

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENTS TO WIS. STAT. § 887.26

PETITION OF JUDICIAL COUNCIL FOR AMENDMENTS TO § 887.26,
WIS. STAT., DEPOSITIONS ~~WITHOUT~~OUTSIDE THIS STATE

The Wisconsin Judicial Council respectfully petitions this Court for an order pursuant to WIS. STAT. § 751.12, adopting these proposed amendments to § 887.26, Wis. Stat. The Judicial Council Evidence and Civil Procedure Committee's explanation for the proposed amendments, entitled "JUDICIAL COUNCIL COMMITTEE NOTE" follows the text of the proposed amendments.

A. SECTION 887.26(1) of the statutes is amended to read:

- (1) HOW TAKEN. In any civil action, proceeding or matter in which depositions may be taken within this state, the deposition of any witness ~~without~~outside the state may be taken before any officer as provided in s. 804.03(1) or (2) or as provided in the rules of that state or country and upon written interrogatories the procedure as provided in this section.

B. SECTION 887.26(4) of the statutes is amended to read:

- (4) COMMISSION TO TAKE. A commission may issue from any court of record to take the deposition of any witness ~~without~~outside the state, ~~where an issue of fact has been joined or the time therefor has expired,~~after commencement of the action, except as provided in s. 804.015 or as provided in s. 804.02(1), for any cause which shall be deemed sufficient by the court, or when required for use on any trial or hearing or upon any motion or proceeding. The commission shall be signed by the clerk and sealed and shall be accompanied by a copy of subs. (4), (5) and (6).

C. SECTION 887.26(5) of the statutes is amended to read:

- (5) PROCURING COMMISSION. (a) The ~~party~~person desiring a commission shall prepare ~~interrogatories~~a notice of intent to obtain a commission and state in the caption thereof ~~the name of the commissioner proposed by the party,~~ the name of the witness and ~~the~~his or her residence ~~of each~~ with particularity, and shall serve

a copy thereof on the opposite party, with a notice that, at the expiration of ~~105~~ 5 days from the date of ~~such service~~ the notice of intent, a commission will be issued directed to the court of the county of residence of the witness, requesting that a subpoena issue from that court compelling to take the deposition of the witness, and specifying the reason for taking the same. Within ~~such time~~ the 5-day period the opposite party may file with the clerk and serve upon the other party ~~his or her objections to the interrogatories proposed and to the competency of the witness and to the issuance of the commission and serve his or her cross-interrogatories; and state the name and residence of any person whom the opposite party desires to act as an additional commissioner, who must reside in the county in which the commissioner first named resides.~~

(b) ~~At the expiration of the 5 day~~ time limited, and no objection being received or sustained, the commission shall issue as provided in sub.(4). ~~At the moving party's expense, the commission shall be transmitted to the court of the county of residence of the witness, for issuance of the deposition subpoena in accord with the statutes and rules applicable to that court.~~ may file the notice and interrogatories, with proof of service thereof and the moving party's objections to the cross-interrogatories. The moving party may also serve redirect interrogatories on the opposite party, who may, within 3 days after such service, file objections to such redirect interrogatories. Thereupon the commission shall be issued, with the interrogatories, direct, cross and redirect, and all objections, and transmitted to the commissioner first named by mail or express at the expense of the moving party. But when any defendant shall not have appeared and the time for the defendant to plead has expired, no notice is required to be given such defendant, and the commission may issue on filing the direct interrogatories. No commission shall issue if the witness's residence s-are-is not given as required.

(c) Where testimony is sought of a witness outside the state before commencement of an action as provided in s. 804.02(1), the order issued under s. 804.02(1)(c) shall also include a commission in the form provided by sub.(4) of this section.

D. SECTION 887.26(6) of the statutes is amended to read:

~~(6) Duty of commissioner. (a) The commissioner first named shall fix the time and place for executing the commission and give the other commissioner one day's notice if residing in the same place, and when not, one day's notice in addition for every 30 miles of distance between the place of residence and the place fixed for executing the commission. If the notice be by mail double time shall be allowed; but notice may be waived in writing or by appearance at the execution of the commission. If there be 2 commissioners the commission shall be executed in the county where they reside, unless they agree upon another. The~~

~~commissioner first named shall have charge of and return the deposition, which return shall be in the form and manner directed by the commissioner as provided by s.804.05(7). If either commissioner shall not attend at the time and place so fixed, the other may execute the commission with like effect as if both were present, but such commissioner must certify in the return that the other had due notice but failed to attend~~ (6) Certification and service by officer; Exhibits; Copies; Notice of Service. The officer taking or transcribing the deposition shall have charge of and return the deposition, in the same form and manner as provided by s. 804.05(7).

