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DEPOSITIONS, COMMISSIONS, AND LETTERS ROGATORY IN A CONFLICT OF LAWS CASE

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The power of a proper Court to honor the request of a Court in an independent jurisdiction expressed by letters rogatory, for use of its process in aid of obtaining the deposition of a witness whose testimony is material in a cause pending in the latter, while perhaps not frequently called into exercise, is inherent, and does not depend upon statutes. It exists to prevent a failure of justice. . . . It is a matter, as has been said, resting upon comity.


INTRODUCTION

Since a majority of the states and foreign countries follow the territorial concept of sovereignty as the principal basis for furnishing jurisdiction over a person, problems frequently arise involving the testimony of absent or non-resident witnesses. Often, the forum does not require the witness' physical presence, but only his testimony. This power to procure testimony from an absent or non-resident witness is fundamentally a judicial power of any sovereign and is restricted by a sovereign's territorial boundaries.¹ In the absence of a treaty, convention, statute, or judicial authorization, a state may not send a representative outside of the state and into another state or country and there permit him to exercise his power to compel the absent or non-resident witness to testify.² This would clearly interfere with the sovereignty of the sister state or foreign country. One may readily foresee a number of other jurisdictional problems arising in this respect and which have called for some practical solutions. A few of the other problems which frequently arise, besides procuring the testimony of absent or non-resident witnesses, are: serving documents on non-residents, extraditing an absent witness, obtaining information on, pleading and proving foreign law at the domestic forum.³

This article attempts to examine one of these interstate or international problems, viz., the different methods of procuring the testimony of absent

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1. 8 Wigmore, Evidence § 2195a (McNaughton's rev. ed. 1961).
2. Ibid.
or non-resident witnesses through the use of depositions, commissions, and letters rogatory in a Conflict of Laws case and the problems raised therein.

The term Conflict of Laws would include any case in which the facts, occurrences or events have transpired in a state or country and suit is brought in another, so that the domestic forum must choose between the forum's law and the law of the place where the facts, occurrences or events have happened before the domestic forum can determine the substantive rights between the parties. *(4)*

At the interstate level, the present method of requiring the actual, physical presence of an absent or non-resident witness is being resolved through the adoption of various Uniform Acts and federal statutes. On the international level, the solution to the same problem appears to be in adopting a reticulation of treaties and conventions with foreign countries. Today, it may be said that interstate and international judicial extradition of an absent or non-resident witness, on the whole, is working out fairly well. *(5)* The problem, however, of procuring and perpetuating the testimony of an absent or non-resident witness demands further investigation.

**DEPOSITIONS**

A narrow definition of the word "deposition" is a written declaration, under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine, or upon submission of written interrogatories. *(6)* Generically, a deposition is any written evidence verified by oath. It is usually limited to the written record of testimony of a witness, taken under oath and with the opportunity of cross-examination, in answer to interrogatories. *(7)* Thus, a very broad definition of the word "deposition" would include all written evidence verified under oath or affirmation, not in open court, but before some duly qualified officer. This would cover "affidavits" as well. However, in legal parlance, the term is limited to the testimony of a witness, taken down in writing, under oath or affirmation, before a duly qualified public official in answer to propounded interrogatories, oral or in writing. *(8)* Depositions must be distinguished from affidavits. An affidavit is an *ex parte* statement, made without notice, and with no opportunity for cross-examination; a deposi-

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4. LEFLAR, THE LAW OF CONFLICT OF LAWS 1 (1959); RESTATEMENT, CONFLICT OF LAWS § 1 (1934).
8. ANDERSON, NOTARIES PUBLIC IN PENNSYLVANIA 128 (5th ed. 1956).
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tion is testimony given under oath, pursuant to notice, upon oral or written interrogatories, and with opportunity for cross-examination.

In a Conflict of Laws case, it very often becomes necessary to obtain the testimony of a person who is unable to be present in court to testify. Illness, age, leaving a sister state, temporary absence, and permanent residence in a sister state or foreign country may be some of the reasons why such a person will not be available to testify. Since the opposite party has a right procedurally to cross-examine the witness in open court, the opposite party should have the same right to cross-examine the testimony given by any witness outside of the court under our system of jurisprudence. The legal procedure for the taking of such testimony of a witness outside of the forum is known technically as the "taking of a deposition," and the actual testimony which is reduced to writing and properly signed before the proper public official is technically called "the deposition."

