

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* 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 these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules 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.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) *PENDING APPEAL.* 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 was 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 the party expects to elicit from each; (2) the reasons for perpetuating their testimony. 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 for by Rules 34 and 35, and thereupon the depositions may be taken and

used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) *PERPETUATION BY ACTION.* This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California*, 292 U.S. 341 (1934); *Todd Engineering Dry Dock and Repair Co. v. United States*, 32 F.(2d) 734 (C.C.A.5th, 1929); *Hall v. Stout*, 4 Del. ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§666-670; Calif.Code Civ.Proc. (Deering, 1937) 2083-2089; Ill.Rev.Stat. (1937) ch. 51, §§39-46; Iowa Code (1935) §§11400-11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, §46-63; N.Y.C.P.A. (1937) §295; Ohio Gen.Code Ann. ((Throckmorton, 1936) §12216-12222; Va.Code Ann. (Michie, 1936) §6235; Wisc.Stat. (1935) §§326.27-326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b). This follows the practice approved in *Richter v. Union Trust Co.*, 115 U.S. 55 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c). This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, [former] §644 (Depositions under *dedimus potestatem* and *in perpetuum*) as an alternate method.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The only changes are in nomenclature to conform to the official designation of a district court in Title 28, U.S.C., §132(a).

NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 28. Persons Before Whom Depositions May Be Taken

(a) *WITHIN THE UNITED STATES.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where

the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) IN FOREIGN COUNTRIES. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) DISQUALIFICATION FOR INTEREST. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

In effect this rule is substantially the same as U.S.C., Title 28, [former] §639 (Depositions *de bene esse*; when and where taken; notice). U.S.C., Title 28, [former] §642 (Depositions, acknowledgements, and affidavits taken by notaries public) does not conflict with subdivision (a).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather

closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co. v. Columbian Button & Fastener Co.* (C.C.N.D.N.Y. 1898) 85 Fed. 54; *Mathieson Alkali Works v. Arnold, Hoffman & Co.* (C.C.A.1st, 1929) 31 F.(2d) 1.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally *Symposium, Letters Rogatory* (Grossman ed. 1956); Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, Proc. A.B.A., Sec. Int'l & Comp. L. 37 (1959); Heilpern, *Procuring Evidence Abroad*, 14 Tul.L.Rev. 29 (1939); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 526-29 (1953); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031, 1056-58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., *United States v. Matles*, 154 F.Supp. 574 (E.D.N.Y. 1957); *The Edmund Fanning*, 89 F.Supp. 282 (E.D.N.Y. 1950); *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953). See also *Ali Akber Kiachif v. Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States v. Paraffin Wax*, 2255 Bags, 23 F.R.D. 289 (E.D.N.Y. 1959). In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witnesses acknowledges as correct. See Jones, *supra*, at 530-32; Doyle, *supra*, at 39-41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See

The Mandu, 11 F.Supp. 845 (E.D.N.Y. 1935). *But cf. Nelson v. United States*, 17 Fed.Cas. 1340 (No. 10,116) (C.C.D.Pa. 1816); *Winthrop v. Union Ins. Co.*, 30 Fed.Cas. 376 (No. 17901) (C.C.D.Pa. 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, *cf. Uebersee Finanz-Korporation, A.G. v. Brownell*, 121 F.Supp. 420 (D.D.C. 1954); *Danisch v. Guardian Life Ins. Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 *Moore's Federal Practice* ¶¶28.05–28.08 (2d ed. 1950).

NOTES OF ADVISORY COMMITTEE ON RULES—1980 AMENDMENT

The amendments are clarifying.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath. For a discussion of the impact of such treaties upon the discovery process, and of the application of principles of comity upon discovery in countries not signatories to a convention, see *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

The term “letter of request” has been substituted in the rule for the term “letter rogatory” because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Rule 29. Stipulations Regarding Discovery Procedure

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that 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, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970; Apr. 22, 1993, eff. Dec. 1, 1993.)

NOTES OF ADVISORY COMMITTEE ON RULES—1970 Amendment

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

Rule 30. Depositions Upon Oral Examination

(a) WHEN DEPOSITIONS MAY BE TAKEN; WHEN LEAVE REQUIRED.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) NOTICE OF EXAMINATION; GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the