

Defending Alien Smuggling Cases
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In criminal proceedings on alien smuggling offenses, a number of common issues may arise. This paper addresses three such issues: (1) governmental issues in the handling of defense witnesses; (2) federal procedure governing the conduct of foreign depositions; and (3) the use of deposition testimony.

I. GOVERNMENT MISCONDUCT

Whether characterized as the right to compulsory process or the more generic right to present a defense, any governmental interference with a defendant's right to present witnesses in his or her defense raises potential Sixth Amendment violations.

A. Deportation of Defense Witness

If the government deports a witness prior to affording defense counsel an opportunity to interview that witness, such an action may violate the Sixth Amendment's Compulsory Process Clause. This Clause guarantees a defendant's right "to have compulsory process for obtaining witnesses in his favor." A violation of this right is established only if the testimony of the missing witness is shown to be (1) favorable and (2) material. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). The mere act of deporting a witness will not in and of itself establish a violation. *Id.* at 872-73. Nor may the potential be cumulative of testimony offered through available witnesses. *Id.* at 873.

The standard for proving a violation is "some showing of materiality" or "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense." *Id.* The Court recommends this be accomplished through agreed facts or a statement of facts supporting the claim verified by oath or affirmation by the defendant or counsel. *Id.* The Fifth Circuit has interpreted this language as a demonstration of prejudice from the deportation of the witness. *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir. 2006). The Court, while declining to specify whether a defendant must also prove bad faith by government officials, holds that proof that the officials acted in good faith will defeat the claim. *Id.*

Sanctions are appropriate if there is a "reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Valenzuela-Bernal*, 458 U.S. at 874.

B. Threatening/Intimidation of Defense Witness

“Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant.” *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982). The Supreme Court has defined this right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Webb v. Texas, 409 U.S. 95, 98 (internal quotation marks omitted)(holding forceful court admonishment of defense witness on penalty for perjury resulting in refusal of witness to testify violated due process).

Substantial interference may arise in a case in the form of a prosecutor's notification of a witness that he or she will be prosecuted for an unrelated drug offense if testimony is provided at trial, *United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir. 1986)(citing as example of violation prosecutor's notification of defense witness that trial testimony may result in perjury and drug prosecution), threats from prison guards intimidating a defense witness, *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980), suggestion that testimony would result in conviction in witnesses' state criminal case, *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979), *on reh'g*, 605 F.2d 862 (5th Cir. 1979)(finding due process violation when FBI agent told defense witness he would have “nothing but trouble” in pending state case if he testified), or a plea agreement expressly providing that witness' testimony would render the agreement void, *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977)(finding substantial interference due to plea agreement that became void if witness presented testimony that tended to exonerate co-defendant). The aforementioned cases establish that government interference includes the court, the prosecutor, agents or guards.

If a case involves threats, the Fifth Circuit adopted a per se rule of reversal. “Threats against witnesses are intolerable. Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. . . . If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants.” *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980).

C. Remedies

The aforementioned cases involve post-judgment review, indicating that prejudice is not potential but actual and realized. Nevertheless, the decisions suggest a number of proactive responses.

Dismissal of a case may be sought as a remedy. This remedy is considered extreme and appropriate “where it has been shown that governmental misconduct or gross negligence in prosecuting the case has actually prejudiced the defendant.” *United States v. Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983). As a demonstration of prejudice is required to establish the violation, this remedy would be an option.

To the extent dismissal is not an alternative, and as will be discussed subsequently, a foreign deposition could be taken pursuant to Federal Rule of Criminal Procedure 15.

If the witness could return for trial but the issue is assertion of a witness’ Fifth Amendment rights, counsel could move for an in camera hearing specific to the witness’ testimony to determine if the privilege applies to the specific area for which the privilege is asserted. *Goodwin*, 625 F.2d at 701.

If ongoing harassment by law enforcement personnel of defense witnesses is reported, a motion could be filed with the court to enjoin future conduct.

