

## Telephonic Depositions of Cooperative Witnesses Abroad: Key Considerations

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The growth of the global business environment means a litigator is more likely than ever to be faced with the need to obtain evidence located in a foreign country. When seeking to conduct depositions, a potential deponent, either American or foreign, residing outside of the United States presents unique considerations. If that potential deponent is not a party to the lawsuit, a lawyer will have valid concerns about how to obtain the individual's testimony. For one, clients may have financial difficulty sending their lawyers abroad to take a deposition. Navigating the international waters in this situation can be overwhelming. But the numerous legal vehicles available for taking a deposition in a foreign country, including the option to proceed telephonically, render such a deposition feasible and affordable, so long as the following considerations are kept in mind.

The Federal Rules of Civil Procedure generally allow depositions of nonparty witnesses located outside the United States. The laws of the foreign country in which a witness is located must nonetheless be consulted and followed. Often, these laws limit the scope of the deposition, restrict the manner in which the deposition may be taken, or require the administration of an oath. Thus, the first consultation must be the local laws or rules governing the deposition and the type of legal vehicle used to set the deposition (e.g., stipulation,

notice, etc.) permitted by those rules.<sup>1</sup> The second consideration should be to identify the parameters of what the foreign country's law permits or prohibits with respect to the type of legal vehicle chosen. With these considerations in mind, a telephonic deposition of a nonparty witness may be accomplished relatively easily within the rules of both the United States and the foreign country.

### *Local Law and Setting the Deposition*

#### *Local Law in the United States*

On the discovery-seeking party's end, the Federal Rules of Civil Procedure permit depositions to be taken in a foreign country by five primary methods.<sup>2</sup> The broadest method under Rule 29 permits depositions to be taken in any manner by written stipulation. The remaining four methods are governed by Rule 28(b), which allows for depositions to be taken in a foreign country pursuant to any applicable treaty or convention, by a letter of request (whether or not captioned a letter rogatory), on notice, and by commission. As noted, in addition to any of these methods, the deposition must also conform to requirements imposed by the foreign country where the witness is located. The applicability and advantages and disadvantages of each of these methods as they

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pertain to the deposition of a nonparty willing witness in a foreign country are considered below.

### *Rule 29 Stipulation*

#### *Rule 29 in General*

Of the available methods, Rule 29 stipulation is preferred because it gives parties wide latitude to simplify the foreign discovery process and avoid conflict. It does not require the assistance of the foreign government, and compliance with U.S. law is expressly provided because a deposition taken pursuant to a Rule 29 stipulation "may be used in the same way as any other deposition."<sup>3</sup> Therefore, it is highly recommended to seek a stipulation from opposing counsel upon first notice that a foreign deposition will be needed. Many of the most difficult potential obstacles, including the voluntary appearance of the deponent and the manner of deposition, can be resolved in advance through a written stipulation. A party should include the written stipulation addressing depositions in a foreign country within the discovery plan required by Rule 26(f), or submit the written stipulation to the court early in the case.

Even though deposition by written stipulation is the preferred method, there remain challenges to using the procedure. Written stipulation of the parties requires the cooperation and agreement of the opposing party as well as the witness. Further, a written stipulation under Rule 29 does not remove the requirement to comply with foreign law. If the foreign country does not allow depositions conducted by outside counsel, the use of a written stipulation under Rule 29 will not trump the foreign law. In still other countries, evidence-gathering may be the duty of the judge, and the taking of any form of evidence may be an infringement on judicial sovereignty.<sup>4</sup>

#### *Telephonic Deposition under Rule 30(b)(4)*

Provided deposition by stipulation is appropriate under Rule 29 and the foreign country's law, the

ideal method is telephonic. Sending a lawyer to the witness's foreign location to take the deposition in person is not always feasible, considering, for example, client budgets, visa requirements, and some civil law countries' rules precluding evidence-gathering by attorneys. It is almost always less costly to take a deposition by remote means. For these reasons, it is much more practical to take a telephonic deposition.

