



STATE OF WISCONSIN JUDICIAL COUNCIL

Suite 822, Tenney Building, 110 East Main Street, Madison, WI 53703-3328 (608) 261-8290

September 5, 2014

Hand Delivered

Clerk of the Supreme Court
Attn: Deputy Clerk -- Rules
110 East Main Street
Suite 215
Madison, Wisconsin 53703

Re: Rule Petition 13-16, Petition to Amend Wis. Stat. § 887.24

Dear Clerk of Court:

Enclosed please find the response of the Wisconsin Judicial Council's Evidence & Civil Procedure Committee to issues and questions raised in correspondence from Commissioner Julie Rich, dated August 7, 2014, and regarding Rule Petition 13-16. Commissioner Rich's questions appear in bold italics, followed by the committee's response.

Please provide several specific examples of how the proposed rule will work in practice. Include examples involving pro se litigants, corporate parties, and where a special proceeding is commenced.

The proposed rule is intended to serve a single, narrow function. It comes into play only when there is civil litigation pending in the courts of another state or territory of the United States and one of the parties to that case desires to obtain discovery from a person located in Wisconsin, for use in the case pending in that state. The proposed rule does not apply to criminal or other non-civil proceedings or to civil actions pending in federal courts (for which it is not needed, because of the provisions of Fed. R. Civ. P. 45) or to civil actions pending in the courts of other countries.

Because the courts of the state in which the action is pending will not normally have jurisdiction to compel a person located in Wisconsin to appear and give testimony either in the state in which the action is pending or in Wisconsin, it is necessary for the party seeking the Wisconsin person's deposition testimony to seek the assistance of the courts of Wisconsin to compel the testimony. Present law requires the party seeking such testimony to resort to one of several mechanisms that have often proved cumbersome, time-consuming, and expensive and that require the involvement of a Clerk of the Supreme Court

Wisconsin circuit judge in every case, even if the Wisconsin person whose testimony is sought, though unwilling to appear for deposition voluntarily, is not contesting the taking of the deposition. The existing mechanisms include the issuance of a commission by the court of another state to a Wisconsin court (under a procedure in that state like that provided for in Wis. Stat. § 887.26 for taking depositions outside Wisconsin for use in this state), the issuance of letters rogatory by the court of another state to a Wisconsin court, or the issuance of a subpoena by a Wisconsin court under the vague procedure of current Wis. Stat. § 887.24 upon a showing that the state in which the action is pending has a similar provision in its laws that could be used to compel a person in that state to give a deposition there for use in a Wisconsin proceeding.

The existing mechanisms require the involvement of a judicial officer in one or both states, and the opening of a Wisconsin case file simply to have the Wisconsin subpoena issued. The delay and expense are unnecessary in the many cases in which the witness appears and gives deposition testimony once served with a Wisconsin subpoena.

Moreover, there is no procedure provided for under the existing mechanisms to allow the Wisconsin witness to contest the subpoena's command to appear or the breadth of the information sought from the witness, either in the form of documents or testimony, or to assert a claim of privilege or oppression; or where the party that has caused the subpoena to be issued wishes to compel the witness to appear, to produce documents, or to testify. Nor does existing law make clear that all such matters are to be resolved by the Wisconsin court that issued the subpoena, applying Wisconsin law to the issues are presented.

Under the proposed rule, the party to the action in another state will prepare a subpoena, under the caption of that pending case, but addressed to the person located in Wisconsin whose testimony is desired. That party will then prepare a form of Wisconsin subpoena complying with Wis. Stat. § 885.02 that is identical in content to the other-state-captioned subpoena with a copy of that other subpoena attached to it. The clerk of the Wisconsin circuit court where the witness is located, having verified that these simple requirements are met, will then issue a subpoena out of that Wisconsin court and deliver it to the requesting party for service. Alternately, if the party procuring the subpoena wishes to engage Wisconsin counsel for assistance, the Wisconsin counsel may issue the subpoena as provided in Wis. Stat. § 805.07.

Normally, we would expect that the parties in the civil action pending in another state (whether the parties are business entities or individuals) would have the attorneys representing them in that action attend to the details of having a Wisconsin subpoena issued under the proposed rule, with or without the assistance of Wisconsin local counsel. If a party to the action in the other state is proceeding *pro se*, nothing in the

proposed rule precludes the *pro se* litigant from utilizing the rule, again with or without the assistance of Wisconsin local counsel.

