Interstate and International Depositions

BY ANDREW AGATI
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The increasing geographical mobility of individuals and expanding global economy are distinct characteristics of today's marketplace. Individuals and companies routinely do business with merchants in other states throughout the nation. Moreover, the recent elimination or reduction of national trade restrictions as well as increasing telecommunications technology allows many smaller businesses to become players in the international economy.

It is inevitable, therefore, that litigation will also increasingly become multi-jurisdictional. An elimination of the borders of litigation necessarily means that pre-trial discovery will increasingly take on an interstate and international aspect. Witnesses may be found outside the jurisdiction and, indeed, in other countries. How to procure a foreign deposition, however, is itself foreign to many lawyers. This article attempts to unearth the mystery of interstate and international depositions and identify the hoops through which the practitioner must leap in order to obtain extra jurisdictional oral discovery. It will focus on the issue of how to compel the deposition attendance of a nonparty witness located in a foreign jurisdiction.

DEPOSITION OF A NONPARTY WITNESS LOCATED IN A DIFFERENT STATE

When a *federal* court litigant wishes to depose a nonparty witness, the latter must be served with both a subpoena and a notice of deposition. *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683 (D.Kan. 1995). While the notice of deposition must also be served with a subpoena, the notice, in and of itself, is insufficient to compel the attendance of the nonparty witness. The only way to compel the attendance of the nonparty witness is by issuing the subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure.

Rule 45(a)(2) provides that "[a] subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken." However, under Rule 45(b)(2), a subpoena generally can only be served in three areas: (1) anywhere within the district by which the subpoena is issued; (2) anywhere within a 100-mile radius of the site selected for the deposition; or (3) anywhere within the state where a state statute or rule of court permits similar service. Moreover, Rule 45(c)(3)(A)(ii) provides that a subpoena will be quashed or modified if it requires a nonparty witness to travel more than 100 miles for the deposition.

Thus, by way of example, if the lawsuit is in a federal court in Ohio and a party wishes to depose a nonparty witness residing in Florida, a subpoena issued from the Ohio court cannot be served for it would not satisfy any of the provisions of Rule 45(b)(2) and would very likely be quashed pursuant to Rule 45(c)(3)(A)(ii). Accordingly, the deposition will have to take place in Florida and the subpoena compelling the attendance of the nonparty witness will have to issue from the appropriate federal district court in Florida.

When a subpoena must be issued from a federal court other than one in which an action is pending, as in the above example, Rule 45(a)(3)(B) provides the method for securing the issuance of the subpoena. Specifically, "[a]n attorney as officer of the court may… issue and sign a subpoena on behalf of… a court for a district in which a deposition… is compelled… if the deposition… pertains to an action pending in a court in which the attorney is authorized to practice." As explained by the Advisory Committee Notes to a 1991 amendment to Rule 45:

> Any attorney permitted to represent a client in a federal court, even one admitted pro hac vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice.

Thus, all that an attorney must do is issue a subpoena from the district in which the deposition will be taken—Florida in the

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above example. The attorney can accomplish this by simply inserting the name of the appropriate Florida court in the space provided in the subpoena form.

As described above, in *federal* litigation, compelling the attendance of the nonparty witness located in a different state than where the litigation is pending is uniform and straightforward. The same, however, cannot be said when the lawsuit is in *state* court.

In *federal* litigation, compelling the attendance of the nonparty witness located in a different state than where the litigation is pending is uniform and straightforward. The same, however, cannot be said when the lawsuit is in *state* court.

When an action is pending in one state's court and a party needs to depose a nonparty witness located in another state, the party will first have to determine the circumstances under which the forum state permits depositions to be taken in a different state. In fact, all states have rules permitting such depositions. *See, e.g.,* Ariz.R.Civ.P. 28(a); Ohio R.Civ.P. 28(B); Tenn.R.Civ.P. 28.01. [Note: The authors of this article have a complete state-by-state listing of citations to the applicable rule, which they can share with interested readers.] Next, the party will have to seek the assistance of the state where the witness is located. There is no uniform rule amongst the 50 states that governs such assistance, despite valiant legislative effort.

In 1920, the National Conference of Commissioners on Uniform State Laws (the "National Commissioners") approved the Uniform Foreign Depositions Act, which provides, in pertinent part:

> Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

Then, in 1962, the National Commissioners approved the Uniform Interstate and International Procedure Act, which superseded the UFDA. *See* 13 U.L.A. 355 (1980). Section 3.02 of the UIIPA provides:

> (a) A court of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.
>
> (b) A person within this state may voluntarily give his testimony or statement or produce documents or other things for use in a proceeding before a tribunal outside this state.

Despite the National Commissioners' efforts, not all states adopted the UFDA or the UIIPA, and even some of those which adopted the UFDA did not subsequently repeal it and adopt the UIIPA as the National Commissioners intended. For example, the UFDA is in force in California, Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, and Wyoming. In contrast, Indiana, Louisiana, Massachusetts, Michigan, Pennsylvania, and Oklahoma have enacted the UIIPA.

