for an order authorizing the prosecuting attorney to take the deposition of any witness for any of the reasons and subject to the limitations stated in subsection (1). Upon the filing of such application, the court shall set the matter for hearing and shall order the defendant to be present at such hearing. If, upon hearing, the court determines that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material and that it is necessary to prevent a failure of justice, the court may authorize the prosecuting attorney to take the deposition of the witness.

(4) If the crime charged is a felony, the prosecuting attorney may apply to the court for an order authorizing the prosecuting attorney to take the deposition of any essential witness. Upon the filing of such application, the court shall set the matter for hearing and shall order the defendant to be present at such hearing. If, upon hearing, the court determines that the witness is an essential witness, the court shall authorize the prosecuting attorney to take the deposition of the witness in the county where the complaint or indictment has been filed. Upon application, the court may order that a deposition taken pursuant to this subsection be videotaped.

(5) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(6) A deposition shall be taken in the manner provided in civil actions. The court, upon request of the defendant, may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(7) Whenever the court authorizes the taking of a deposition, other than a deposition upon written interrogatories, the court shall make a concurrent order requiring that the defendant be present when the deposition is taken. If it appears that the presence of the defendant may be coercive to the witness whose deposition is to be taken, the court shall order that the deposition be taken before a judge.

(8) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears that:

- (a) The witness is dead;
- (b) the witness is out of the state and the witness' appearance cannot be obtained, unless it appears that the absence of the witness was procured by the party offering the deposition;
- (c) the witness is unable to attend or testify because of sickness or infirmity; or
- (d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena or other process.

Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering party to offer all of it which is relevant to the part offered, and any party may offer other parts.

(9) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(10) As used in this section, "essential witness" means a prospective witness in the prosecution of a felony who is an eyewitness to the felony or without whose testimony a conviction could not be obtained because the testimony would establish an element of the felony that cannot be proven in any other manner.

**History:** L. 1970, ch. 129, § 22-3211; L. 1982, ch. 147, § 1; L. 1987, ch. 115, § 1; July 1.