If a special proceeding must be commenced in the issuing Wisconsin court to resolve issues of compliance, privilege, burden, and so forth, the normal rules for proceedings in Wisconsin courts would apply, including the requirement that the attorneys appearing for the parties in the proceeding be admitted to practice in this state, or obtain permission to appear *pro hac vice*. Again, we would expect the normal rules regarding *pro se* appearances in Wisconsin proceedings to apply as well.

Did the committee consider whether the proposed rule presents implications for the unauthorized practice of law (“UPL”), SCR Ch. 23?

- o The proposed rule eliminates the need to obtain local counsel for depositions. Does this change have UPL implications?***

The committee considered whether the proposed rule presents implications for the unauthorized practice of law (“UPL”) and concluded that eliminating the need to obtain local counsel for depositions pursuant to Wis. Stat. § 887.24 does not constitute the unauthorized practice of law under Wisconsin law.

SCR 23.01 defines the practice of law in Wisconsin as follows:

The practice of law in Wisconsin is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (2) Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
- (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(5) Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

SCR 23.02 requires a license to practice law in Wisconsin. SCR chapter 23 is generally not applicable to a *pro se* party because he or she is not representing another entity or person when conducting a deposition in Wisconsin.

With regard to depositions by out-of-state attorneys, the Wisconsin Court website lists frequently asked questions regarding admission *pro hac vice*. Question #10 addresses depositions by non-resident attorneys and states, “Non-resident attorneys who may appear as counsel in depositions, or in situations in which the attorney will not enter an appearance before a Wisconsin tribunal should consult SCR 20:5.5.”

(See <http://www.wicourts.gov/services/attorney/prohacvice.htm#10>)

SCR 20:5.5 provides the following guidance on the unauthorized practice of law and the multijurisdictional practice of law by a lawyer:

Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or

(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

(3) are in, or reasonably related to, a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of, or are reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within subsections (c)(2) or (c)(3) and arise out of, or are reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

With regard to an out-of-state lawyer taking a Wisconsin deposition pursuant to proposed Wis. Stat. § 887.24, the drafting committee believes SCR 20:5.5 specifically permits a lawyer to take depositions in Wisconsin for use in an action or proceeding pending in another jurisdiction where the lawyer is admitted to practice. This interpretation is supported by the fact that Rule 5.5 (c) of the Minnesota Rules of Professional Conduct is substantially similar to Wisconsin's SCR 20:5.5 (c). Comment 10 to the Minnesota rule specifically states, "Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, **including taking depositions in this jurisdiction.**" (Emphasis added.)

Did the Uniform Law Commission provide comment on this proposal?

The Uniform Law Commission did not provide comment on this proposal. However, the Wisconsin Commission on Uniform State Laws requested that the Judicial Council review the Uniform Interstate Deposition and Discovery Act and make a recommendation regarding whether it should be adopted in Wisconsin.

The Judicial Council referred the project to its Evidence & Civil Procedure Committee. The committee reviewed the UIDDA, as well as the variations of the UIDDA that have been adopted in each jurisdiction, prior to recommending that a variation of the UIDDA should be adopted in Wisconsin. If the court adopts proposed Wis. Stat. § 887.24, the Wisconsin Commission on Uniform State Laws has recommended that the national office be contacted to verify that the rule qualifies as a substantially similar enactment, like the many other states that have adopted modified versions of the UIDDA.

Proposed Wis. Stat. § 887.24(3)(a) provides that to "request issuance of a subpoena under this section, a party may submit a foreign subpoena to a clerk of the circuit court for the county in which discovery is sought to be conducted in this state, accompanied by the appropriate Wisconsin subpoena form." Is a standard subpoena form used throughout Wisconsin?

Yes, the standard court subpoena form is GF-126. It was created by the Wisconsin Court Records Management Committee to comply with the requirements of Wis. Stats. §§ 805.07 (4) and 885.02 (1) regarding form of subpoena. The Wisconsin Court website (www.wicourts.gov) provides access to standard court forms. The Court's website states that "Standard, statewide forms are required by all Wisconsin circuit courts for civil, criminal, family, guardianship, juvenile, mental commitment, probate and small claims cases." Standard court forms are also available in any county Clerk of Circuit Court office.