Usually there are two methods of "taking a deposition" of an absent or non-resident witness, which may then be read into evidence in a Conflict of Laws case at the domestic forum:

1. DEPOSITION BY ORAL EXAMINATION:

The first method may be classified as deposition by oral examination. This method is the one most commonly followed in the taking of depositions of witnesses residing within the same state, although most state statutes permit the "taking of a deposition" of a non-resident without the state by oral examination also. Depositions in reply to the propounded oral questions by the attorney are generally taken, only after proper notice to the adverse party or agreement between the parties' attorneys, before some duly designated public official, such as a notary public, before whom the parties have arranged to be present and to have the witnesses present at the time and place spelled out in the notice or agreement. In the event either party is absent at the time and place appointed, the public official should be satisfied that the absent party was duly served and then ask judicial assistance to subpoena or summon the witness. Either or both parties have the right to be present when this method is used, by attorney or in person, or both. The final deposition should be reduced to writing by the public official, by the witness, or by some disinterested person, the stenographer. The public official taking the deposition, after writing out the proper caption of the case, should then proceed to write or have written for him, usually by a stenographer present, the questions propounded and the answers given by the witnesses.

10. ANDERSON, op. cit. supra note 8, at 129.
11. See APPENDIX OF FORMS, Form No. 1; 7 AM. JUR. PL. & PR. FORMS 7:337-7:338; ANDERSON, op. cit. supra note 8, at 136.
verbatim. The deposition is signed, sealed, and then sent on to the court where the case is ultimately going to be heard.\(^\text{12}\)

2. **Deposition by Written Interrogatories:**\(^\text{13}\)

The second method, less commonly used for persons residing within the state, is the taking of a deposition by means of written interrogatories. This is the method most frequently resorted to in regard to persons permanently residing outside the state; although it may be resorted to in regard to persons residing within the state. If this method is used, the public official will receive by mail the written interrogatories and cross-interrogatories, accompanied by a letter of instructions on the performance of his duty and the procedure to be followed in securing the evidence and returning the completed testimony. It is advisable for the public official to conduct the examination in accordance with the instructions received. When this method is employed, neither party to the litigation has a right to be present or represented by an attorney. The witness should first be duly sworn or affirmed, if he won't take an oath, by the public official and the interrogatories should be put to him separately by the public official and separate answers should be taken by him. The deposition by written interrogatories is then properly signed, sealed and returned to the court requesting them.\(^\text{14}\)

**COMMISSIONS**\(^\text{15}\)

Bouvier declares the commission of a public officer to be: "An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal. . . ."\(^\text{16}\)

Ballentine states a commission to examine witnesses to be: "A writ or process issued by special order of the court to take the testimony of witnesses by deposition out of court."\(^\text{17}\)

Black defines a commission as: "A warrant or authority or letters patent, issuing from the government, or one of its departments, or a court, empowering a person or persons named to do certain acts, or to exercise jurisdiction, or to perform the duties and exercise the authority of an office (as in the case of an officer in the army or navy.)"\(^\text{18}\)

\(^\text{12}\) Anderson, *op. cit. supra* note 8, at 129.


\(^\text{14}\) Anderson, *op. cit. supra* note 8, at 128-129.

\(^\text{15}\) See *Appendix of Forms*, Form No. 3; 7 Am. Jur. Pl. & Pr. Forms 7:436-7:438; Anderson, *op. cit. supra* note 8, at 138-139.


\(^\text{17}\) Ballentine, *Law Dictionary* 239 (2d ed. 1948).

Depositions of absent or non-resident witnesses, therefore, may be taken before such persons appointed by commission issuing out of court.19