Telephonic depositions are permitted by Rule 30(b)(4), which allows parties to stipulate in writing or move for a court order to take depositions by telephone or other remote means.<sup>5</sup> Leave to take telephonic depositions should be liberally granted in most cases, and once a party has moved for telephonic depositions, the burden is on the opposing party to establish why the deposition should not be conducted telephonically.<sup>6</sup> Most courts have extended the liberal permissions of Rule 30(b)(4) to permit telephonic depositions of witnesses in foreign countries.<sup>7</sup>

The use of the telephonic deposition method provides several benefits. As noted, a primary advantage of the telephonic deposition is reduced litigation costs.<sup>8</sup> Because travel is not required, a telephonic deposition is also useful to avoid any delay in discovery if the deposition of a foreign witness is last-minute or becomes time-sensitive. Finally, a remote deposition may be recorded by non-stenographic means.<sup>9</sup>

Further, a telephonic deposition in a foreign country is one type of deposition to which the parties may explicitly stipulate under Rule 29. Courts have also allowed telephonic depositions in foreign countries by reading Rules 30(b)(4) and 28(b) (specifying means by which a deposition may be taken in a foreign country) together.<sup>10</sup> For these reasons, and primarily the convenience factor, it is recommended that the parties stipulate to a telephonic deposition of a nonparty, foreign witness whenever possible.

#### *Rule 28(b) Options*

Unfortunately, cooperation between parties is not always present. If a witness is willing to be deposed, but opposing counsel will not agree to a Rule 29 written stipulation regarding the time, place, and manner of that deposition, a party must rely on one of the four methods provided for in Rule 28(b) or international law to unilaterally set a telephonic deposition in a foreign country.<sup>11</sup>

### *Notice*

Of the permissible methods for foreign telephonic depositions, giving notice of a telephonic deposition "before a person authorized to administer oaths either by federal law or by the law in the place of examination" is most preferred with two critical caveats—the foreign country at issue must permit deposition by notice, and the witness must be willing. The principle advantage of a "notice" deposition is that it avoids judicial intervention.<sup>12</sup> A party should follow procedures consistent with Rule 30 when taking a telephonic deposition on notice. Rule 30(b)(1) requires written notice to be sent to every other party to the action.<sup>13</sup> Local rules (where the action is pending) will determine whether a copy of the notice must also be submitted to the court. To ensure compliance, a party should send written notice of telephonic deposition of a non-party witness in a foreign country to every other party and the court. The notice should include a specific explanation of the proposed procedure in accordance with Rule 28(b).<sup>14</sup> As a best practice, the notice should also include a legitimate reason for conducting the deposition telephonically. For example, courts have found that a reduction in the cost of litigation in accordance with Rules 1, 30(b)(3)(A), and 30(b)(4) is a legitimate reason for telephonic depositions.<sup>15</sup>

### *Commission*

In a deposition taken by commission under Rule 28(b), the witness may appear before a person commissioned by the court to administer the necessary oaths (and, like a deposition by notice, the witness must appear voluntarily).<sup>16</sup> Upon

motion to the domestic court in which the action is pending, an individual may be commissioned to administer oaths and receive testimony for specific purposes. Although any person may be commissioned, for additional cost savings, this person is often a court reporter. A commissioned court reporter could travel to the location of the witness, administer the oath, and record the testimony while counsel questions the witness telephonically. Aside from being cumbersome, this procedure is limited by foreign law and may not be available in countries that do not permit deposition by commission or evidence to be gathered by private individuals instead of judges.<sup>17</sup>

Although it is generally preferable to use a U.S. consular official, the commission method may be useful when the witness is in a remote area with limited access to a U.S. consular office or local person authorized to administer oaths. This method may also be beneficial for cases involving multiple witnesses, as a single commissioned person could administer oaths to all of the deponents regardless of the state or country in which they are located (again, as long as deposition by commission is permitted).<sup>18</sup> In addition, this procedure can potentially be used in a country that prohibits depositions taken by stipulation or on notice.

### *Letter of Request*

Some countries only allow for depositions to be taken through a letter of request (also known as a letter rogatory). Letters of request under Rule 28(b)<sup>19</sup> are formal written communications sent through a court in which an action is pending to a court or judge in a foreign country requesting that the testimony of a witness residing within the jurisdiction be taken and transmitted to the requesting court for use in the pending action.<sup>20</sup> Letters of request will often be channeled through the U.S. Department of State and the foreign ministry of the receiving country, though all United States courts have inherent authority to issue such letters.<sup>21</sup>

Pursuing a deposition through a letter of request provides a method to compel the deposition of an unwilling witness through judicial intervention. The court in which the action is pending must have a good reason for refusing to issue a letter of request.<sup>22</sup> Letters of request under Rule 28(b) also provide a level of protection for the party taking the deposition, as evidence gathered pursuant to such a letter need not be excluded from trial merely because it departs from the format of depositions taken under the Federal Rules.<sup>23</sup>

But letters of request have disadvantages, too. Many countries will not execute a letter of request if it seeks pretrial discovery rather than evidence.<sup>24</sup> A requesting party should include a translation of its request and accompanying papers into the language of the receiving country, which can be costly. Perhaps the biggest obstacle is that the entire process can take up to a year to obtain the requested deposition, with the foreign court setting the date of the examination.<sup>25</sup> Given these significant drawbacks, as long as the witness is willing to give his or her testimony, a party should proceed through written stipulation, on notice, or by commission.

