

Alabama Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 28.

Persons before whom depositions may be taken.

(a) *Depositions taken within the United States to be used in this state.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions to be used in this State shall be taken before an officer authorized to administer oaths by the laws of the United States, or of the State of Alabama, or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *Depositions taken in foreign countries to be used in this state.* In a foreign country, depositions to be used in this state may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power, by virtue of the commission, to administer any necessary oath and take testimony, or (3) pursuant to letters rogatory or a letter of request, or (4) pursuant to any applicable treaty or convention. A commission or letters rogatory or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or letters rogatory or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and letters rogatory or a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. Letters rogatory or a letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be styled in the form prescribed by that treaty or convention. Evidence obtained in response to letters rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Depositions taken within this state to be used outside this state.* A person desiring to take depositions in this state to be used in proceedings pending in the courts of any other state or country may produce to a judge of the circuit where the witness resides a commission authorizing the taking of such depositions or proof of notice duly served, whereupon it shall be the duty of the

judge to issue, pursuant to Rule 45, the necessary subpoenas. Orders of the character provided for in Rules 30(d), 37(a)(1), 37(b)(1), and 45(c) may be made upon proper application therefor by the person to whom such a subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon that person pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(d) *Disqualification for interest.* No deposition shall be taken before a person who is a relative, employee, attorney or counsel of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.

(dc) *District court rule.* Rule 28(a), Rule 28(b), and Rule 28(d) apply in the district courts in those instances when depositions on written questions or depositions on oral examination are permitted by Rule 26(dc). Rule 28(c) does not apply in the district courts.

[Amended 1-21-86, eff. 9-1-87; Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

Rule 28(a) is based generally on Federal Rule 28(a). It provides a broad class of persons before whom depositions may be taken for use in Alabama actions.

As is indicated by that part of Rule 28(a) which authorizes taking a deposition before “an officer authorized to administer oaths by the laws ... of the state or other place where the examination is held ...”, depositions for use in Alabama actions need not be taken within the state. They may be taken wherever the party noticing the taking of the depositions desires, subject to the power of the court under Rule 26(c) to make a protective order barring taking of the deposition at the place indicated. But a subpoena to require the witness to attend the deposition will not run outside the state. See Rule 45(d). This is immaterial where it is the deposition of a party which is sought. The mere notice of taking the deposition is enough to require a party to attend, Rule 30, and no subpoena is needed. But these rules do not and cannot provide any means to compel a recalcitrant non-party witness who cannot be served within the state to attend the taking of a deposition. Many states, however, have statutes like Rule 28(b) making their subpoena power available to compel their residents to appear for depositions to be used in foreign actions.

Rule 28(b) is closely modeled on Ky.R.C.P. 28.03, and is substantially similar to Code of Ala., Tit. 7, § 464. It provides a procedure for compelling residents of Alabama to attend deposition hearings here for use in actions pending in other states and countries, of the same sort as the similar courtesy which many states extend where the testimony of their residents is needed for use in Alabama actions.

Committee Comments to Amendment to Rule 28 Effective September 1, 1987

Rule 28(a) is virtually identical to Rule 28(a), Federal Rules of Civil Procedure. It provides a broad class of persons before whom depositions may be taken for use in Alabama actions. This amendment revised slightly the wording of Rule 28(a) to more nearly parallel the wording of the Federal Rule.

As is indicated by that part of Rule 28(a) which authorizes taking a deposition before “an officer authorized to administer oaths by the laws ... of the place where the examination is held ...”, depositions for use in Alabama actions need not be taken within the state. They may be taken wherever the party noticing the taking of the depositions desires, subject to the power of the Court under Rule 26(c) to make a protective order barring taking of the deposition at the place indicated. But a subpoena to require the witness to attend the deposition will not run outside the state. See Rule 45(d). This is immaterial where it is the deposition of a party which is sought. The mere notice of taking the deposition is enough to require a party to attend, Rule 30, and no subpoena is needed. But these rules do not and cannot provide a recalcitrant non-party witness who cannot be served within the state to attend the taking of a deposition. Many states, however, have statutes like Rule 28(c) making their subpoena power available to compel their residents to appear for depositions to be used in foreign actions.

Rule 28(b) was added by the 1987 Amendment. This rule is modeled on Federal Rule 28(b) and was added to facilitate discovery in foreign countries to be used in this state, pursuant to these rules.

The taking of depositions in foreign countries which are signatories to the Hague Convention through letters rogatory or letters of request must conform to the provisions of the Hague Convention on The Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970. Appended to the Convention is a specific form for requesting international judicial assistance in taking evidence in a foreign country. See Note to 28 U.S.C. § 1781 (1982).

The necessity for complying precisely with the requirements of a treaty or convention to which the United States is a signatory is demonstrated by *Rivers v. Stihl, Inc.*, 434 So.2d 766 (Ala.1983), which held service of process under Rule 4.4(b)(1) insufficient where the provisions of the Hague Convention on The Service Abroad of Judicial and Extrajudicial Documents In Civil or Commercial Matters of November 15, 1965, were not precisely followed. For federal statutory authorization regarding letters rogatory, see 28 U.S.C. §§ 1781, 1782 (1982).

Rule 28(c), formerly Rule 28(b), closely follows Ky.R.C.P. 28.03, and is substantially similar to Code of Ala., Tit. 7, § 464 (1958). It provides a procedure for compelling residents of Alabama to attend deposition hearings here for use in actions pending in other states and countries of the same sort as the similar courtesy which many states extend where the testimony of their residents is needed for use in Alabama actions. The September 1, 1987, amendment changed the style of this provision from Rule 28(b) to Rule 28(c) and made nonsubstantive grammatical changes.

Rule 28(d) is identical to Federal Rule 28(c). The September 1, 1987, amendment changed the style of this provision from Rule 28(c) to Rule 28(d) and made nonsubstantive grammatical changes.

Rule 28(dc) was changed by the amendment of September 1, 1987, so far as was necessary in order to recognize the changes that had been made by that amendment in the remainder of Rule 28.

**Committee Comments to October 1, 1995,
Amendment to Rule 28**

The amendment is technical. No substantive change is intended.