LETTERS ROGATORY20

A letter rogatory is defined as a polite request by one court in an independent jurisdiction that a witness be examined upon interrogatories sent with the request.21 While it is usual for written interrogatories to be attached to letters rogatory, it appears that this is not essential,22 unless required by statute,23 and that in the absence of such statutory provision, the testimony may be taken upon oral examination.24 There is a fundamental distinction between the execution of a commission and the procuring of a witness’ testimony by the issuance of a “letter rogatory,” “letter requisitory,” or “letter of requisite,” as it is sometimes called. In the first instance, the rules of procedure are governed by the court granting the commission, which has complete control as to how the commission must act; in the last instance, the methods of procedure in the issuance of letters rogatory are controlled exclusively by the foreign tribunal which is appealed to for judicial assistance.25 Thus, the letters rogatory method is resorted to in taking testimony of a witness residing or located in a foreign jurisdiction where a commission cannot be executed or because the laws of such foreign country prohibit depositions by notice or agreement of the parties or because the witness is unwilling to appear and testify before a commissioner.26 Usually, if the commission method is resorted to, a public official in the foreign country, such as a secretary of the embassy or legation, consul general, consul, vice-consul or consular agent of the United States, or other person authorized to administer oaths by the laws of the United States, is commissioned by a United States court to take the testimony of a witness residing in a foreign country.27

It has been held that the power to issue letters rogatory is inherent

21. Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); The Signe, 37 F. Supp. 819 (E.D. La. 1941); Magdanz v. District Court in and for Woodbury County, 222 Iowa 456, 269 N.W. 498 (1936).
23. Magdanz v. District Court in and for Woodbury County, supra note 21.
25. Supra note 22; 1 GREENLEAF, EVIDENCE § 320 (1892); 8 WIGMORE, EVIDENCE § 2195a (McNaughton's rev. ed. 1961); 3 JONES, EVIDENCE § 730 (5th ed. 1958).
26. ANDERSON, op. cit. supra note 8, at 130.
in all courts—law or equity.\textsuperscript{28} In \textit{Ex parte Thomas Taylor},\textsuperscript{29} the Texas court said:

The power of a proper court to honor the request of a court in an independent jurisdiction expressed by letters rogatory, for the use of its process in aid of obtaining the deposition of a witness whose testimony is material in a cause pending in the latter, while perhaps not frequently called into exercise, is inherent, and does not depend upon statutes. It exists to prevent a failure of justice. It is related to the administration of justice in its best sense. Men, generally, owe the duty of giving their testimony to courts of justice in all inquiries where it may be material. Courts of justice of different countries or states, therefore, are, in aid of justice, under a mutual obligation to assist each other in obtaining testimony upon which the right of a cause may depend. There must be the judicial power somewhere to prevent what may amount to the defeat of justice through the recalcitrant conduct of a material witness.

This obligation of courts of independent jurisdictions grows out of necessity—the necessity that the administration of justice be untrammeled and unobstructed. It rests upon the comity of states, and may be said to proceed from the law of nations. The issuance of letters rogatory for the purpose is derived from the civil law. The power is one which has always obtained in courts of chancery.

The court to which the letter rogatory, or request, is addressed, is under no compulsion to respect it. It is within its discretion to refuse to honor it. It is a matter, as has been said, resting upon comity. But if it be a court of appropriate jurisdiction, there is no question as to its power to honor it and by its process execute it.\textsuperscript{30}

In \textit{De Villeneuve v. Morning Journal Association},\textsuperscript{31} it was held that the inherent power of the courts to issue letters rogatory was not to be restricted by the provision of the federal statute covering the method of execution and return of letters rogatory issued in cases in which the United States had an interest or was a party.

Today, the power to issue letters rogatory is frequently provided for and governed by statutes or rules of court in most jurisdictions.\textsuperscript{32} How-

\begin{itemize}
\item \textsuperscript{28} 16 Am. Jur. \textit{Depositions} § 27 (1938); 26A C.J.S. \textit{Depositions} § 28 (1956).
\item \textsuperscript{29} 110 Tex. 331, 220 S.W. 74 (1920).
\item \textsuperscript{30} Id. at 333, 220 S.W. at 75.
\item \textsuperscript{31} 206 Fed. 70 (S.D.N.Y. 1913).
\end{itemize}
ever, such power can be exercised only in aid of a cause actually pending in the court which issues the letters.\textsuperscript{38}

It has been said that the time-honored custom of seeking evidence in foreign countries, particularly in cases in which the aid of foreign courts may be necessary to secure the production of records, has been by letters rogatory.\textsuperscript{34} Letters rogatory are a recognized procedure in federal, as well as state, courts.\textsuperscript{35}

If another statutory method is provided for procuring the testimony of a witness, the letter rogatory will not issue.\textsuperscript{36} Whether the court will issue the letter rogatory depends upon the reasonable\textsuperscript{37} exercise of its discretion.\textsuperscript{38}