Proposed Wis. Stat. § 887.24(3)(a)4 requires that when the subpoena is served it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. How will this provision operate if one pro se party does not want to disclose personal contact information to an adverse party--for example, in cases involving allegations of domestic violence?

This provision imposes no disclosure obligation beyond what is currently required in the standard subpoena form used in Wisconsin. If a *pro se* party does not want to disclose personal contact information, he or she would have the same options currently available in other types of cases.

A Judicial Council Committee Note to Wis. Stat. § 887.24(3) indicates, in an example, that the “clerk of court, upon being given the Kansas subpoena, will then issue the identical Wisconsin subpoena,” and adds that “issue” includes verifying that the subpoena complies with Wis. Stat. § 887.24(3)(a) and signing it. Please explain what is required for verification and clarify any new obligations this provision imposes on a clerk of court.

The Committee Note is intended to clarify that the term “issue” does not mean that the clerk of court is required to draft or complete the Wisconsin subpoena for the out-of-state party. The out-of-state party requesting the subpoena is responsible for presenting a completed Wisconsin subpoena form to the clerk. Prior to signing the subpoena, the clerk is required only to confirm that the subpoena complies with the five requirements of (3) (a), including:

1. List the Wisconsin county in which discovery is to be conducted as the court from which the subpoena is issued.
2. Use the title of the action and its docket number from the foreign jurisdiction.
3. Incorporate the terms used in the foreign subpoena and include a copy of the foreign subpoena as an attachment.
4. Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
5. Advise the person to whom the subpoena is directed that such a person has a right to petition the Wisconsin circuit court for a protective order to quash or modify the subpoena or provide other relief under Wis. Stat. § 805.07 (3).

With regard to obligations, this provision eliminates the current obligations on circuit court judges, including reviewing a petition and signing an order for issuance of a subpoena. It creates only very modest obligations on the clerk to verify that the completed Wisconsin subpoena complies with the five requirements of sub. (3) (a). To illustrate how the proposed rule simplifies this process, attached please find copies of

the out-of-state subpoena procedures for Dane County and Milwaukee County under current Wis. Stat. § 887.24.

The Legislative Reference Bureau commented that, due to the use of passive voice in the proposed rule, it is sometimes unclear who has the duty to act. For example, proposed Wis. Stat. § 887.24(3)(d) states that “[o]btaining and completing a subpoena under this subsection does not constitute an appearance in the courts of this state.”

- o Please provide additional information on the meaning and purpose of proposed Wis. Stat. § 887.24(3)(d).***

Proposed Wis. Stat. § 887.24(3)(d) deliberately makes use of passive voice because it applies regardless of who obtains and completes the subpoena. It specifies that obtaining and completing a subpoena does not constitute an appearance in the courts of this state because it is not the drafting committee’s intent that an out-of-state attorney seek admission *pro hac vice* to obtain a Wisconsin subpoena. It was also not the intent of the drafting committee that the clerk of court be required to open a case file for a matter involving an out-of-state subpoena unless a special proceeding is initiated pursuant to Wis. Stat. § 887.24(6).

This provision differentiates the process to obtain the Wisconsin subpoena from the process necessary to seek a protective order or enforcement action through an application to the court pursuant to Wis. Stat. § 887.24(6). The Uniform Comment to sub. (6) specifies that “the lawyer making or responding to the application must comply with the discovery state’s rules governing lawyers appearing in its courts.” Therefore, filing an application or responding to an application constitutes an appearance in the courts of this state.

- o Is an explanatory note warranted?***

If the court determines that an additional explanatory note is needed, the committee is certainly willing to submit a draft proposal.

Proposed Wis. Stat. § 887.24(4) modifies the language from the UIDDA to substitute the term “party” in place of the term “attorney” to extend the rule’s applicability to the ever-increasing number of cases involving pro se parties.

- o How does the proposed rule operate if a pro se party seeks to conduct a deposition?***

There is no doubt that, as with many other aspects of civil litigation, ranging from pleadings to trials, taking depositions is difficult for *pro se* litigants and the presence of Clerk of the Supreme Court

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pro se litigants can complicate the taking of depositions. However, the streamlining of the procedure with this amendment will make it easier for all, including *pro se* litigants, particularly in comparison with current procedures. Conversely, the proposed change still has procedures in place to invoke the authority of the court to prevent the misuse of a subpoena by or against a *pro se* litigant.

o What effect might this have on the administration of justice?