Note that Oklahoma and Louisiana adopted the UIIPA without repealing the UFDA. It appears that a litigant can use either the UIIPA or the UFDA in these two states in compelling the nonparty witness to appear at deposition. Mullin, "Interstate Deposition Statutes: Survey and Analysis," 11 U.Balt. L.Rev. 2, 6 (1981).

The remaining 30 states have adopted neither the UFDA nor the UIIPA. However, sixteen have promulgated rules that appear to be akin to the UFDA in that the attendance of a nonparty witness will be compelled (*i.e.*, a subpoena will issue) upon the filing of a "commission," a "mandate," or "writ" or upon proof of a duly served "notice to take deposition." These jurisdictions are Alabama, Arkansas, Colorado, Delaware, Hawaii, Idaho, Kentucky, Minnesota, Montana, New Mexico, North Carolina, Rhode Island, South Carolina, Texas, Utah, and Wisconsin. Eight others have promulgated rules that appear to be akin to the UIIPA in that a nonparty witness will be compelled to appear at a deposition upon a "petition," "request," "application," or "motion." These states are Alaska, Connecticut, Illinois, Kansas, Missouri, New Jersey, Vermont, and West Virginia.

Four states have promulgated rules which are not similar to either the UFDA or the UIIPA. In Nebraska, a nonparty witness will be compelled to appear in the same manner as in a case pending in that state when the deposition of the nonparty witness is authorized by the laws of another state. Neb.R.Civ.P. 28(e). Similarly, in Washington, a subpoena will issue when any "officer or person is authorized to take depositions in [Washington] by the laws of another state..., *with or without* a commission." Wash.R.Sup.Ct. 45(d)(4) (emphasis added). Likewise, in Iowa, the person authorized by the laws of Iowa or any other state to take a deposition to be used in the other state may issue subpoenas. Iowa Code §622.84. Finally, in Mississippi, a subpoena will issue when a person has been specially appointed to take a deposition by a court outside of Mississippi. Miss.R.Civ.P. 28(a), 45(a)(1).

Arizona and Maine have promulgated rules containing very detailed requirements. Arizona specifically requires that the out-of-state party file an application containing information such as facts and documents showing that the requesting party is entitled to take the deposition and issue a subpoena, and descriptions of notices given to the other parties to the action. Ariz.R.Civ.P. 30(h). *See also*, Me.R.Civ.P. 30(H).

As the above summary makes clear, there is no uniform rule applied by the 50 states; there will be various technicalities in one jurisdiction that will not apply in another. [The authors can provide a listing of citations to each state's rule.] While it is beyond

the scope of this article to address each technicality, some highlights are interesting.

In most states, the notice of deposition, commission, or application will have to be filed in either the district where the nonparty witness resides, is employed or transacts business in person, or is found. *See*, *e.g.*, Kan.Stat. §60-228(d); Ill.Stat. Art. II, Part E, Rule 204(b); Ala.R.Civ.P. 28(c).

Witness fees will likely have to be tendered. For instance, before a nonparty witness can be compelled to attend a deposition in New Mexico, he or she must be paid the witness fees and mileage to which he would be entitled if the action was pending in New Mexico. N.M.Stat. §38-8-1. Similarly, North Carolina requires the party seeking to depose the nonparty witness to deposit with the appointed commissioner a "sum of money to cover all costs and charges incident to the taking of the deposition, including [witness fees]." N.C.R.Civ.P. 28(d)(2). Remember that witness fee requirements may be set forth in a statutory section unrelated to the deposition statutes. Mullin, *supra,* at 29.

Must local counsel be employed? Maine, for one, specifically requires the application to be signed by a member of the Maine Bar; other states do not have such a requirement. However, because most states have a general rule that pleadings must be signed by an attorney authorized to practice in the state, an out-of-state attorney would be well advised to associate with local counsel.

Other issues an attorney may face when seeking to depose a nonparty witness across state lines include: (1) whether the UFDA, UIIPA, or other applicable state statutes permit depositions to be taken for administrative hearings or purposes not associated with a pending lawsuit; (2) whether a nonparty can claim entitlement to the procedures set forth in the statutes; and (3) the conflict of laws issues that may arise, such as the procedure to be followed in taking the deposition, questions of relevance, and questions of privilege. For a general overview of these issues, see Mullin, *supra*, at 7-14, 35-46.

While the above discussion provides the necessary background information, the following example provides a better understanding of the mechanics in compelling the deposition attendance of a nonparty witness located in a different state than where the action is pending.

Assume that litigation is pending in Texas in the District Court of Matagorda County between ABC Corp. and XYZ Corp., and that XYZ needs to depose Mr. Nonparty Witness, who resides in Cleveland, Ohio. The first step is to serve a "notice to take deposition" on Mr. Nonparty Witness in accordance with Texas law. The second step is to procure from the District Court of Matagorda County, Texas, a mandate, writ, or commission authorizing a notary public or other officer authorized to take depositions outside of Texas (*i.e.*, a court reporting service) to take the deposition of Mr. Nonparty Witness. A "form" commission follows.