Since the court deals with many variables, it is impracticable to lay down any general rule that will determine when a petition for letters rogatory should be granted and when it should be refused.\textsuperscript{39} It depends on the totality of the circumstances and the applicant has the burden of satisfying the court that it is in the interest of justice that the examination of the witness should take place in the foreign jurisdiction.\textsuperscript{40}

Should a foreign nation honor letters rogatory issuing from another state or country? The United States is somewhat behind the other countries in rendering judicial assistance honoring letters rogatory.\textsuperscript{41} The majority view seems to be that all courts have inherent power not only to issue, but to execute letters rogatory from another state or country.\textsuperscript{42}

\textsuperscript{33} In re Martinelli, 219 Mass. 58, 106 N.E. 557 (1914).
\textsuperscript{34} Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).
\textsuperscript{35} Ibid.
\textsuperscript{36} Magdanz v. District Court in and for Woodbury County, \textit{supra} note 21.
\textsuperscript{37} In re McKenzie, 2 Pars. Eq. Cas. (Pa.) 229, 1 Pa. L.J. 356 (1843).
\textsuperscript{38} Hite v. Keene, 137 Wis. 625, 119 N.W. 303 (1909).
\textsuperscript{40} In re Garret's Estate, 335 Pa. 287, 6 A.2d 858 (1939).
The minority view is that statutory authority is necessary. Whether a court is required to honor letters rogatory from the court of another jurisdiction is generally treated as a matter for the court's discretion.

The letters rogatory should be in due form, correctly authenticated, properly addressed, and written interrogatories attached thereto.

UNIFORM FOREIGN DEPOSITIONS ACT

Today, if the testimony of a witness is required in a sister state or foreign country, a deposition, commission, or letter rogatory accompanied by written interrogatories is used. Originally, some doubts arose in regard to honoring the issuance of depositions of a sister state, so the Uniform Foreign Depositions Act was passed by twenty states and territories. Section One of the Act provides as follows:

Authority to Act—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.

In 1962, the Uniform Interstate and International Procedure Act was designed to clarify, consolidate and improve existing law and supplant the Uniform Foreign Depositions Act.

A PENNSYLVANIA STUDY

In order to implement the foregoing, the legislatures and the supreme courts of the states have adopted statutes and orders amending rules of civil procedure governing depositions and interrogatories. A typical case study may be made of Pennsylvania (or any other state for this subject matter) wherein the Supreme Court adopted an order, effective

46. Christ v. Superior Court in and for City and County of San Francisco, 211 Cal. 593, 296 Pac. 612 (1931).
49. 9B Uniform Laws Ann. 43 (1957).
50. Id. at 26, Supp. (1963).
July 1, 1954. Certain of these rules of Conflict of Laws interest are as follows:

Rule 4002. Depositions Taken on Stipulation

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.53

Rule 4003. Right to Take Depositions. Notice

(a) A deposition for use at trial in open court may be taken of

(1) an aged, infirm or going witness who is within one hundred (100) miles of the courthouse, whether or not within the Commonwealth, by written interrogatories or by oral examination upon notice; or

(2) any other witness who is outside the Commonwealth and any witness who is more than one hundred (100) miles from the courthouse, either by written interrogatories on notice or by oral examination by leave of court on motion.54

Rule 4004. Depositions by Written Interrogatories

(a) A party taking a deposition by written interrogatories shall file the interrogatories with the prothonotary of the court and serve a copy upon each party or his attorney of record. Within ten (10) days thereafter the party so served may file cross interrogatories with the prothonotary and shall serve a copy upon the party taking the deposition or his attorney of record. Subsequent interrogatories shall be filed and served within five (5) days...55


(a) Any party may take the testimony of any person, including a party, for the purpose of discovery by deposition upon oral examination or written interrogatories of the identity and whereabouts of witnesses. Subject to the limitations provided by Rule 4011, the deponent may also be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action and will substantially aid in the

54. PA. STAT. ANN. tit. 12, Rule 4003(a) (1954).
55. PA. STAT. ANN. tit. 12, Rule 4004(a) (1954).
preparation of the pleadings or the preparation or trial of the case. . . .

