

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) Within the State. Within the state depositions shall be taken before a notary public or a person appointed by the court. A person so appointed has power to administer oaths and take testimony.

(b) Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or 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 appointed or commissioned by the court, and such a person shall have the power by virtue of the appointment or 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 state, territory or country)." 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 the United States under these rules.

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

Advisory Committee's Note April 15, 1975

Rule 28(d) is abrogated. The procedure which it provides is replaced by the revised procedures contained in simultaneous amendments adding Rules 30(h) and 31(d). Those rules are a more logical location for these provisions. The current amendments provide an appropriate opportunity for this clean-up change.

Advisory Committee's Note

November 1, 1969

The appointment of commissioners to take depositions under 16 M.R.S.A. §§ 554-56, has fallen into complete disuse, and 1969 Laws, c. 367, § 3 repeals those sections. The present amendment of Rule 28(a) eliminates the reference to commissioners appointed under that statute.

The other amendment of Rule 28(a) and the amendment in Rule 28(b) are made for the purpose of making available within another state or within a territory or insular possession subject to the dominion of the United States all the same options for deposition-taking as are available in foreign countries under the existing Rule 28(b). The present rule created the anomalous situation that there were fewer options for taking a deposition in the State of New Hampshire or the State of Louisiana than there were for taking a deposition in Canada. For example, the letter rogatory was not provided as a way for taking a deposition in another state. This revised form of Rule 28 follows Rule 28 of the Rhode Island Rules of Civil Procedure.

Explanation of Amendment November 1, 1966; January 1, 1967

The amendment in Rule 28(a) merely updated the statutory reference.

Revised Rule 28(b) was taken from a 1963 amendment to F.R. 28(b), which was developed collaboratively by the Commission and Advisory Committee on International Rules of Judicial Procedure and the Federal Advisory Committee on Civil Rules. It enlarges the class of persons before whom depositions may be taken in a foreign country so as to include officers of the country in which the deposition is taken. It also makes clear that the appointment of a person to take a deposition in itself confers the power to administer any necessary oath, as Rule 28(a) already provides with respect to depositions within the United States. The amendment also seeks to overcome an antipathy to letters rogatory reflected in some federal decisions and to give the court a free choice in issuing a letter rogatory or a commission in the light of all the circumstances. The last sentence of the amended rule gives discretion to the trial court to admit a deposition taken under a letter rogatory which does not satisfy the ordinary requirements for depositions taken within the United States. In executing a letter rogatory a foreign court may be expected to follow its customary procedure for taking testimony, which may not be in accord with our own.

Reporter's Notes
December 1, 1959

This rule is similar to Federal Rule 28 but with some modifications and additions. The first sentence of Rule 28(a) preserves existing law. R.S.1954, Chap. 117, Sec. 2 (repealed in 1959). The reference in the statute to disqualification for interest is covered by Rule 28(c). Depositions without the state but within the United States may be taken before any of the enumerated persons. *Compare* R.S. 1954, Chap. 117, Sec. 20 (repealed in 1959).

Rule 28(b) covers depositions in foreign countries.

It is contemplated that under this rule depositions will be taken under the simple notice procedure whenever practicable. The notice procedure will not work, however, when it is necessary to enlist the aid of the foreign court to compel the attendance of the witness. Moreover, some foreign countries will not allow a person appointed by a court of another country to sit within their jurisdiction to take deposition testimony. This is true in Russia, Yugoslavia and Switzerland. Hence letters rogatory may be necessary. When the need arises to take a deposition in a foreign country, it is advisable to make inquiry of the State Department as to precisely what method may be used.

Rule 28(d), which is not included in the federal rule, is designed to help persons in other states get deposition testimony from witnesses in Maine. A witness who fails to respond to a subpoena for a deposition in an out-of-state action is punishable for contempt, and the court may order an answer in accordance with Rule 37(a) and punish for contempt in accordance with Rule 37(b) (1).