

LEGISLATIVE BILL 504

Approved by the Governor May 2, 1973

Introduced by Judiciary Committee, Luedtke, 28, Chmn.;
Stull, 49; Carpenter, 48; Barnett, 26; DeCamp,
40; Fellman, 4; Richendifer, 16; Chambers, 11

AN ACT to amend sections 25-1240, 25-1242, 25-1267.01,
25-1267.04, 25-1267.05, 25-1267.10,
25-1267.12, 25-1267.19, 25-1267.25,
25-1267.34, and 25-1267.35, Reissue Revised
Statutes of Nebraska, 1943, and sections
25-1222.02 and 25-1267.23, Revised Statutes
Supplement, 1972, relating to court procedure;
to provide for the presentation of deposition
testimony by videotape; to provide rules and
procedures for taking depositions by
videotape; and to repeal the original
sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 25-1222.02, Revised
Statutes Supplement, 1972, be amended to read as follows:

25-1222.02. No written, audio-visual, or
videotape statement, other than a deposition, may be used
against a person who is a party to a civil action arising
under the laws of the State of Nebraska or the common law
recognized therein, if the person giving such statement
shall have made a written request for a copy thereof and
such copy shall not have been furnished within twenty
days after the date of such request.

Sec. 2. That section 25-1240, Reissue Revised
Statutes of Nebraska, 1943, be amended to read as
follows:

25-1240. The testimony of witnesses may be taken
in three ~~four~~ modes: (1) By affidavit; (2) by
deposition; and (3) by oral examination; and (4) by
videotape of an examination conducted prior to the time
of trial for use at trial in accordance with procedures
provided by law.

Sec. 3. That section 25-1242, Reissue Revised
Statutes of Nebraska, 1943, be amended to read as
follows:

25-1242. A deposition is a written declaration
under oath or a videotape taken under oath in accordance

with procedures provided by law, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine, † or made upon written interrogatories.

Sec. 4. That section 25-1267.01, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.01. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within twenty days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided by law. Depositions shall be taken only in accordance with sections 25-1267.01 to 25-1267.36 and 25-1267.39 to 25-1267.44 and the provisions of section 14 of this act. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Sec. 5. That section 25-1267.04, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.04. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due 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;

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, 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 That the witness is dead; (b) that the witness is out of the county of the place of trial or hearing, unless it appears that the absence of the

witness was procured by the party offering the deposition; (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) 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 used; or (f) the court may authorize the use of audio-visual or videotape means for the taking and presentation of such testimony by agreement between counsel, or by order of the court after hearing and showing adequate cause therefor; and

(4) If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced.

Substitution of parties does not affect the right to use deposition previously taken; and, when an action in any court of the United States or of any state 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.

Sec. 6. That section 25-1267.05, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.05. Subject to the provisions of section 25-1267.34, objection may be made at the trial or hearing to receiving in evidence any transcribed or videotaped deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying; or if the trial court directs, such objections may be heard and determined prior to trial.

Sec. 7. That section 25-1267.10, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.10. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and

specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with sections 25-1267.01 to 25-1267.36 and 25-1267.39 to 25-1267.44, and the provisions of section 14 of this act, and the court may make orders of the character provided for by sections 25-1267.39 and 25-1267.40. For the purpose of applying sections 25-1267.01 to 25-1267.36 and 25-1267.39 to 25-1267.44 to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

Sec. 8. That section 25-1267.12, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.12. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each, and (2) the reasons for perpetuating their testimony, and (3) the manner in which such testimony shall be preserved. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided by sections 25-1267.39 and 25-1267.40, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in sections 25-1267.01 to 25-1267.36 and 25-1267.39 to 25-1267.44 and section 14 of this act for depositions taken in actions pending in the district court.

Sec. 9. That section 25-1267.19, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.19. ~~If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. If a~~

party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to assure that the recorded testimony will be accurate and trustworthy.