IN THE DISTRICT COURT OF MATAGORDA COUNTY, TEXAS
130th JUDICIAL DISTRICT

ABC CORP.,	)	
	)	
Plaintiff,	)	**No. 98-S-4404-C**
v.	)	
	)	
XYZ CORP.,	)	
	)	
Defendant.	)	

COMMISSION TO TAKE FOREIGN ORAL DEPOSITION

To: A1 Court Reporting Service, 420 Lincoln Building, 1367 East Sixth Street, Cleveland, Ohio 44114.

GREETINGS:

You have been commissioned and are hereby authorized to take the oral deposition of Mr. Nonparty Witness, 2057 East 4th Street, Cleveland, Ohio 44115. As a result, you are authorized to issue a subpoena for the appearance of Mr. Nonparty Witness as a witness in the above-styled action at a time and place designated on the Notice of Intention to Take Oral Deposition filed in this cause on August 31, 1998, a copy of which is attached to this Commission.

You are also authorized and ordered to administer the oath to said witness and reduce the questions and answers or all responses to such questions to writing, unless they have been excluded by the mutual agreement of all parties. In addition, you are authorized and ordered to mark exhibits as they are introduced, certify the accuracy of your transcription, seal the transcript and evidentiary materials along with a copy of this Commission in an appropriate container with an endorsement showing the style and cause number of this case, and return it to the party asking the first question, with a copy to all other parties.

This Commission is authorized by order of the court issued on August 5, 1998.

The third step in compelling attendance of the nonparty witness is for Texas counsel to secure local counsel in Cleveland. The fourth step is for that local counsel to prepare a petition to file with the appropriate court in Ohio. Attached to the petition should be the notice to take deposition, the commission, and the proposed subpoena that is to be issued. The petition, which is filed like a complaint (with payment of any filing fees), will then be assigned to a judge and given a case number. The Ohio judge will then rule on the petition. A "form" petition follows.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

In re:	)	
	)	
ABC CORP.,	)	
c/o Statutory Agent	)	
150 Parkway Blvd.	)	**No. 98-A-789-C**
Houston, Texas 77056,	)	

Plaintiff,	)
	)
v.	)
	)
XYZ CORP.,	)
25 Main Street	)
Houston, Texas 77056,	)
	)
Defendant.	)

PETITION TO AUXILIARY COURT FOR ISSUANCE OF DEPOSITION SUBPOENA PURSUANT TO UNIFORM FOREIGN DEPOSITION ACT

Petitioner XYZ Corp., through its undersigned counsel, petitions this Court as follows:

1. This petition is brought pursuant to Ohio Revised Code Section 2319.08, *et seq.* for auxiliary relief under the Uniform Foreign Deposition Act.

2. The petitioner is a defendant in a pending civil action filed in the District Court of Matagorda County, Texas, being Case No. 98-S-4404-C on the docket thereof.

3. Petitioner desires, by the issuance of a subpoena, to obtain the oral deposition of Mr. Nonparty Witness, of 2057 East 4th Street, Cleveland, Ohio 44115 and various records of Mr. Nonparty Witness which are necessary and material to the aforesaid civil action pending in the District Court of Matagorda County, Texas. A true and accurate copy of the Notice to Take Deposition is attached hereto as Exhibit A.

4. Petitioner further states that A1 Court Reporting Service, a notary public in and for Cuyahoga County, Ohio, and also a court reporting service located at 420 Lincoln Building, 1367 East 6th Street, Cleveland, Ohio 44114, has received a Commission issued by the Clerk of the District Court of Matagorda County, Texas authorizing A1 Court Reporting Service to take the deposition of Mr. Nonparty Witness, and that such Commission was issued pursuant to the said Texas District Court's Order of September 4, 1998. A certified copy of the Commission is attached hereto as Exhibit B.

5. A true copy of a requested subpoena to be served upon Mr. Nonparty Witness is attached hereto as Exhibit C.

6. Petitioner also requests that this Court act as an auxiliary Court to provide it any other relief, at law or in equity, as may be necessary in the taking of testimony and the production of records for the foreign action.

WHEREFORE, pursuant to Ohio's Uniform Foreign Deposition Act and Civil Rule 45(c), Petitioner requests this Court to act as an auxiliary Court to the District Court of Matagorda County, Texas and enter its order, to wit:

(1) authorizing the Clerk of this Court to issue the subpoena, attached hereto as Exhibit C, to Mr. Nonparty Witness ordering the oral deposition of Mr. Nonparty Witness and production of documents at the time and place set forth in Exhibit C, subject to any continuances to which the parties may agree,

(2) appoint as special process server A1 Court Reporting Service, a person who is not a party and is not less than eighteen years of age, to serve the subpoena upon Mr. Nonparty Witness, and

(3) grant Petitioner such further relief, at law or in equity, as may be necessary, if any, in the taking of the said deposition testimony and the production of records in the foreign action.

Respectfully submitted,

_____

[Cleveland law firm, as local counsel]

_____

[Texas law firm]

In order to speed the process along, it is recommended that a proposed order be prepared for the judge to sign. Once the order is entered, the subpoena will issue, compelling the attendance of Mr. Nonparty Witness at the deposition.

