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Foreign Depositions

Stephen A. Goodwin

Author contact information:
Stephen A. Goodwin
Carrington, Coleman, Sloman &
Blumenthal, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201

sgoodwin@ccsb.com
214-855-3082

I. INTRODUCTION

Commerce reaches across the globe, and, as the world "shrinks," conflicts between parties in different countries multiply. An attorney with a case pending before a court in the United States may need the testimony of a witness located in a foreign country. To help an American attorney familiarize himself with the procedures to obtain evidence located in foreign countries, this paper examines the applicable procedures for obtaining foreign witness testimony.

II. BACKGROUND INFORMATION REGARDING DISCOVERY CONDUCTED IN FOREIGN COUNTRIES FOR USE IN AN AMERICAN COURT

A. Foreign Attitudes Regarding American–Style Discovery

Pretrial discovery as it is known in the United States simply does not exist in other countries. In America, attorneys lead the discovery process and can discover any evidence "reasonably calculated to lead to the discovery of admissible evidence."[1] Obviously, this rule allows attorneys to discover evidence that may not be used at trial and even to discover evidence that would be inadmissible at trial. Such a broad scope far exceeds even what is customary in other common law countries.[2]

Other countries operate differently. Foreign courts severely limit pretrial factual inquiry. And, courts themselves, not attorneys, gather the evidence. Courts may limit attorneys' participation and may decline to use court reporters or to provide verbatim transcripts.[3] Civil law countries describe evidence-gathering as an exercise of "judicial sovereignty."[4] As such, attempts by non-judicial officials (attorneys) to obtain evidence without governmental participation or consent may be considered unauthorized and may even result in criminal violations.[5]

The differences between these discovery processes flow from the dominant principles guiding each system. In the United States, the guiding principle holds that a complete exchange of relevant information between parties will advance the search for the truth.[6] The prevailing principle in other countries, however, holds that each party must prove its position based upon

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1 FED. R. CIV. P. 26(b)(1).

2 David Epstein, *Obtaining Evidence from Foreign Parties, in* INT'L BUS. LITIG. & ARBITRATION 2004, at 131, 133 (PLI Litig. & Admin. Practice Course, Handbook Series No. 704, 2004).

3 *Id.*

4 David Epstein, Jeffrey L. Snyder, and Charles S. Baldwin, IV, *International Litigation* § 10.02 (3d ed. 2000).

5 *Id.*

6 Marc J. Goldstein, *Discovery of Evidence Located Abroad: A Planning Perspective,* A.B.A. Center for Continuing Legal Educ., A-38 (1998).

information within its own control.[7] The great variance between these systems leads to hostility in foreign courts towards American-style discovery practices.[8]

B. Controlling Law

An attorney who wishes to obtain evidence in another country must comply with both the proper procedures in the American court and in the foreign country. Both the Federal Rules of Civil Procedure and the Texas Rules of Civil Procedure detail state-side procedures. Actual evidence-gathering is then conducted following the host country's laws. Thus, the discovery scope may be severely restricted and the process may be radically different compared to American-style depositions.[9]

C. Possible Methods of Obtaining Testimony

Several methods exist for obtaining testimony from a foreign witness. First, a party's testimony may be obtained through an agreement between counsel to conduct discovery without foreign court intervention.[10] For non-party witnesses, selecting the correct method hinges upon the witness's willingness to testify. A voluntary witness can testify without the aid of foreign authorities provided the foreign country does not prohibit such testimony.[11] Other methods must be pursued if the witness refuses to testify voluntarily. These methods include: testimony pursuant to a letter of request or a letter rogatory, testimony before a person authorized to administer oaths, testimony before a person commissioned by the court, or testimony before a consular agent or diplomatic officer.

III. DOMESTIC LAW GOVERNING AN ATTORNEY'S ATTEMPT TO OBTAIN FOREIGN WITNESS TESTIMONY

An American attorney must comply with the law of the forum court when seeking foreign witness testimony. The attorney must follow either the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure, or the applicable rules of civil procedure in the state in which you practice.

A. Federal Law

Under Federal Rule of Civil Procedure 28, a deposition in a foreign country may be taken in one of four ways: (1) pursuant to an applicable treaty or convention; (2) pursuant to a letter of request; (3) on notice before a person authorized to administer oaths in the place where the

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7 *Id.*

8 Robert B. von Mehren, *Current Development: Discovery of Documentary and Other Evidence in a Foreign Country*, 77 AM. J. INT'L L. 896, 896 (1983).

9 Epstein, *supra* note 4 § 10.04.

10 Epstein, *supra* note 2 at 135.

11 Epstein, *supra* note 4 § 10.06.

examination is held, either by the law of that place or by the law of the United States; or (4) before a person commissioned by the court.[12]

1. Pursuant to an Applicable Treaty or Convention

When obtaining evidence pursuant to an applicable treaty or convention, an attorney should follow the procedures set out by the convention or treaty. The most widely recognized foreign evidence convention is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (also known as the "Hague Evidence Convention" or the "Convention"). While this Convention is discussed in detail later, it is an agreement between signatories as to appropriate ways to obtain evidence located in signatories' countries. Other treaties may govern the relationship between the United States and a particular nation.

2. Pursuant to a Letter of Request

a. Overview

A letter of request is a letter from a United States court to a foreign court, asking the foreign court to perform some judicial act, such as gathering evidence.[13] It operates on the principle of comity, the recognition foreign courts give to the decisions of other courts.[14] While no law requires a foreign court to comply, comity ensures compliance in most instances.[15]

Attorneys frequently use letters of request. They are the only way to obtain evidence in countries that prohibit attorney-taken deposition testimony.[16] Time-wise, however, a letter of request may significantly delay discovery; six months to a year may elapse between the date a letter is sent and the date it is received after execution.[17] A letter of request is also costly; a $650.00 consular fee is charged for processing letters of request,[18] and foreign authorities may also charge a fee.[19]

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12 FED. R. CIV. P. 28(b).

13 Epstein, *supra* note 4 § 10.09.

14 Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 593 (2001).

15 Richard S. Sanders and Christina N. Smith, *Massachusetts Discovery Practice*, II. Mass. Continuing Legal Educ. § 18.3.2 (2002).

16 Epstein, *supra* note 4 § 10.09.

17 United States Department of State, Preparation of Letters Rogatory ("Letters of request" and "letters rogatory" are considered synonymous.) (Dec. 6 2004), *available at* http://travel.state.gov/law/letters_rogatory.html (2004).

18 *Id.* This fee is payable to the United States embassy in the foreign country. No consular fee is charged for letters of request issued on behalf of federal, state, or local governmental officials.

19 *Id.*

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