#### *Treaty or Convention: Hague Evidence Convention*

Finally, Rule 28(b)(1)(A) authorizes depositions "under an applicable treaty or convention." This provision was intended to incorporate any relevant treaties, including any bilateral agreements, but the key agreement is the Hague Evidence Convention.<sup>26</sup> The U.S. Supreme Court has determined that the Hague Evidence Convention is not a "preemptive replacement," but rather, a "permissive supplement" to the Federal Rules of Civil Procedure for obtaining evidence abroad.<sup>27</sup>

Several considerations go into determining whether invocation of the Hague Evidence Convention is appropriate. First, while Rule 28(b) is a discovery tool, the Hague Evidence Convention is a device for taking presumptively admissible trial evidence, and,

thus, prohibits a party from pretrial, fact-finding discovery missions for background, rather than trial purposes.<sup>28</sup> Second, the facts of the particular case and the interests of the foreign country will also determine the Convention's availability.<sup>29</sup> The Hague Evidence Convention can be quite useful, however, in that it expressly permits evidence to be taken in a foreign country similar to methods under Rule 28(b)—deposition before a consular official, by commission, and by letter of request—but guarantees cooperation by the Convention's signatories.<sup>30</sup> Moreover, certain restrictions that inhibit the taking of depositions under Rule 28(b) in nonsignatory countries, such as limits on the location of depositions and the lack of ability to compel testimony, are addressed by the Convention.<sup>31</sup> The Hague Evidence Convention also establishes accepted procedures for issuing letters of request.<sup>32</sup>

#### *Local Law in the Foreign Country*

The law of the foreign country where the potential deponent is located is equally important. Under any of the previously discussed methods, the ultimate ability to take a telephonic deposition in a foreign country rests on that country's local laws and procedural rules. Thus, it is advisable that a party first contact the U.S. embassy or consulate in that country to choose the most appropriate procedure.<sup>33</sup> For example, in civil law countries, the judge, rather than a private party, gathers evidence. An attempt by counsel to take nonjudicial discovery may be seen as a threat to that country's sovereignty, or may even subject the witness to allegations of illegal conduct. Indeed, foreign laws may prohibit even informal witness interviews. Contact with the U.S. embassy or consulate is also important to confirm even basic information like the adequacy of electrical and telephonic equipment in the foreign country, which is especially critical with a telephonic deposition that depends entirely on the stability of a foreign country's telecommunications infrastructure.

#### *Oath Administration*

One final consideration is any applicable oath. Only the Rule 28(b) notice option includes language requiring a deposition to be taken on notice "before a person authorized to administer oaths either by federal law or by the law in the place of examination."<sup>34</sup> But *all depositions* taken in foreign countries—just as within the United States—require that the witness give sworn testimony. In addition to being sworn in by a person authorized to administer oaths under the laws of the country where the telephonic deposition is being taken, a witness may be sworn in by a U.S. consular official. Although the authority to administer oaths in a foreign country is a matter of foreign law, consular conventions empower U.S. consular officers to administer oaths abroad.<sup>35</sup> But the use of consular officials to administer oaths and the extent of a consular official's involvement will be a matter of circumstance. For example, "[i]n a country that regards the taking of testimony 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 notice depositions *before officers of the country in which the examination is taken*."<sup>36</sup> In other cases, a foreign country may require the use of a consular official or require the deposition to take place in the embassy or consulate.<sup>37</sup> Ideally, however, a U.S. consular official will be permitted to "administer oaths to the witnesses and court reporter/interpreter and withdraw, based on stipulation between the parties . . . . Questions are actually asked by attorneys from the U.S. and counsel in the foreign country."<sup>38</sup>

### Enforcement

The methods described above all pertain to the telephonic deposition of a willing witness. If the witness is unwilling to comply, the applicable options for obtaining the evidence are substantially reduced, but not entirely eliminated.<sup>39</sup> First, if the witness is a party to the litigation, he or she may be compelled by motion to appear or be subject to sanctions under Rule 37.<sup>40</sup> Second, if the witness is not a party to the litigation, but is a United States national located abroad, the court in which the

action is pending may have authority to issue a subpoena.<sup>41</sup> Third, if an initially willing nonparty witness later fails to attend or comply with the deposition, a party may pursue a letter of request under Rule 28(b), or, if the witness's country of residence is a signatory, under the Hague Evidence Convention.