Rule 4015. Persons Before Whom Depositions May Be Taken

(a) In the United States or a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of this Commonwealth or of the place where the examination is held.

(b) In a foreign state or country, depositions shall be taken (1) before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or other person authorized to administer oaths by the laws of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on petition, and on such terms and with such directions as are appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [name of country]. . . ."

Also, the matter of depositions, commissions and letters rogatory in federal cases is governed by statute§ and order of court. The Federal Judiciary Act provides, in part:

Sec. 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) 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.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly

from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) 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.60

Sec. 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.61

The Federal District Court Rules of Civil Procedure, adopted on September 1, 1938, as amended, further implement the statute. As a matter of fact, the aforementioned Pennsylvania Rules of Civil Proce-

duce 4001-4025 are basically identical with Rules 26-37 of the Federal Rules of Civil Procedure. This situation prevails in other states as well.\textsuperscript{62}

In the federal courts, depositions, commissions, and letters rogatory are all available to be used in a conflict of laws case, if desired.\textsuperscript{63} Specifically, Federal Rule 28(b) provides:

\textbf{Rule 28. Persons Before Whom Depositions May Be Taken}

\begin{itemize}
  \item (b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory 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 rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory 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 rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

The procedure governed by Federal Rule of Civil Procedure 28(b) has now been incorporated by reference in behalf of the accused in criminal cases.\textsuperscript{64} Federal Rule of Criminal Procedure 15(d) now provides:

\textbf{Rule 15. Depositions}

\begin{itemize}
  \item (d) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.
\end{itemize}

\textsuperscript{63} Fed. R. Civ. P. 28(b).
\textsuperscript{64} Fed. R. Crim. P. 15(d).
In *In re Insull*, a extradition proceeding to the United States, it was held that under the Canadian Extradition Act depositions taken in a foreign country are admissible in evidence without the deponents being subject to cross-examination, and the Canadian Judge had no power to compel them to submit to cross-examination in the foreign country, or to attend for examination in Canada.

For the same effect, in *United States v. Egorov*, the defendants, charged with conspiring to transmit to a foreign government information relating to the national defense of the United States and acting as agents for a foreign government, were entitled to an order to take depositions of foreign nationals alleged to be co-conspirators even though defendants did not know the whereabouts of the prospective witnesses and could not ascertain whether they would consent to be permitted to be examined, and, if so, the nature and extent of their testimony.

However, in *United States v. Grado*, defendant, accused of violation of the Federal Mann Act, was not entitled to the deposition of a witness who admittedly would be one of the government's main witnesses at the trial.

**UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT**

Article III of the recent Uniform Interstate and International Procedure Act provides the procedures for taking depositions, issuing letters rogatory and commissions, as well as assisting tribunals in a sister state or foreign country in obtaining testimony in this state.

**ARTICLE III. TAKING DEPOSITIONS**

Sec. 3.01. [When and How a Deposition May Be Taken Outside this State]

(a) A deposition to obtain testimony or documents or other things in an action pending in this state may be taken outside this state:

(1) On reasonable notice in writing to all parties, setting forth the time and place for taking the deposition, the name and address of each person to be examined, if known, and if not known, a general description sufficient to identify him or the

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68. 9B UNIFORm LAWS ANN., Supp. 75 (1964).
particular class or group to which he belongs and the name or descriptive title of the person before whom the deposition will be taken. The deposition may be taken before a person authorized to administer oaths in the place in which the deposition is taken by the law thereof or by the law of this state or the United States.

(2) Before a person commissioned by the court. The person so commissioned has the power by virtue of his commission to administer any necessary oath.

(3) Pursuant to a letter rogatory issued by the court. A letter rogatory may be addressed "To the Appropriate Authority in [here name the state or country]."

(4) In any manner before any person, at any time or place, or upon any notice stipulated by the parties. A person designated by the stipulation has the power by virtue of his designation to administer any necessary oath.

(b) A commission or a letter rogatory shall be issued after notice and application to the court, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient, and both a commission and a letter rogatory may be issued in proper cases. Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within this state.