While the above procedure is in accordance with the rules of Texas and Ohio, the technicalities of each relevant jurisdiction should be consulted. *See, e.g.*, Cal.Code Civ.Proc. §2029, which provides a suggested form for an "application for issuance of deposition subpoena to obtain testimony for use in out-of-state proceeding and supporting declaration."

DEPOSITION OF A NONPARTY WITNESS LOCATED IN A FOREIGN COUNTRY

While the transaction of business around the world continues to progress, obtaining an individual's deposition in a foreign country remains difficult. The procedure for taking a foreign deposition begins with a review of Rule 28(b) of the Federal Rules of Civil Procedure (or the equivalent state rule), 28 U.S.C. §1781, and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. [Note that the full text of the Hague Convention is in United States Code Annotated, following the text of 28 U.S.C. §1781.] Section 1781 provides the U.S. State Department with the authority to receive letters rogatory from U.S. courts and transmit them to the applicable foreign tribunal. Rule 28(b) delineates three methods for taking a foreign deposition: by notice in accordance with Rule 30; by asking the court to appoint a commission; and by letter rogatory. An amendment to Rule 28 in 1993 added that foreign depositions may also be taken in accordance with any applicable treaty or convention.

The United States is a party to several bilateral agreements, including the Vienna Convention on Consular Relations, the Japan-United States Consular Convention, and the Inter-American Convention on Letters Rogatory. *See* 21 U.S.T. 77, 28 U.S.T. 2555, and notes to 28 U.S.C. §1781. Information on whether the United States has an agreement with a particular country can be obtained from the Department of State, Office of Legal Advisor, Treaty Affairs (www.acda.gov/state); the United Nations (www.un.org); the Organization of American States (OAS) (www.oas.org); and the Internet law library of the U.S. House of Representatives (http://law.house.gov/89.htm).

The primary treaty for which Rule 28(b) was amended, however, is the Hague Convention. It is a multilateral treaty, adopted in 1970 and ratified by the United States in 1972, "that was designed to provide a uniform procedure to be used in obtaining evidence in foreign countries." *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 59 (E.D.Pa. 1983). The central pur-

pose of the convention "was to establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state." *Societe Nationale v. United States District Court*, 482 U.S. 522, 530 (1987). In other words, the convention attempted to reconcile the different discovery methods that exist in common law countries (*e.g.*, United States, United Kingdom) and civil law countries (*e.g.*, France, Germany, Mexico). *Philadelphia Gear Corp.*, *supra*. While common law countries allow attorneys to examine and cross-examine the witness during a deposition, the judicial authority conducts the deposition in civil law forums. This "reconciliation" in the Hague Convention resulted in the adoption of three methods for obtaining foreign depositions: (1) notice to appear before a competent officer (Arts. 15, 16); (2) the appointment of a commission (Arts. 17, 18); and (3) by letter of request (or letter rogatory) (Arts. 1-14). These methods, of course, coincide with the process outlined in Rule 28.

If the country in which the desired deponent resides is a signatory to the Hague Convention, then the American attorney should initially attempt to obtain the deposition under the procedures set forth in that multilateral treaty. There are 46 signatory states, including Argentina, Australia, Denmark, Finland, France, Germany, Israel, Italy, Mexico, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Interestingly, Canada, China (except Hong Kong), and Japan, three of the major U.S. trading partners, are not signatories. For depositions in these and other non-signatory countries, therefore, the American attorney must utilize the procedures set forth in bilateral agreements or the other procedures set forth in Rule 28 and 28 U.S.C. §1781.

Even for signatory countries, however, the Hague Convention does not necessarily provide for trouble-free depositions. Article 33 of the treaty allows signatory countries to file reservations at the time of ratification objecting to certain provisions. For instance, a country may ratify the treaty but decline to allow depositions to be taken by a commissioner appointed by a U.S. court. Thus, the American attorney should review any declarations or reservations made by the contracting state before moving forward with the deposition. In addition, Article 32 of the Hague Convention states that preexisting treaties between countries remain in effect and are not superseded by the Hague Convention. Prior treaties between the United States and a foreign country may allow less restrictive procedures for taking a deposition and must also be consulted by the American attorney prior to scheduling a deposition.

While the methods of Rule 28 and the Hague Convention overlap, the decision on which method to employ depends upon whether the proposed deponent is a willing participant. As described below, the deposition of a voluntary witness can be obtained with only minor impediments; however, obtaining the deposition of an uncooperative witness can prove to be cumbersome, tricky, and, sometimes, impossible.

DEPOSING VOLUNTARY WITNESSES IN A FOREIGN COUNTRY

While taking a deposition of a cooperative witness in a neighboring state can be accomplished by simple agreement, deposing a voluntary witness in a foreign country requires at least some form of international assistance. The methods to obtain such a deposition are discussed below.

- **Rule 29 Stipulation**

If the deponent has no objection to being deposed and will submit voluntarily, then the simplest and least cumbersome method for obtaining the deposition need not invoke Rule 28 or any treaty. Rule 29 of the Federal Rules of Civil Procedure provides that the parties may, by written stipulation, "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." A foreign deposition under Rule 29 is taken at a time and location convenient to the attorneys and witness, and need not involve United States or foreign tribunals or U.S. consular officers. For instance, it can be taken in the office of a foreign attorney or at a local hotel. United States notaries are not authorized to administer oaths in foreign countries; therefore, the American attorney should ensure that he or she schedules the deposition before a person authorized to administer oaths under the laws of the host country.

