

LITIGATION 101: TIPS FOR TAKING AN OUT-OF-STATE DEPOSITION

by

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You've found the star witness. This is the witness that you know holds the key to your case. With this witness's testimony, you are sure to make the other side crumble in a summary judgment motion. They might even throw in the towel. They will certainly, if not concede defeat, weep. There's only one problem – the witness doesn't live in your state.

Now, instead of preparing questions for the witness, you are consumed with other questions. How do you get the witness to appear? How do you serve them with a subpoena? Do you have to get letters rogatory? Just what are letters rogatory, anyway? The answers to these questions are easy. Just read the tips below, and you'll have more time for the real questions – the ones for your witness that will lead to victory.

- **Plan Ahead.** The processes described below can take time, especially if you need to get two courts to act – the court handling your case and the court with jurisdiction over the witness. Make sure you start the process early enough in discovery that you have enough time to take the deposition.

- **Check if the Witness Will Consent to a Deposition.** Consider whether you need a subpoena at all. If a friendly witness will agree to appear, then you do not need a subpoena. But if that witness later changes her mind and decides not to show up, you'll have no power to make her do so, no threat of sanctions to impose, and no court power to invoke. Worse, if you and opposing counsel have traveled to take the deposition and find an empty chair, you may be liable for the other side's costs. To be safe, you should probably serve a subpoena.

- **Figure Out Where the Witness Lives.** As a first step, you'll need to figure out just where the witness lives. If you're in state court, you'll need to know what county the witness lives in so that you know which state court has jurisdiction over that witness. Once you have an address, the Internet can help you figure out in which county the witness resides.

- **Serving a Subpoena in Federal Court.** If your case is pending in federal court, then you can serve a subpoena anywhere within the federal judicial district in which your case is pending, or you can serve it anywhere outside the district that is within 100 miles of the place of deposition named in the subpoena. *See* Fed. R. Civ. P. 45(b)(2). As a practical matter, that means you can take anyone's deposition in the U.S., so long as you notice the deposition to take place within 100 miles of where the witness is served.

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- **Call the Clerk.** In state court, the most helpful person to you will be the clerk of the court in the judicial district in which the deponent lives. After you determine what county the witness lives in, find the website for that county’s court online. The web site will tell you the number for the clerk. (The National Center for State Courts website, available at <http://www.ncsconline.org>, lists all courts by state.) The clerk can tell you the specific requirements of that state to issue a subpoena. Some courts even have a section of their website devoted to this issue.

- **Check the Local Rules.** Each state has a statute or rule of civil procedure addressing this very issue. For example, Arizona Rule of Civil Procedure 30(h) specifies that a party shall file an application, under oath, captioned as in the “foreign” action, containing legal authority to take the deposition, any notice of deposition or other pleadings necessary in the foreign jurisdiction to take the deposition, and a description of notice given to other parties. If you’re unclear about the rule, you can ask the clerk.

- **Opening a Case in Another State.** Some states require that you hire local counsel to open up a case in their state court. *See, e.g.*, Maine Rule of Civil Procedure 30(h)(3). This route is not cheap. In addition to the costs of taking a deposition out-of-state, you’ll need to pay the filing fee to open a new case plus local counsel’s attorneys’ fees. On the plus side, local counsel can assist with the form of pleadings you need to file, file these pleadings in court, supply you with the names of process servers, and otherwise streamline the process for you.

- **Ask What Pleadings You Need to File if You Open a Case in Another State.** Be sure to ask the clerk what information the pleading for the new case has to include. Do you need a caption page with an affidavit, a caption page plus a motion asking the court to issue the subpoena, or some other set of pleadings? The clerk can guide you.

- **Know the Uniform Foreign Depositions Act (“UFDA”).** Some states, such as Nevada and New Hampshire, have adopted some version of the UFDA, which provides that if a deposition subpoena issues in a foreign jurisdiction, “the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending before the courts of this state.” *See, e.g.*, Nev. Rev. Stat. § 53.060.

- **UFDA Simplifies Taking Foreign Depositions.** As a practical matter, the UFDA means you can use the same process that you would use in your state. You will need to serve the subpoena in the same manner as you would in your state, which probably means locating a process server for personal service.

- **UFDA May Apply Only in Other UFDA States.** Make sure to read the state version of the UFDA for your witness’s state. Some states, like Virginia, extend UFDA privileges only to states that have also enacted the UFDA. *See* Virginia Code Ann. § 8.01-412 (“[T]he privilege extended to persons in other states [by the Act] shall only apply to those states which extended the same privileges to the Commonwealth.”). This means that if your witness lives in Virginia but your case is pending in a non-UFDA state like Arkansas, you can’t rely on the UFDA to issue your subpoena. Call the clerk to find out what you need to do.

- **Commission? Letters Rogatory? What?** You may need to get a commission or letters rogatory from your state court, depending on the witness's court's requirements. A letters rogatory is a request from your state court addressed to the deponent's state court asking that court to issue a subpoena. A commission authorizes the person who receives it to conduct a deposition and take oaths in the foreign state. *See, e.g.,* N.Y. Civil Practice Laws and Rules 3108 (stating a commission or letters rogatory may be issued to assist with taking an out-of-state deposition).

- **How Do You Get a Commission or Letters Rogatory?** You can draft a commission or letters rogatory and bring it to the court where your case is pending for your judge's signature. Your library should have form books showing you how to draft a commission in your state; also be sure to check your local rules. You may have to make a particular showing in your state's court. For example, in New York, you'll need to show that the witness won't cooperate with a notice of deposition absent a subpoena and that his or her testimony is material to a claim or defense in the action.

- **What Do You Do With the Commission or Letters Rogatory?** Ask the clerk in the witness's state how to get the commission to that court's judge; you may be able to do it by letter. A commission authorizes you to take the deposition but does not confer jurisdiction on the witness; therefore, you'll still need to invoke the process of the witness's court by opening a case or moving the court to issue the subpoena. For example, in New Jersey, you would have local counsel open an action typically entitled, "In the Matter of the Subpoena of [Witness]" and then request a court order issuing a subpoena. Remember your mantra: ask the clerk!

- **Filing a Notice of Deposition or Party Agreement.** In still other states, such as Utah, you can take a deposition by filing a notice of deposition in the court in which your case is pending and then filing a copy of that notice in the witness's state court. You may be able to do this by letter, or you may need to petition the court to issue the subpoena. Or you may need to submit a written agreement of the parties demonstrating that the parties agree to the deposition to both courts. Again, ask the clerk how this agreement should be filed.

- **Deposing a U.S. Citizen Residing in a Foreign Countries.** If the witness in a foreign country is a U.S. citizen or resident, then 28 U.S.C. § 1783 governs the issuance and service of a subpoena. The U.S. can compel a citizen or resident to testify, which is considered a civic duty, even when he lives abroad. *See Blackmer v. United States*, 284 U.S. 421, 438, 76 L. Ed. 375, 52 S. Ct. 252 (1932) ("[I]t [cannot] be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.").

- **Deposing a Foreign National.** Depositions of foreign nationals vary by country. Several countries are members of the Hague Convention on Taking Evidence Abroad for Civil or Commercial Affairs (the "Hague Convention"), which was enacted to smooth differences between countries' civil law systems. In general, you will need to draft a Letter of Request, which is then issued by the court in which your case is pending to the foreign central authority designated for these requests. You'll want to consult a specific guide to the Hague Convention

to obtain specific information about how to proceed and to check if the foreign country has any special requirements.

Now that you've got your witness served, you can get back to the important part of the deposition – preparing what to ask.

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