(c) When no action is pending, a court of this state may authorize a deposition to be taken outside this state of any person regarding any matter that may be cognizable in any court of this state. The court may prescribe the manner in which and the terms upon which the deposition shall be taken.69

Sec. 3.02. [Assistance to Tribunals and Litigants Outside this State]

(a) [A court] [The ——— 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

69. Id. at 87.
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.70

Sec. 3.03. [Other Provisions of Law Unaffected]

This Act does not repeal or modify any other law of this state permitting another procedure for obtaining testimony, documents, or other things for use in this state or in a tribunal outside this state.71

Subsection 3.01(a)(1) is intended to permit a deposition to be taken in all sister states and foreign countries on reasonable notice in writing to all parties. The need to respect the sovereignty of many foreign countries makes it desirable to permit as large a group of persons as possible to take the deposition. For example, in a country that is inclined to regard the taking of depositions 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 permit officers of the country in which the examination is conducted to take the depositions.72

Subsection 3.01(a)(2) is intended to permit the obtaining of evidence outside the country pursuant to a commission issued by the domestic forum, a method long accepted in this country.73 A commission is an official appointment by the domestic forum to take a deposition in the foreign country. Provisions for the taking of depositions by commission are found in most states.74 Usually, the commission will designate a state

70. Id. at 91.
71. Id. at 92.
official, a person competent to take testimony under the law of the foreign country, the United States consular officials stationed in the foreign country, or any other appropriate person.

The commission may be used in any foreign country, but any person involved in the taking of a deposition by commission should consider the possible sanctions that may be imposed upon him by any foreign country because the taking of the deposition may be in violation of the foreign country's law. Frequently, compulsory process to assist a commissioner is unavailable in civil law countries. If possible, the appointment of a foreign officer should be made to secure the execution of the commission or necessary compulsory process.

Subsection 3.01(a)(3) permits the obtaining of evidence outside the country pursuant to a letter rogatory. This subsection need not be resorted to in a sister state, but only in a foreign country. Usually, the letter rogatory is sent to the foreign country through diplomatic channels. Switzerland insists upon this diplomatic procedure. In United States v. Paraffin Wax, 2255 Bags, motion of a third party plaintiff for issuance of letters rogatory, pursuant to Federal Rule of Civil Procedure 28(b), directed to the appropriate court in Switzerland, requesting examination of an associate and a former employee on written interrogatories and cross interrogatories, would be granted by a Federal District Court wherein a letter from the United States Department of State stated that the testimony of witnesses residing in Switzerland, for use in another country, may only be taken by interrogatories forwarded to the appropriate Swiss Court through diplomatic channels.

In those countries that object to the obtaining of depositions by stipulation of the parties, on notice, or by commission in aid of litigation, a letter rogatory represents the last available method for the taking of depositions. In addition, if the witness is unwilling to testify and the foreign country will not issue a compulsory process in aid of a commission, the letter rogatory may provide the last means to compel a witness' testimony.

Heretofore, comparatively few states have specifically provided for a letter rogatory. However, in the states that have no provision for a letter rogatory, some of the courts have found implied authority for the issuance of a letter rogatory.

Subsection 3.01(a)(4) appears in the rules of most states and permits

the parties to control the form of the examination to fit their individual means and needs.

Section 3.01(b) enables the domestic forum to exercise its discretion to fix the terms upon which it issues a commission or a letter rogatory. Of course, the rules and procedures in force in the foreign court of execution may limit the effectiveness of the court of origin's discretion.

State and federal courts have held that a letter rogatory will not be issued unless it is shown that it is not possible to obtain a deposition by stipulation, notice or commission, or that neither a letter rogatory nor a commission will be issued if any other method of procuring the testimony is available.\(^78\) This view appears to be unsound and is changed by this subsection. Generally, the issuance of a letter rogatory is the least expensive method for taking testimony overseas; parties may, therefore, prefer it to the taking of a deposition on notice or by commission. Furthermore, it is difficult to prove that it is impossible or impractical to secure the testimony by other means. The real importance of Section 3.01(b) is that it eliminates the hierarchy among the types of depositions and permits a court to issue both a commission and a letter rogatory, the letter rogatory to issue if the commission is not recognized.\(^79\)

Upon receipt of a letter rogatory, the courts of foreign countries follow, as one would expect, their own procedures for the taking of evidence. In the civil law countries, the judge interrogates the witness, an oath need not be administered, attorneys may ask supplemental questions of the witness through the judge, and the judge dictates a summary of the witness which the witness acknowledges as being correct.\(^80\) Moreover, such evidence obtained under a letter rogatory which has been executed in a foreign country and which does not strictly comply with the requirements of the domestic forum need not be excluded for this reason.\(^81\) Section 3.01(b), in this respect, is now consistent with case law.\(^82\) To what degree the value of the evidence may be affected by the method of taking or recording the testimony is to be determined by the domestic forum exclusively. If the evidence is taken in a manner entitled to little weight in the domestic forum, it may be rejected. If the evidence is taken contrary to the procedure of the court of execution,


\(^79\) Hite v. Keene, 137 Wis. 625, 119 N.W. 303 (1909).