The Rule 29 stipulation should include an agreement as to the admissibility of evidence. Some countries, such as those governed by civil codes, do not permit oral discovery in the examination and cross-examination format with which American lawyers are familiar. Moreover, the stipulation should include the parties' agreement to appoint the chosen court reporter as a commissioner to administer oaths. A sample stipulation under Rule 29 follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

ABC CORP.,	)	
	)	
Plaintiff,	)	
	)	**No. 1234**
v.	)	
	)	
XYZ CORP.,	)	
	)	
Defendant.	)	

STIPULATION TO TAKE ORAL DEPOSITION BEFORE FOREIGN OFFICIAL

Pursuant to Rule 29 of the Federal Rules of Civil Procedure, it is hereby stipulated that the deposition of [foreign witness] will be taken before [foreign court reporter], who is authorized to administer oaths under the law of the United Kingdom, on the 4th day of January, 1999, at the [hotel, conference room or solicitor's office] at 9:00 a.m. It is further stipulated that the deposition will be conducted in accordance with Rules 26 and 30 of the Federal Rules of Civil Procedure and through direct and cross-examination of the witness by attorneys for all parties to this action. The designated court reporter is hereby commissioned to administer the oath to the witness, transcribe the testimony, and transmit a copy to the attorneys. The parties hereby agree that the deposition testimony is not objectionable due to any procedural deficiencies associated with the foreign deposition.

Respectfully submitted,

_____

Attorney for Plaintiff

_____

Attorney for Defendant

• **Notice**

If stipulation under Rule 29 is not feasible, other methods for deposing a voluntary witness include the notice and commission options contemplated by Rule 28 and the Hague Convention. The deposition by notice method is simply a deposition taken before a competent official after the proponent of the discovery provides reasonable notice to his or her adversary. *See* Fed.R.Civ.P. 30; 22 C.F.R. §92.52; Arts. 15, 16 of the Hague Convention. Before utilizing this method, however, the American attorney should be cognizant of two points. First, the notice method cannot be used unless it is specifically allowed under the law of the host country. Whether the deposition will be allowed may depend upon the nationality of the deponent. Japan, for example, allows deposition upon notice only of U.S. citizens. Furthermore, the host country may perceive the taking of a deposition of one of its citizens before a U.S. official to be an infringement upon its sovereignty; therefore, in such a situation the deposition should be held before an official of the host country.

Second, the deposition must be taken before a competent official. There is no longer a requirement that the deposition be taken by a United States consular agent; rather, the deposition may be taken before any person authorized to administer oaths in the locality where the deposition is held, either under U.S. or foreign law. Notarizing officers under U.S. law, as defined in 22 C.F.R. §92.1, are considered competent officials and include consular officers, officers of the foreign service, and U.S. State Department employees. As in a deposition taken in the United States, however, any relative, employee, or attorney for a party cannot administer the oath and preside over the deposition. In any event, the notice should not identify the official before whom the deposition will be taken by name, but should only state the descriptive title of the person. Identifying the official by name may be narrowly interpreted as permitting the deposition to occur only before that person. For example, a notice should read that the deposition of John Doe "will be taken before the United States Consul to the United Kingdom or any of his employees, representatives, or designated agents." A sample notice follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

ABC CORP.,)
)
Plaintiff,)
) **No. 1234**
v.)
)
XYZ CORP.,)
)
Defendant.)

NOTICE TO TAKE DEPOSITION BEFORE OFFICIAL IN THE UNITED KINGDOM

Pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure, the defendant hereby gives notice that it will take the deposition of John Doe, 123 Highbridge Crescent, London, England, before the United States Consul or any of his representatives or designated agents at [hotel or solicitor's office] beginning at 9:00 a.m. on January 4, 1999.

Respectfully submitted,

_____

Attorney for Defendant

Articles 15 and 16 of the Hague Convention provide the methods by which to notice a deposition in signatory countries. Article 15 allows a United States consular agent to take the deposition of a U.S. national. This article, however, also permits signatory countries to file a declaration forcing even a U.S. consular agent to obtain permission before presiding over a noticed deposition of an American. To date, Norway, Sweden, Denmark, and Portugal have filed such declarations. Under Article 16, permission must always be obtained before taking the deposition of a national of the host country. Only the United States and Finland have waived this provision.

• **Commission**

A foreign deposition under Rule 28(b) of the Federal Rules of Civil Procedure and the Hague Convention may also be taken before a commissioner appointed by the U.S. court. Again, however, the law of the host country should be reviewed to determine the legality of a deposition by commission. Denmark and Portugal, for instance, refuse to permit depositions by commission under any circumstances.