Given the relative infrequency with which the depositions of persons located in Wisconsin who are unwilling to appear voluntarily, without requiring a subpoena, are taken for use in litigation pending in other states, we would not expect the availability of the procedure in the proposed rule to add any material burden to the administration of justice.

o Is Wisconsin unique in requiring corporations to appear by counsel (subject to certain exceptions such as small claims proceeding)?

The committee has not researched the exact number of states that require corporations to appear by counsel in civil actions, but, based on the experience of some of the committee's members, Wisconsin's rule is certainly not unique. It is consistent with common law and many other jurisdictions. It has long been the rule in the federal courts, for example. *Osborn v. President, Directors & Co. of the Bank of the United States*, 22 U.S. 738, 9 Wheat. 738, 6 L.Ed. 204 (1824) (Chief Justice John Marshall, writing for the majority, stated, "[a] corporation, it is true, can appear only by attorney[.]").

Proposed Wis. Stat. § 887.24(5) requires compliance with Wisconsin's "rules relating to discovery..." Is the term "rules" sufficiently inclusive? Should "rules" be replaced with "laws"?

The committee's intent was to require that the procedure applicable to discovery obtained in Wisconsin for use in civil actions pending in other states is Wis. Stat. ch. 804, as it is for depositions and discovery for use in civil proceedings in Wisconsin. The committee has no other discovery rules or laws in mind.

Is local counsel needed for special proceedings commenced under Wis. Stat. § 887.24(6)?

Unless a party is appearing *pro se*, counsel participating in such special proceedings must be admitted to practice in the courts of Wisconsin, either generally or *pro hac vice*.

Proposed Wis. Stat. § 887.24(6)(c) states that if a special proceeding is required, the court “in its discretion may award any prevailing party its reasonable attorney’s fees and expenses.”

O What is the court’s authority to impose such a fee?

O Did the committee consider whether this provision comports with rules in typical in-state discovery practices?

The committee’s intent with respect to this provision was to invoke the court’s authority under Wis. Stat. § 804.12(1)(c) and Wis. Stat. § 804.01(3)(b), which are the applicable rules in typical in-state discovery practice.

Thank you and please don't hesitate to contact me if you have any additional questions.

Sincerely,

April M. Southwick, Attorney
Wisconsin Judicial Council



Court Services
Pay Fines Online
Administrative Services
Chief Judge
Children's Court Division
Clerk of Circuit Court
Clerk of Circuit Court Contact List
Civil Division - Small Claims - Family
Civil Court Filing Fees
Civil Court Records
Civil General information
Forms
Out Of State SubPoena Procedure
Small Claims Procedure Video
Unable To Appear Due To Illness
Civil/Family FAQs
Criminal / Traffic Division
Family Court Commissioner
Jury Management
Probate Division
Self-Help Clinics
Interpreter Services
Legal Resource Center
State of Wisconsin
Wisconsin Court System
Wisconsin State Law Library

[Printable Version](#) [Civil Division - Small Claims - Family > Out Of State SubPoena Procedure](#)

Out Of State SubPoena Procedure

OUT OF STATE SUBPOENA PROCEDURE

State Court Cases Venued Outside of Wisconsin

Follow the instructions below to have a Wisconsin resident subpoenaed.

References below to "circuit court judge" refer to the Chief Judge in Milwaukee County, or any circuit Court judge in the state of Wisconsin, most preferably one within the county in which the witness to be subpoenaed resides.

1. Commission

A commission must be issued by the out-of-state court of jurisdiction to the circuit court judge or Chief Judge (Milwaukee County). Typically, the attorney taking the deposition petitions his or her court or judge to issue a commission to our judge in the county of the witness's residence thereby empowering him or her to issue a subpoena for the witness's appearance. The document should state the parties, who they are, and that the witness is necessary for the case to proceed.

2. Petition for Issuance of Subpoena

This is a request for the circuit court judge or Chief Judge to issue a subpoena, authorized by the above commission. The petition should contain reference to your state's statutes regarding deposition testimony reciprocal with Wisconsin Statutes 887.24, 887.25 and 887.26. An attachment of your state statute as well as a certified copy of the Commission and Order for Commission is required.