There is limited authority on what sanctions, if any, may be enforced against a witness who commits perjury in a telephonic deposition. Some case law suggests that foreign countries lack authority to enforce sanctions for making untruthful statements during depositions.<sup>42</sup> It is also unlikely for a perjurer to be prosecuted.<sup>43</sup> Yet, in other cases, an oath administered by an authorized person in the foreign country may allow for local penalties if the witness commits perjury.<sup>44</sup>

### Conclusion

In sum, any litigator needing to take a deposition in a foreign country is faced with multiple hurdles, the severity of which is highly dependent on the individual country. Each country's own law, including any unique bilateral agreements or reservations to multinational treaties, will ultimately dictate the methods available to obtain evidence. But procedures permitted by the Federal Rules of Civil Procedure (including written stipulation or, if no stipulation, by notice, commission, letter of request, or treaty), early cooperation between counsel, and assistance from the U.S. State Department go a long way to remove many of the barriers presented by cross-border discovery.

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<sup>1</sup> This article assumes the witness is willing, but touches briefly on compelling a foreign witness's appearance.

<sup>2</sup> Fed. R. Civ. P. 28(b).

<sup>3</sup> Fed. R. Civ. P. 29 (permitting depositions to be taken "before any person, at any time or place, on any notice, and in the manner specified—in which it event it may be used in the same way as any other deposition").

<sup>4</sup> U.S. DEP'T OF STATE, CIRCULAR: OBTAINING EVIDENCE ABROAD, 721 PLI/LIT 1139 (2005) (noting that even voluntary depositions may offend the rules of particular judicial systems).

<sup>5</sup> Fed. R. Civ. P. 30(b)(4). The final sentence of Rule 30(b)(4) clarifies that "the deposition takes place where the deponent answers the questions." Therefore, if a deponent answering questions is located in a foreign country, a telephonic deposition is considered to be taking place in that foreign country under Rule 30(b)(4), and the deposition procedure must also comply with the requirements of Rule 28(b) (or a written stipulation pursuant to Rule 29), and the foreign country's specific procedural rules. See *Advani Enters., Inc. v. Underwriters at Lloyds*, No. 95-cv-04864, 48 Fed. R. Serv. 3d 897 (S.D.N.Y. Oct. 19, 2000) (granting the request for telephonic depositions on the express condition that before the depositions take place the party must submit a proposal of compliance with Rule 28(b)). Cf. *Loucas G. Matsas Salvage & Towage Maritime Co. v. M/T Cold Spring I*, Nos. 96-cv-00621, 96-cv-00931 (E.D. La. Mar. 5, 1997) (holding that the telephonic deposition of a witness in a foreign country was not admissible as the party did not follow the procedural requirements of Rule 28(b)).

<sup>6</sup> *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C. 1986). See also *Zito v. Leascomm Corp.*, 233 F.R.D. 395, 398 (S.D.N.Y. 2006) ("Telephone depositions are a presumptively valid means of discovery." (internal quotation omitted)).

<sup>7</sup> *Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 446-47 (W.D. Mich. 1993). Most courts have followed the

rationale of *Rehau* and allowed the telephonic deposition of a witness in a foreign country. See, e.g., *Flores v. Bodden*, No. G-07-cv-00088, 2009 BL 194134 (S.D. Tex. Sept. 10, 2009); *HealthSouth Corp. v. Sussman*, No. 02-cv-04408 (N.D. Ill. Feb. 26, 2003); *Normande v. Grippo*, No. 01-cv-07441 (S.D.N.Y. Jan. 16, 2002); *Durgin v. Crescent Towing & Salvage, Inc.*, No. 00-cv-01602 (E.D. La. Oct. 18, 2001); *Anguile v. Gerhart*, No. 93-cv-00934 (D.N.J. Oct. 7, 1993). Such a finding is consistent with the goal of Rule 1, "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

<sup>8</sup> *Jahr*, 109 F.R.D. at 431.