A commission is a written authority issued by a court that gives or delegates the power to take the testimony of a witness to a specific individual. 22 C.F.R. §92.53. Unlike a notice, a commission may only be issued by a court upon a party's application or motion. A commission, moreover, may only be appointed by a court and not by a quasi-judicial authority such as an arbitration panel. Whether to issue a commission lies within the total, yet limited, discretion of the trial court. Rule 28(b) states that a commission "shall be issued" on terms that are "just and appropriate." This rule "give[s] trial courts *limited* discretion to deny applications for the issuance of a commission" and the court must specifically articulate some reason for refusing such an issuance. See *Complaint of Bankers Trust Co.*, 752 F.2d 874, 890 (3d Cir. 1985).

In order to obtain a commission, the American attorney must file an application or motion with the court before which the action is pending. The application must be specific and should be accompanied by an affidavit of the requesting attorney. The affidavit should identify the witness by name and title, state with

specificity the knowledge the witness allegedly possesses, identify the relevant documents in the witness's possession, and describe how the potential testimony is material to the attorney's client's claim or defense. The attorney's affidavit should also explain why the issuance of a commission is the best method by which to obtain the testimony. Examples follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

ABC CORP.,	)	
	)	
Plaintiff,	)	
	)	**No. 1234**
v.	)	
	)	
XYZ CORP.,	)	
	)	
Defendant.	)	

APPLICATION FOR ISSUANCE OF COMMISSION TO TAKE DEPOSITION IN FOREIGN COUNTRY

Pursuant to Rule 28(b) of the Federal Rules of Civil Procedure, the defendant hereby moves the Court to appoint as a Commissioner the United States Consul to the United Kingdom, or any of its representatives, officers, or designated agents, American Embassy London, 24/31 Grosvenor Square, W1A 1AE, London, England, to take the deposition of John Doe, a resident and citizen of Great Britain. The defendant requests that the commission designate that the deposition be taken under oath and in accordance with Rules 26 and 30 of the Federal Rules of Civil Procedure and specifically permit direct and cross-examination by attorneys for all parties. The defendant submits the affidavit of its attorney in support of this application.

Respectfully submitted,

_____

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

ABC CORP.,	)	
	)	
Plaintiff,	)	
	)	**No. 1234**
v.	)	
	)	
XYZ CORP.,	)	
	)	
Defendant.	)	

AFFIDAVIT

I, defendant's attorney of record, being first duly sworn, state and depose under oath as follow:

1. I am the attorney for the defendant in the above-entitled action. I am competent to provide this affidavit and have personal knowledge of the matters stated herein.

2. This affidavit is submitted in support of defendant's application for the appointment of a commission to take the deposition of John Doe, a resident and citizen of the United Kingdom. Mr. Doe is a critical witness in this commercial litigation. Mr. Doe is a former employee of the plaintiff and, based upon investigation and discovery, possesses knowledge material to the transaction between the parties that is the subject of this lawsuit. Mr. Doe's unique knowledge and understanding of the subject transaction is essential to the defendant's ability to submit a defense in this matter. Without this testimony, the defense of this action will be greatly compromised.

3. The proposed deponent is believed to be a willing witness and has no objections to submitting to a deposition in this matter. Due to the deponent's location, the appointment of a commission to preside over his deposition is the best method to ensure that Mr. Doe's testimony is taken and received in a form admissible at the trial of this action.

Sworn and subscribed before
[a notary public].

_____

Attorney for Defendant

The trial court may commission virtually anyone to preside over the deposition; however, the law of the country in which the deposition is to be held may limit the choice. If the United States court commissions an official of the host country, then the American attorney should send the order of commission directly to that official. Alternatively, the commission order may be sent to the U.S. diplomatic mission of the host country that, in turn, forwards it to the host's Foreign Office and ultimately to the designated commissioner.

Most commissions, however, are issued to U.S. notarizing officers (consular agents, State Department employees, etc.). Under this scenario, the order of commission is sent directly by the American attorney to the designated commissioner. The American attorney should consult with the State Department to ascertain a list of officers willing to preside over the deposition.

The order of commission should not designate the commissioner by name because the designee may be the only person before whom the deposition may be taken. Rather, the commission should simply identify the officer by title and provide, for example, that the deposition will be taken by "any notarizing officer of the United States" in the United Kingdom. 22 C.F.R. §92.55. The order of commission should also state the name, address, and title of the deponent as well as the date, time, and location of the deposition. The commissioner has no compulsory powers; therefore, the deponent must be willing and, of course, apprised of the situation and deposition.

DEPOSING HOSTILE OR UNCOOPERATIVE WITNESSES

In actuality, very few countries allow depositions of their citizens by notice or the appointment of a commission. Moreover, these methods have no compulsory attributes and cannot force even a willing witness to answer every question. When the witness refuses to submit voluntarily for a deposition, or there is some doubt surrounding the witness's willingness to answer certain questions, the American attorney must resort to the compulsory methods of obtaining the foreign deposition—subpoena or letter rogatory.