\(^80\) Jones, supra note 72, at 530-32; Smit, supra note 72, at 1058-59.


the court of origin in which the action is pending may, in its discretion, reject it. In *Robles v. Industrial Commission*, 83 a proceeding under the Workmen's Compensation Act of Utah, so-called depositions taken in Mexico in the Spanish language without any notice, stipulation or order authorizing the taking of the same were considered as *ex parte* affidavits regarding the dependency of the deceased employee's mother and were held not to be competent evidence on which an award could be based.

Section 3.01(c) is intended to permit the obtaining of a deposition outside the state when no action is pending and evidence is necessary to be preserved or is needed to assist any person in framing a complaint or for any other reason deemed to be sufficient by the domestic forum. 84

Section 3.02(a) [Assistance to Tribunals and Litigants Outside this State] liberalizes the procedure for rendering assistance to tribunals and litigants outside the state in obtaining oral and tangible evidence against a person who is domiciled or is found within the state of rendition.

Judicial assistance by a foreign tribunal may be sought not only to compel testimony, but also to require the production of documents and other tangible evidence. The court of rendition, however, retains complete discretion to frame an appropriate order. In exercising this power, the court of rendition may take into account the nature and attitudes of the requesting government and the character of the proceedings. In addition, the court of rendition may impose fees for counsel, attendance of witnesses, interpreter's and stenographic services.

Section 3.02(b) reaffirms the existing freedom of persons within the United States voluntarily to give testimony or produce evidence for use in proceedings or investigations before a tribunal outside of this country.

Section 3.03 is a savings clause. It preserves all existing methods for obtaining evidence within the state and all methods for rendering assistance to tribunals outside the state.

CONCLUSION

In view of the foregoing statutes and court rules (state and federal), it is obvious that a domestic forum does not require an absent or non-resident witness to come back personally to testify or be brought back bodily from a sister state or foreign country. Frequently, the domestic forum does not demand the witness' physical presence, but only his testimony. There are different methods of procuring the testimony of absent or non-resident witnesses through the use of depositions, commissions, and letters rogatory in a Conflict of Laws case.

83. 77 Utah 408, 296 Pac. 600 (1931).
On the interstate level, the best means of obtaining the vital testimony is through the adoption of various Uniform Acts and federal statutes, such as: The Uniform Foreign Depositions Act; Uniform Interstate and International Procedure Act; Statutes Authorizing Resident Commissioners of the Forum State to Issue Subpoenas; the Federal Judiciary Act (28 U.S.C., Sec. 1781), permitting the issuance of depositions, commissions and letters rogatory; Federal Rules of Civil Procedure 28(b) (Persons Before Whom Depositions May be Taken in Foreign Countries); and Federal Rules of Criminal Procedure 15(d) (How Depositions May be Taken in a Criminal Case).

On the international scene, the answer may lie in adopting a reticulation of treaties and conventions with foreign countries to guarantee that international judicial assistance will always be forthcoming when one of the states issues a deposition, commission or letter rogatory seeking the testimony of an absent or non-resident witness in a case with an international aspect. To date, the situation is unsatisfactory. The United States courts neither grant nor receive adequate judicial assistance from other nations, especially from those nations where the civil law prevails. These countries, on the other hand, have entered into numerous treaties among themselves to assure international judicial assistance when required. Isn't it about time for the United States to propose another international convention covering this growing area of the law and work out a permanent solution to this vexing problem?

APPENDIX OF FORMS

Form No. 1
Deposition by Oral Examination

(Caption)
Deposition by Oral Examination

Deposition of witnesses produced, sworn (or affirmed) and examined by me, the ___ day of ___, A.D. 19___, at my office at ______________________, between the hours of ___ A.M. and ___ P.M., by virtue of the ______________ (or notice hereto attached) for the examination of witnesses in the above-mentioned cause pending in said Court, wherein __________________ is plaintiff, and __________________ is defendant.