<sup>9</sup> DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 11.425 (4th ed. 2010). See also Fed. R. Civ. P. 30(b)(3)(A) ("Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means."). Rule 30(b)(3)(A) was amended to encourage the use of depositions recorded by non-stenographic methods the same year Rule 30(b)(4) was added. See Advisory Comm. Notes to 1980 Amendments, Rule 30, Subdivision (b)(4) [former numbering for current Subdivision 30(b)(3)(A)].

<sup>10</sup> *Advani Enters.*, No. 95-cv-04864, 48 Fed. R. Serv. 3d 897 (stating that Rule 28(b) governs the "taking" of depositions in foreign countries, and that the clarification on where telephonic depositions are "taken" in the 1980 amendment to Rule 30(b)(4) brings these two rules into harmony); see *Loucas G. Matsas Salvage & Towage Maritime Co.*, Nos. 96-cv-00621, 96-cv-00931 (stating that the meaning of "taken" is logically the same in both rules).

<sup>11</sup> As noted below, however, even compliance with the Federal Rules of Civil Procedure, generally, and Rule 28(b), specifically, will not ensure completion of a foreign deposition; the law of the foreign country in which the witness is located is always the ultimate binding authority in these circumstances. Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8A Federal Practice and Procedure § 2083 (3d ed. 2010).

<sup>12</sup> Fed. R. Civ. P. 28(b)(1)(C). See also ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 38.04[B] (4th ed. 2002).

<sup>13</sup> Fed. R. Civ. P. 30(b)(1).

<sup>14</sup> Cf. *United States v. Ruiz-Castro*, 92 F.3d 1519, 1532-33 (10th Cir. 1996) (affirming the denial of a request for a telephonic deposition in a foreign country because the deposition proposal did not satisfy Rule 28(b) procedures, including the identification of any authorized individual that would be administering an oath).

<sup>15</sup> *Anguile v. Gerhart*, No. 93-cv-00934 (D.N.J. Oct. 7, 1993) (considering a reduction in litigation costs a legitimate reason to conduct telephonic depositions of the plaintiff; telephonic depositions of non-party witnesses were not even contested).

<sup>16</sup> See Fed. R. Civ. P. 28(b)(1)(D).

<sup>17</sup> Haydock & Herr, DISCOVERY PRACTICE § 38.04[C].

<sup>18</sup> "It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment." Advisory Comm. Notes to 1946 Amendments, Rule 28.

<sup>19</sup> Fed. R. Civ. P. 28(b)(1)(B).

<sup>20</sup> Wright, Miller & Marcus, *supra* n.11.

<sup>21</sup> *Id.* See also 28 U.S.C. § 1781; U.S. DEP'T OF STATE, CIRCULAR: PREPARATION OF LETTERS ROGATORY, *available at* [http://travel.state.gov/law/judicial/judicial\\_683.html](http://travel.state.gov/law/judicial/judicial_683.html).

<sup>22</sup> Wright, Miller & Marcus, *supra* n.11.

Notwithstanding this requirement, a foreign receiving court is not required to execute a letter of request submitted outside any international agreement such as the Hague Evidence Convention discussed below.

<sup>23</sup> Fed. R. Civ. P. 28(b)(4). For example, in some civil law countries, the deposition record may consist of a judge's summary of a witness's testimony, which the witness subsequently reviews and affirms, rather than a verbatim transcript. The permissiveness of Rule 28(b)(4) is a result of the fact that U.S. courts are sensitive to other countries' customary procedures. Wright, Miller & Marcus, *supra* n.14. See also *Am. Nat'l Fire Ins. Co. v. Mirasco, Inc.*, 265 F. Supp. 2d 240, 250-51 (S.D.N.Y. 2003) (finding that deposition taken in accordance with Rule 28(b) was presumptively valid).

<sup>24</sup> Haydock & Herr, DISCOVERY PRACTICE § 38.04[E]. There is significant difference in scope between pretrial discovery and the collection of trial evidence. The scope of discovery under the Federal Rules of Civil Procedure is much broader, permitting discovery of "any nonprivileged matter that is relevant to any party's claim or defense . . . Relevant information need not be admissible at the trial." Fed. R. Civ. P. 26(b)(1). See also *Lakeland Partners, L.L.C. v. United States*, 88 Fed. Cl. 124, 131 (2009) (the scope of discovery includes "not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, . . . or any other matters which may aid a party in the preparation or presentation of his case." (quoting Advisory Comm. Notes to 1946 Amendments, Rule 26)).