[View Petition Example](#)

3. Order for Issuance of Subpoena

This is the document prepared by the petitioning attorney and presented to the circuit court judge or Chief Judge for his or her signature, thereby ordering the issuance of the subpoena. Any additional request for production of records or duces tecum is to be included in the **subpoena** itself, not this document.

4. Subpoena

[s. 885.02(2)] This is the actual subpoena which is then presented to the process server for service on the witness. This document may contain requests for records production or duces tecum [s.885.02(2)]. You may use Wisconsin Circuit Court form GF-126. If the Wisconsin Circuit Court form is used an attorney licensed to practice in Wisconsin or the Chief Judge or Clerk of Circuit Court must sign the subpoena. You may submit any other acceptable subpoena drafted by you and used in your jurisdiction but it must be signed by the Court in the foreign jurisdiction.

(MS Word format)

(PDF format)

5. Submit Subpoena

Send all four documents (original plus two copies) to the circuit court judge's office. Please include a self-addressed, stamped envelope for return of the signed copies.

Milwaukee County

Arrange for local counsel or a process server to deliver all four of the above documents (original plus two copies). At that point, a case file will be opened in Milwaukee County. Counsel or process server will next be directed to the Chief Judge's office, with the Circuit Court file, for the required signatures.

6. Arrange Witness Payment

After accomplishing the above steps, make out a check payable to the witness for \$5.00 [regular depo, s. [814.67\(1\)\(a\)1](#)] or \$16.00 [video/evidentiary depo or court appearance, s. [814.67\(1\)\(am\)](#)] plus .20/mile [s. [814.67\(1\)\(c\)](#)] for the round trip for the witness to the deposition site or circuit court.

Fees

Check rates in the county where the witness resides.

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🔍 **Are there court forms specific to Dane County?**

There are several court forms that are designed for use in Dane County only. Locate a court form here on our [Court Forms page](#).

🔍 **How do I get a lawyer?**

There are several ways for you to locate an attorney to assist you. One way is to call the WI State Bar Lawyer Referral and Information Service at (608) 257-4666. You could also search lawyer directories or the yellow pages. For more information, visit this topic on the [Wisconsin State Law Library's Legal Topics page](#).

🔍 **How do I access legal information?**

Online, a substantial amount of Wisconsin legal information can be found by accessing the [Wisconsin State Law Library's website](#) and searching its contents. Not all legal information is available on the Internet, nor is it all available for free. You may also visit the Dane County Legal Resource Center or WI State Law Library during normal business hours. Another option is emailing your question to dclrc.ref@wicourts.gov or calling (608) 266-6316 for more information and assistance.

🔍 **How do I file an Out of State Subpoena?**

OUT OF STATE SUBPOENA PROCEDURE
State Court Cases Venued Outside of Wisconsin

Parties to lawsuits pending in other states may obtain a subpoena for a witness located in Dane County. Inquiring parties should be advised to prepare and submit the following four documents to the duty judge for review and processing:

1. Commission

A commission must be issued by the out-of-state court of jurisdiction to the circuit court judge. Typically, the attorney taking the deposition petitions his or her court or judge to issue a commission to the judge in the county of the witness's residence thereby empowering him or her to issue a subpoena for the witness's appearance. The document should state the parties, who they are, and that the witness is necessary for the case to proceed.

2. Petition for Issuance of Subpoena

This is a request for the circuit court judge or Chief Judge to issue a subpoena, authorized by the above commission. The petition should contain reference to your state's statutes regarding deposition testimony reciprocal with Wisconsin Statutes 887.24, 887.25 and 887.26.

3. Order for Issuance of Subpoena

This is the document prepared by the petitioning attorney and presented to the duty judge for his or her signature, thereby ordering the issuance of the subpoena. Any additional request for production of records or duces tecum is to be included in the **subpoena** itself, not this document.

[View Example](#)

4. The Subpoena

◦ **Submit Documents**

Send all four documents (and copies) to the circuit court judge's office. Please include a self-addressed, stamped envelope for return of the signed copies. Once the duty judge has signed the subpoena, the documents are forwarded to the Clerk of Court's Administrative Office for Processing. **There is no filing fee.** The cover letter, a copy of the subpoena, and any other pleading accompanying the subpoena are retained by the Clerk's Office. The original subpoena is sealed and returned to the requester to arrange for service.

◦ **Arrange Witness Payment**

To compel attendance, the witness fee and mileage must accompany the subpoena when served.