_________________________, aged ___ years, or thereabouts, of ___________, being produced, sworn, and examined, on the part of the ___________, depoeth as follows, &c. And further saith not.

__________________________
Signature of Witness
I hereby certify that the above witness was duly qualified and examined at the time and place stated above and subscribed his deposition in my presence.

(Seal)
Notary Public, (City, Boro. or Twp., and County)
My commission expires ____________________

If the witness should testify in relation to any paper or exhibit, it should be entered in the deposition thus, “The witness being shown the paper marked A hereto attached, deposes and says, etc.;” and before the paper is attached to the deposition, it should be endorsed thus, “This is the paper ‘A’ referred to by the witness ______________, on his examination before me, this ___ day of ____, 19___,” with the signature of the notary affixed.

Form No. 2
Deposition by Written Interrogatories

(Caption)
Deposition by Written Interrogatories

Deposition of ________________, a witness produced, sworn (affirmed) and examined this ___ day of ____, 19___, at _______________ in the City of ___________ and State of ____________, in pursuance of a commission issued by the Court of Common Pleas of ___________ County, to me directed in a cause therein pending, in which ________________ is plaintiff and ________________ is defendant.

______________, residing at ________________, whose occupation is ________________, aged ___ years, being first by me sworn (affirmed), and examined on the part of the plaintiff (or defendant) did depose and say:

To the first interrogatory: ________________.
To the second interrogatory: ________________
etc., etc.

______________________
Signature of Witness

The foregoing examination was taken and reduced to writing, and was subscribed and sworn to (affirmed) by the said witness, this ___ day of ____, 19___, before me.

(Seal)
Notary Public, (City, Boro. or Twp., and County)
My commission expires ____________________

Form No. 3
Commission

(Caption)
Commission

To ________________ (name of commissioner) ________________

_______ Greeting:
Having confidence in your prudence and fidelity, we have appointed you, and by these presents do give unto you full power and authority, in pursuance of an order made in our (name of court) in a certain cause therein pending, between (plaintiff) and (defendant) to call before you at a certain day and place, by you, for that purpose, to be appointed (give names and addresses of witnesses, or in the alternative designate "all persons who may be named to you by the (plaintiff or defendant)" as witnesses in the said cause; and then and there to examine each of the said witnesses upon their respective oaths or solemn affirmations, touching the premises, and reducing their testimony to writing. And when you shall have so done, you are to send the same before the Judges of our said Court, together with the interrogatories and this commission, under your hands and seals and the hands and seals of such of you as may act hereunder.

In Testimony Whereof, we have caused the seal of our said Court to be hereunto affixed.

Witness the Honorable (name), Chief Judge of our said Court, at (name), this (day) day of (name), 19__.

Seal of the Court

Clerk of the Court

(If a commission is issued in support of oral examination, the reference to the interrogatories is to be omitted.)

(This commission is designed to be used either if a single commissioner is named or if alternative commissioners are named.)

Form No. 4
Letters Rogatory

(Caption)

Letters Rogatory

To the Appropriate Judicial Authority in (name of country) ____________.

Whereas a certain action is pending before us, in which (name) is plaintiff and (name) is defendant, and it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice cannot be completely done between the said parties.

We therefore request that, in furtherance of justice, you will, by your proper and usual process, cause (names and addresses of witnesses) to appear before you or some competent person by you for that purpose authorized, at a time and place by you to be fixed, there to answer on their oaths or affirmations the several interrogatories hereto annexed; and that you will cause their testimony to be committed to writing, and such books, papers, records or other things which said witnesses produce to be marked as Plaintiff's Exhibits or Defendant's Exhibits as the
case may be, in the manner indicated in the various interrogatories; and that you will cause the same to be returned to us under cover duly sealed and addressed to ________________, together with these presents; and we shall be ready and willing to the same for you in a similar case when required.

Witness the Honorable Chief Judge of the said court this ___ day of ______, 19___.

Seal of the Court

Clerk of the Court

(Certification by Chief Judge of the Clerk of Court's office, signature and seal.)

(Certification by the Clerk of Court of the Chief Judge's signature and office.)