<sup>25</sup> Haydock & Herr, DISCOVERY PRACTICE § 38.04[E].

<sup>26</sup> CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS (HAGUE EVIDENCE CONVENTION) 23 U.S.T. 2555, T.I.A.S. No. 7444 (1969), *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82).

<sup>27</sup> *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).

<sup>28</sup> Haydock & Herr, DISCOVERY PRACTICE § 38.02[A]. See also *supra* n.27.

<sup>29</sup> See Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8 Federal Practice and Procedure § 2005.1 (3d ed. 2010). Before requiring use of the Convention's procedures, a district court should examine the facts of the case, the interests of the foreign country under international comity considerations, and evaluate the expected efficacy of the Convention's procedures. See also *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 543-44.

<sup>30</sup> See Hague Evidence Convention Status Table (noting reservations, declarations, and notifications for individual signatory countries), *available at* [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82) (last visited Nov. 29, 2010). A country's cooperation, however, is subject to any declarations or reservations altering or limiting a signatory's obligations.

<sup>31</sup> Haydock & Herr, DISCOVERY PRACTICE § 38.04[D].

<sup>32</sup> HAGUE EVIDENCE CONVENTION, *supra* n.26. See also U.S. DEP'T OF STATE, CIRCULAR: PREPARATION OF LETTERS ROGATORY, *available at* [http://travel.state.gov/law/judicial/judicial\\_683.html](http://travel.state.gov/law/judicial/judicial_683.html).

<sup>33</sup> U.S. DEP'T OF STATE, CIRCULAR: OBTAINING EVIDENCE ABROAD, 721 PLI/LIT 1139 (2005).

<sup>34</sup> Fed. R. Civ. P. 28(b)(1)(C).

<sup>35</sup> U.S. DEP'T OF STATE, CIRCULAR: OBTAINING EVIDENCE ABROAD, 721 PLI/LIT 1139 (2005).

<sup>36</sup> Advisory Comm. Notes to 1963 Amendments, Rule 28 (emphasis added).

<sup>37</sup> Haydock & Herr, *supra* n.31.

<sup>38</sup> U.S. DEP'T OF STATE, CIRCULAR: OBTAINING EVIDENCE ABROAD, 721 PLI/LIT 1139 (2005).

<sup>39</sup> The Federal Rules of Civil Procedure require motions to compel depositions of nonparty witnesses located within the United States to be made in the court where the deposition is or will be taken. Fed. R. Civ. P. 37(a)(2). See also *Omega Elec., S.A. v. Stewart-Warner Corp.*, No. 86-cv-08186 (N.D. Ill. Dec. 2, 1988); *W.R. Grace & Co. v. Pullman, Inc.*, 74 F.R.D. 80, 82-83 (W.D. Okla. 1977). For foreign depositions, that means moving to compel discovery in the appropriate foreign court

where the witness is located, which is not necessarily feasible or permissible. *See* Fed R. Civ. P. 30(b)(4).

<sup>40</sup> Fed. R. Civ. P. 37. For an unwilling nonparty witness, the party seeking the deposition may move to compel the deposition through the U.S. court and seek to have its motion to compel submitted to the appropriate foreign authority. But any sanctions that the party seeks against the witness are only available through the foreign courts applying foreign law. *See also* Arthur R. Miller, INTERNATIONAL COOPERATION IN LITIGATION BETWEEN THE UNITED STATES AND SWITZERLAND: UNILATERAL PROCEDURAL ACCOMMODATION IN A TEST TUBE, 49 Minn. L. Rev. 1069, 1086-87 (1965).

<sup>41</sup> 28 U.S.C. § 1783(a).

<sup>42</sup> *United States v. Grossman*, No. 03-cr-01156, 2005 BL 69872 (S.D.N.Y. Mar. 2, 2005); *United States v. Feijoo-Tomala*, 751 F. Supp. 40, 43 (E.D.N.Y. 1990).

<sup>43</sup> Charles L. Gholz, Steven B. Kelber & Masayasu Mori, THE TAKING OF VOLUNTARY TESTIMONIAL DEPOSITIONS IN JAPAN FOR USE IN U.S. PATENT INTERFERENCES, 78 J. Pat. & Trademark Off. Soc'y 138, 144 (1996).

<sup>44</sup> Thomas J. Tallerico & Jan L. Herrick, DISCOVERY OF WITNESSES AND DOCUMENTS LOCATED ABROAD, 69 Mich. Bus. J. 664, 666 (1990).