- **Subpoena Method**

If the potential deponent is a United States citizen living abroad, he or she may be subpoenaed back to the jurisdiction in which the litigation is pending. Section 1783(a) of Title 28 provides that a U.S. court "may order the issuance of a subpoena requiring the appearance as a witness before it... of a national or resident of the United States who is in a foreign country...." The subpoena will only be issued, however, "if the court finds that particular testimony... is necessary in the interest of justice, and... that it is not possible to obtain his testimony in admissible form without his personal appearance...." 28 U.S.C. §1783(a). The subpoena should designate the date, time, and location of the deposition and be accompanied by the deponent's estimated "travel and attendance expenses." 28 U.S.C. §1783(b).

The subpoena will be issued only upon order of the trial court. The American attorney, therefore, should file a motion, along with an affidavit, requesting issuance of the subpoena and outlining with specificity the reasons for wanting the testimony and explaining why other means of taking the deposition are insufficient. An affidavit similar to the one reproduced above should suffice.

If the court issues the subpoena, the service should occur in accordance with Rule 45(b)(2), which provides that "[a] subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. §1783." In short, the subpoena should be sent either to the U.S. consul in the foreign country in which the deponent resides or to the U.S. State Department for forwarding to the appropriate officers of the Foreign Office. 22 C.F.R. §§92.86, 92.88. The local U.S. officials, therefore, execute and return service of the subpoena.

Service of the subpoena may also be accomplished in accordance with the provisions of the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, which includes service by international registered mail. The deposition may be taken in the foreign country at a convenient location or the subpoena may mandate that the U.S. citizen return for a deposition in the state or federal jurisdiction in which the subject litigation is pending. See *Aframe Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1365-66 (7th Cir. 1985).

- **Letters Rogatory**

The American attorney should resort to the use of a letter rogatory—or, as termed by the Hague Convention, a letter of request—only when all other methods are not feasible. A letter rogatory is a formal request of the United States court where the litigation is pending to the appropriate judicial authority in the country in which the desired deponent resides. In essence, the U.S. court requests that the foreign tribunal compel the witness to a deposition in the foreign country for use in the U.S. litigation. This method has long been recognized as an inherent power of a U.S. court, *United States v. Reagan,* 453 F.2d 165, 172 (6th Cir. 1971), *cert. denied,* 406 U.S. 946 (1972), and is also authorized by Rule 28 of the Federal Rules of Civil Procedure, 28 U.S.C. §1781, and the Hague Convention. The form and procedure for executing a letter rogatory under any of these authorities is virtually the same and will be discussed simultaneously.

The letter rogatory must be obtained from the American court. To do so, the American attorney must first file an "Application for International Judicial Assistance" along with a personal affidavit and a proposed letter rogatory. The application, based upon the affidavit, should state precisely why the letter of request is necessary. For instance, the application and affidavit should state that the witness is hostile or unwilling to appear, that a subpoena is impractical, or that a notice or commission is unavailable in the particular foreign country. The application and affidavit should follow the same form as the application and affidavit set forth above for use in obtaining the appointment of a commission.

Rule 28(b) provides that "a letter of request shall be issued on application and notice and on terms that are just and appropriate." While this language indicates that the issuance is mandatory, the trial court retains some discretion under Rule 26(c) to limit or preclude a deposition. For instance, in *DBMS Consultants Limited v. Computer Associates International, Inc.,* 131 F.R.D. 367 (D.Mass. 1990), the court refused to issue a letter rogatory for an oral deposition of a witness in Australia despite "counsel's serendipitous Australian holiday plans" and, instead, issued a letter rogatory for a deposition of the witness by written interrogatories. In this case, the expense to the parties was a major consideration in the court's decision. In determining whether to issue a letter rogatory, courts typically will not weigh the evidence to be obtained through the requested deposition or ascertain the witness's ability to give testimony. *B & L Drilling Electronics v. Totco*, 87 F.R.D. 543, 545 (W.D.Okla. 1978). In fact, courts have held that refusal to issue a letter rogatory is reversible error. See *Oscar Gruss & Son v. Lumbermens Mutual Casualty Co.*, 422 F.2d 1278 (2d Cir. 1970); *Zassenhaus v. Evening Star Newspaper Co.*, 404 F.2d 1361 (D.C.Cir. 1968).

The letter rogatory serves the same purpose whether issued under Rule 28 or the Hague Convention. The treaty, however, provides a model letter of request that conveniently outlines all necessary items. *See* Notes to 28 U.S.C. §1781. This model is comprehensive and should be used by the practitioner in preparing the letter rogatory. The model is based on Article 3 of the Hague Convention, which provides that the letter rogatory "shall specify" (a) the requesting U.S. court and the executing judicial authority (foreign court); (b) the names and addresses of the parties and their attorneys; (c) the nature of the proceedings (*e.g.*, civil products liability action); (d) that the evidence to be obtained is an oral deposition of a material witness; (e) the name, address, and title of the party to be deposed (as well as the person's date of birth and nationality); (f) a statement of the subject matter of the questioning; (g) the identity of any documents to be inspected; (h) a statement that the deposition will be taken under oath; and (i) a statement that the deposition shall be taken under a common law format (examination and cross-examination

by the attorneys). For other forms of a letter rogatory, see 7 *Cyclopaedia of Federal Procedure* §§25.145-25.174 (3d Ed. 1992); 8 *Federal Forms* §§23:223-23:261; 1 Ristau, *International Judicial Assistance* §§5-2-1 to 5-2-7 & §§5-3-1 to 5-3-3 (1995); 8A *American Jurisprudence Pleading & Practice Forms* §§201-225 (1996).