~~(b) One of the commissioners shall publicly administer an oath or affirmation to each witness that the answers which the witness shall make to each of the interrogatories propounded to the witness shall be the truth, the whole truth, and nothing but the truth. The witness's answers to each interrogatory shall be reduced to writing. Each witness shall subscribe the witness's name at the end of the witness's answer and the commissioners shall subscribe their names at the foot of each page of the testimony. If any exhibit is produced and proved or referred to in the answer of any witness, it shall be marked as an exhibit, either by letter or number, by a commissioner, and referred to in the testimony of the witness, and annexed to and returned with the deposition. If the paper be a record or other document not in the control of either party, it shall be sufficient to annex a copy, stated by the witness in the witness's answers to be a true copy thereof. The commissioners shall certify in their return that each witness, before giving the witness's evidence, was duly sworn or affirmed, and shall state the time when the testimony was taken.~~

~~(c) The proper commissioner shall enclose the commission, the interrogatories, and the deposition with the return annexed in a sealed envelope, with the title of the action endorsed thereon and immediately transmit the same by mail or express to the clerk of the court from which the commission issued.~~

~~(d) Upon the receipt of such package, the clerk shall endorse the time and manner in which the clerk received the same, and open it and file the contents thereof and give notice of the receipt of the same to the attorneys for the respective parties.~~

E. SECTION 887.26(7) of the statutes is amended to read:

- (7) FEES. The persons who ~~take~~take or transcribe the depositions and the witness shall be entitled to the fees allowed ~~supplemental court commissioners~~reporters under s. 814.698(1) and witnesses for similar service by the law of this state, or ~~such~~ as may be prescribed by the law of the state or country where taken.

F. SECTION 887.26(8) of the statutes is amended to read:

- (8) TRANSLATIONS. When the witness is unable to speak the English language, the judge of the court from which the commission issues may appoint some competent and disinterested person to translate, at the expense of the noticing person, the commission subpoena, rules, interrogatories—and—cross-interrogatories and deposition questions and answers, or such any part thereof as may be necessary, from the English into the language spoken by the witness or vice versa; and such the translation shall be sent to the commissioner in place of the original papers that have been translated.—transcribed and maintained as part of the deposition transcript. ~~Upon the return of the commission and deposition, such judge shall in like manner cause the answers of the witness and the exhibits to be translated into English, as well as all other proceedings in a foreign language, and such translation to be filed.~~ The translator shall append to all translations the translator's affidavit that the translator knows ~~the~~ English and such the foreign language of the witness, and that in making such translation the translator carefully and truly translated ~~thesuch~~ proceedings from ~~the~~ English into such the witness's foreign language or from the latter into English, and that ~~thesuch~~ translation is correct. Such A translation under this paragraph shall have the same effect as if all the proceedings were in English, but the trial court, upon the deposition being offered in evidence, may admit the testimony of witnesses learned in such the foreign language for the purpose of correcting errors therein; and, if it shall appear that the first translation was in any respect so incorrect as to mislead the witness, the court may, in its discretion, continue the cause for the further taking of testimony.

JUDICIAL COUNCIL COMMITTEE NOTE:

Section (1) was revised to delete the restriction of depositions outside the state to depositions by written question, and now allows depositions outside the state to be oral or written. This change conforms to practice. Wisconsin litigants routinely take oral depositions; depositions upon written question are rarely conducted. Section (1) also provide that the persons before whom depositions may be taken are those as described in s. 804.03(1) or (2), or as provided by the specific rules of the state or country where the deposition is taken.

Section (4) now acknowledges that a commission also may be obtained to take out-of-state depositions prior to commencement of an action, subject to the provisions of s. 804.02(1). Where an action already has been commenced, section (4) now permits out-of-state depositions before the answer is filed. This change conforms with s. 804.05(1), which permits in-state depositions to be taken after commencement of the action.

Subsections (5)(a) and (b) eliminate the requirement for a motion to obtain a commission for foreign deposition. The motion procedure has been replaced by a simple notice procedure, subject to a 5-day rule.

Subsection (5)(a) also replaces the provision for objection to the competency of the designated witness with a general provision for objections as allowed by s. 804.05(4). This change reflects the liberalization of the law with respect to competency of a witness.

Subsection (5)(c) incorporates the commission format requirements into the procedure for seeking a deposition before an action is commenced, as described in s. 804.02(1), but does not replace the 20-day notice period provided in s. 804.02(1).

Section (6) was substantially changed. That section had provided for two commissioners to preside at the taking of the deposition by written question and to ensure that the deposition was returned to the clerk of the court which had issued the commission. The bulk of section (6) was replaced by requiring that the officer before whom the deposition is taken comply with the provisions of s. 804.05(7) for certification of the deposition transcript, and mailing and handling of exhibits.

Grammatical changes throughout s. 887.26 also were made to substitute the word “such” for more specific articles “a” or “the”, in conformance with recent Revisor’s bills. The phrase “without the state” was replaced with the more modern equivalent “outside the state” throughout.

RESPECTFULLY SUBMITTED

JUDICIAL COUNCIL

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