

STATE OF WISCONSIN  
SUPREME COURT

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In re:

PROPOSED AMENDMENTS TO WIS. STAT. § 887.26

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

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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 the state or country where taken. Depositions outside the state may be taken orally or upon written interrogatories questions 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) Oral Depositions.

1. The person desiring a commission shall prepare a notice of intent to obtain a commission and state in the caption thereof the name of the witness and his or her residence with particularity, and shall serve a copy thereof on the opposite party, with a notice that, at the expiration of 5 days from the date of the notice of intent, a commission will be issued directed to the court of jurisdiction of the residence of the witness, requesting that a subpoena issue from that court compelling the oral deposition of the witness, and specifying the reason for taking the same. Within the 5-day period the opposite party may file with the clerk and serve upon the other party objections to the issuance of the commission.
2. At the expiration of the 5 days, and no objection being received or sustained, the commission shall issue as provided in sub. (4). At the noticing person's expense, the commission shall be transmitted to the court of jurisdiction of residence of the witness, for issuance of the deposition subpoena in accord with the rules applicable to that court. No commission shall issue if the witness's residence is not given as required.

(a)(b) Written Questions.

1. 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 ~~to take the deposition of the witness,~~ directed to the court of jurisdiction of the residence of the witness, requesting that a subpoena issue from that court compelling the deposition upon written

questions of the witness, and specifying the reason for taking the same. The notice of intent shall be accompanied by the questions. Within ~~such time~~ the 5-day period, the opposite party may file with the clerk and serve upon the other party ~~his or her~~ any 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., and may serve any objections to the questions and any cross questions.

2. If cross questions are served, within 3 days after such service the noticing person may also serve redirect questions on the opposite party, who may, within 3 days after such service, serve objections to such redirect questions.

(b)3. At the expiration of the time limited, the moving party may file the notice and interrogatories, with proof of service thereof and the moving parties' 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 period under sub. (b)1. and (b)2., and no objection to the issuance of the commission being received or sustained, the commission shall be issued, with the interrogatories, direct, cross and redirect, and all objections, and transmitted to the commissioner first named 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, as provided in sub. (4). At the noticing person's expense, the commission shall be transmitted to the court of jurisdiction of the residence of the witness, for issuance of the subpoena in accord with the rules applicable to that court. No commission shall issue if the witness's residences are is not given as required.

4. Upon issuance of the commission, the noticing person shall transmit to the officer taking or transcribing the deposition, by mail or express, the direct, cross, and redirect questions, and the objections to the questions.

(c) Before Commencement of Action. 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. EXAMINATION AND CROSS-EXAMINATION; RECORD.

(a) Oral Examination. Testimony shall be taken in the manner provided by ss. 804.05(4) to (6).

(b) Examination by Written Questions. Testimony shall be taken in the manner provided by s. 804.06(2).

(c) Certification and Service by Officer; Exhibits; Copies; Notice of Service.

~~(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 officer taking or transcribing the deposition shall have charge of and return the deposition, which return shall be in the same form and manner directed by the commission or 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.~~

~~(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 or transcribe the depositions and the witness shall be entitled to the fees allowed ~~supplemental~~-court ~~commissioners~~reporters under s. ~~814.68~~814.69(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 ~~the commission, rules, interrogatories and cross-interrogatories, or such,~~ at the expense of the noticing person, the subpoena, rules, and deposition questions and answers, or any part thereof as may be necessary, from the English into the language spoken used by the witness or vice versa; and ~~such translation shall be sent to the commissioner in place of the original papers that have been translated. 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 translation shall be transcribed and maintained as part of the deposition transcript. The translator shall append to all translations the translator's affidavit that the translator knows ~~the~~ English and ~~such foreign~~ the language of the witness, and that in making such translation the translator carefully and truly translated ~~such~~ the proceedings from ~~the English into such foreign~~ the witness's language or from the latter into English, and that ~~such~~ the 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~~ circuit court, upon the deposition being offered in evidence, may admit the testimony of witnesses learned in ~~such foreign~~ the language of the deposed witness 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 add a procedure for taking depositions outside the state either orally or by written questions. This change conforms to practice. Wisconsin litigants routinely take oral depositions; depositions upon written question are rarely conducted. Section (1) also provides 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. Structurally, section (5) has been divided to separately describe the procedure for oral depositions outside the state, and for depositions by written question outside the state. In addition, the section now provides that the commission will be directed to the court of jurisdiction of the witness, instead of the court of the county of residence of the witness. This broader description acknowledges that potential witnesses may reside in jurisdictions lacking county boundaries.

The prior provision in 5(a) for objection to the competency of the designated witness has been replaced with a general provision in section (6) for objections as allowed by s. 804.05(4) and s. 804.06(2). 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. The rule with respect to the person before whom the deposition is taken is essentially the same whether the deposition takes place in Wisconsin or in another jurisdiction. Section (6) 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. In short, the conduct of a deposition outside the state will now take place in the same manner as it would if it were inside Wisconsin.

Section (7) is amended to make the costs of out-of-state depositions the same as costs for depositions within the state.

Section (8) has been modified slightly, so as to encompass translation of testimony by witnesses who speak languages other than English or who use sign language. The amended section also makes clear that the noticing person is responsible for any costs of translation.

Grammatical changes throughout s. 887.26 also were made to replace “such” with the 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. The term “trial court” was replaced with the more precise “circuit court.” The term “interrogatories” has been changed to “questions” throughout, to conform to the use of “depositions upon written questions” directed to party and non-party witnesses within the state, as provided in s. 804.06, and in contrast to the use of “interrogatories” solely directed to a party, as provided in s. 804.08.

RESPECTFULLY SUBMITTED

JUDICIAL COUNCIL

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