The letter of request should contain a translation to the language of the executing country. Although most countries will accept a letter rogatory in either French or English, the process will move ahead more smoothly and correctly if the home language is provided. The practitioner should avoid use of all-encompassing language such as "any and all documents" or that questioning will concern "all of the witness's involvement in the ABC Corp." Such broad language may catch the attention of the host country and create unnecessary impediments to obtaining the deposition. The letter rogatory should contain short, plain, and specific language.

After the trial judge signs the letter rogatory, it is prudent, although not necessarily mandatory, for the court clerk to certify that the judge's signature is authentic. The signed letter rogatory and the clerk's certification should be placed under the court's seal and returned to the requesting attorney. The attorney then has two options. First, he or she can send the letter rogatory to the U.S. State Department, which has the power "to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution." 28 U.S.C. §1781(a)(2). The State Department will transmit the letter rogatory to the central authority in the host country, which then sends it to the appropriate tribunal in that country. The foreign tribunal serves its equivalent to a subpoena upon the witness and returns the executed letter rogatory back through these diplomatic channels.

The second option for the American attorney is to bypass the U.S. State Department and send the letter rogatory directly to either the U.S. Embassy in the host country or, if permitted, directly to the foreign tribunal (with the assistance of a foreign attorney). Section 1781(b)(2) specifically allows "the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner." Traversing through diplomatic channels adds unnecessary time to an already time-consuming process that takes six to twelve months to complete. It is obvious, therefore, that the attorney should choose the least cumbersome route where possible.

The host country and its applicable tribunal will execute or "serve" the letter rogatory in accordance with its own compulsory laws. The deposition, moreover, will generally take place in accordance with the host country's laws. Thus, in civil law countries, the judicial authority poses the questions and the court summarizes the witness's responses. While the attorneys may be allowed to submit additional questions through the judge, there will be no verbatim transcript recording the witness's answers. Signatories to the Hague Convention, however, should allow attorneys from common law countries to pose direct and cross-examination questions if specified as a "special method" in the letter rogatory. *See* Arts. 9 and 19 of the Hague Convention. In non-signatory, civil law countries, however, this may not be an option.

- **Administrative and Procedural Details**

While the above-described methods appear well founded and workable in theory, there are many practical aspects the American attorney must consider before embarking on a foreign deposition. Each country has its particular oddities and requirements that must be consulted.

The most efficient and comprehensive resource for obtaining country-specific law and guidelines is the Office of American Citizens Services of the U.S. State Department. This office maintains current circulars on each country, whether or not a signatory to the Hague Convention, that lists the country's method of service, whether deposition by notice or commission is permitted, and the name and address of the central authority. These circulars may be obtained by mail or fax upon request, by autofax (202-647-3000), or via the office's home page on the Internet (http://travel.state.gov).

As with interstate depositions, it is often advisable to obtain the services of foreign counsel when taking a deposition of a foreign national. Local attorneys can not only provide advice on their country's applicable laws, but may also increase the speed of the entire process.

After determining the most efficient and legally appropriate avenue through which to obtain a foreign deposition, the American attorney still has several administrative details to accomplish. No diplomatic mission or foreign office will schedule the deposition or provide court reporters, stenographers, or videographers. Therefore, the attorney must arrange these services well in advance of the deposition. The Office of American Citizens Services as well as the local U.S. Consulate may be able to assist in retaining these services. A local attorney should be helpful as well. Perhaps the American attorney will have to bring along his own court reporter, videographer, or translator.

The services associated with taking a foreign deposition are not free. The attorney can expect to pay a scheduling fee (currently $400), an hourly deposition fee for the use of a consular agent ($200/hour), notarial services ($55), and packaging fees for certifying and returning the deposition ($180). *See* 22 C.F.R. §22.1. Payment must be made in advance. It is advisable to send more money than is believed necessary to cover additional unknown or hidden fees. Any overpayment will be returned.

This article has presented a general overview of foreign depositions. There are many resources that provide additional information for the American attorney, including: Title 22 of the Code of Federal Regulations; *Moore's Federal Practice*, §§28.03-28.10 (Supp. 1998); *Manual for Complex Litigation* §21.485 (2d ed. 1985); *Federal Procedure Forms,* §§33.147-33.172.50; *Cyclopedia of Federal Procedure, supra*; *Federal Forms, supra*; Ristau, *International Judicial Assistance*, *supra*; *American Jurisprudence Pleading & Practice Forms*, *supra*; and *Obtaining Evidence Abroad* and *Preparation of Letters Rogatory,* both from the Office of American Citizens Services. Any or all of these are excellent resources that should be consulted before the attorney attempts to take a deposition abroad.

CONCLUSION

The process of compelling the attendance of a nonparty witness located in a different state or country than where the litigation is pending is time-consuming and wrought with unforeseen impediments. In short, the task can be accomplished, but not without research, preparation, and patience. ■