Sec. 10. That section 25-1267.23, Revised Statutes Supplement, 1972, be amended to read as follows:

25-1267.23. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by ~~some-one~~ someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise: Provided, that such testimony may be taken by videotape upon compliance with the requirements of law relating thereto. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the qualifications of the person recording the testimony, or to the manner of taking the deposition, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

Sec. 11. That section 25-1267.25, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.25. [1] When If the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the

deposition may then be used as fully as though signed, unless on a motion to suppress under section 25-1267.35 the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(2) If the testimony is taken by other than stenographic means, the court authorizing the taking of such testimony in such manner shall make reasonable provisions for making such testimony available to the parties and the witness.

Sec. 12. That section 25-1267.34, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.34. (1) 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. In the case of a deposition taken by nonstenographic means, such objections listed above shall be made to the court before the trial or hearing or such objections will be deemed waived.

(2) 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 parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under sections 25-1267.28 to 25-1267.31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

Sec. 13. That section 25-1267.35, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1267.35. Errors and irregularities in the manner in which the testimony is transcribed or video-recorded, or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under sections

25-1267.20 to 25-1267.31 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.

Sec. 14. (1) The provisions of this act shall apply to all trial courts of record in Nebraska in the reception and utilization of testimony and other evidence recorded on videotape.

(2) (a) A party taking a deposition may have the testimony recorded by videotape by complying with the provisions of this section.

(b) The taking of a videotape deposition is subject to the requirements of this act and existing law regarding notice specifying the manner of recording, preserving, and filing of the videotape deposition, but it shall be sufficient in this regard if the notice specifies that the videotape deposition is to be taken pursuant to the provisions of this section regarding the recording, preserving, and filing of the videotape deposition.

(c) The officer before whom a videotape deposition is taken shall be subject to the provisions enumerated in sections 25-1267.14 to 25-1267.18. Upon the request of any of the parties, the officer shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.

(d) When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be recorded on the videotape with a statement by the witness on such tape of the reasons given by him for making such changes.

(e) The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by him and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

(f) (i) If no objections have been made by any of the parties during the course of the deposition, the

videotape deposition, with the certification, shall be filed by the officer with the clerk of the trial court in accordance with section 25-1267.26 (1) and notice of its filing shall be given as provided in section 25-1267.26 (3).

(ii) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted by the officer to the trial judge upon the request of any of the parties within ten days after its recording or within such other period of time as the parties may stipulate, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose. For the purpose of ruling on the objections, the trial judge may view the entire videotape recording, view only those parts made, or he may listen to an audio-tape recording submitted in lieu of the videotape recording. The trial judge shall rule on the objections prior to the date set for the trial of the action and shall return the recording to the officer with notice to the parties of his rulings and of his instructions as to editing. The editing shall reflect the rulings of the trial judge and shall then remove all references to the objections. The officer shall then cause the videotape to be edited in accordance with the court's instructions and shall cause both the original videotape recording and the edited version of that recording, each clearly identified, to be filed with the clerk of the trial court.

(g) Each trial court shall provide secure and adequate facilities for the storage of videotape recordings.

(h) Except upon order of the trial judge and upon such terms as he may provide, the videotape recordings on file with the clerk of the trial court shall not be available for inspection or viewing after their filing and prior to their use at the trial of the cause or their disposition in accordance with this section. The clerk may release the videotape to the officer taking the deposition, without the order of the trial judge, for the purpose of preparing a copy at the request of a party as provided in subdivision (2) (c) of this section.

(i) The effectiveness of a videotape deposition will be greatly increased when all of the objections have been ruled upon, following the procedures set forth in this section, prior to the time of trial. If an objection is made at the time of trial, which objection has not previously been waived pursuant to section

25-1267.34 or previously raised and ruled upon, such objection shall be made before the videotape deposition is presented and shall be ruled upon by the trial judge in advance of that presentation. If such objection is sustained, that portion of the videotape deposition containing the objectionable testimony shall not be presented to the jury.

Sec. 15. That original sections 25-1240, 25-1242, 25-1267.01, 25-1267.04, 25-1267.05, 25-1267.10, 25-1267.12, 25-1267.19, 25-1267.25, 25-1267.34, and 25-1267.35, Reissue Revised Statutes of Nebraska, 1943, and sections 25-1222.02 and 25-1267.23, Revised Statutes Supplement, 1972, are repealed.