Finally, as mentioned in *Whittington*, counsel could seek use immunity to eliminate Fifth Amendment concerns applicable to a particular witness, although it should be noted that the availability of use immunity has not been established.

D. Practice Pointers

1. Use Immunity

With regard to the issue of use immunity, such a request should be considered a remedy of last resort. It is well established in this Circuit that trial courts lack broad authority to grant judicial use immunity. *United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992). A grant of immunity may, however, issue to stem governmental abuse. *Id.* The seminal case addressing the availability of judicial use immunity in the Fifth Circuit is *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir.1982). In *Thevis*, the Court first noted the absence of statutory authority on which to grant immunity. *Id.* at 638-39. The Court then proceeded to analyze the Third Circuit Court of Appeals standard, which assessed the following considerations in determining the availability of judicial use immunity: (1) immunity properly was sought in the district court; (2) the witness is available to testify; (3) the testimony is both essential and clearly exculpatory; and (4) no strong governmental interests weigh against a grant of immunity. *Id.* at 639 n.24. Ultimately, the Court declined to sanction the authority of a trial court to “grant immunity to defense witnesses simply because that witness has essential exculpatory information unavailable from other sources.” *Id.* Stated otherwise, the Court rejected a rule that “where a witness has essential exculpatory evidence, a defendant is entitled to his immunized testimony by judicially conferred immunity unless outweighed by strong government interests.” *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983).

Recitation of the rejection of this rule appears in numerous decisions in this Circuit. *United States v. Chagra*, 669 F.2d 241, 258-61 (5th Cir. 1982)(discussing absence of authority under a variety of constitutional theories); *United States v. Heffington*, 682 F.2d 1075, 1081(5th Cir. 1982); *Mattheson v. King*, 751 F.2d 1432, 1443 (5th Cir. 1985); *United States v. Ramirez*, 996 F.2d 307, 307 (5th Cir. 1993); *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1995). It is important to note that the Court of Appeals “has not completely foreclosed the opportunity for a district court to grant use immunity.” *United States v. Woods*, 992 F.2d 324, 324 (5th Cir.1993)(unpublished decision). As such, a grant of judicial use immunity is available as necessary to stem governmental abuse that otherwise would detrimentally effect a defendant’s right to a fair trial.

2. Government Response to Request for Second Deposition for Deported Material Witness

In response to a motion to conduct a foreign deposition, counsel may see a response that the granting of such a motion would undermine the beneficial purpose of Local Rule 15B. Local Rule of Criminal Procedure 15B provides procedures for deposition and release of material witnesses in custody. In response to a motion to conduct a foreign deposition the Government responded that a subsequent deposition of a witness previously deposed pursuant to this provision would undo the beneficial purpose of this rule. Federal Rule of Criminal Procedure 15(a)(2) and 18 U.S.C. § 3144 provide for the release of any material witness provided the testimony can be adequately preserved by deposition. Under these provisions the witness need only make the request. The Local Rule (1) imposes specific requirements for those depositions and (2) obviates the need for a material witness to request a deposition prior to one being granted. No additional rights are given to material witnesses under the Local Rule that did not previously exist.

II. FOREIGN DEPOSITIONS OF WITNESSES

In general, counsel should note that foreign depositions in criminal cases, unlike their civil counterpart, are not considered discovery depositions but rather are mechanisms to preserve evidence.

Federal Rule of Criminal Procedure 15 is provided in its entirety at the conclusion of this paper. Rule 15(a)(1), governing motions to conduct depositions, provides “[t]he court may grant the motion because of exceptional circumstances and in the interest of justice.” The Eleventh Circuit adopted a test used to determine whether a court should grant a Rule 15 motion that should serve as a useful guide for such motions comprised of the following elements: (1) the witness is likely to be unavailable at trial; (2) injustice will otherwise result without the material testimony that the deposition could provide; and (3) countervailing factors would make the deposition unjust to the nonmoving party. *United States v. Ramos*, 45 F.3d 1519, 1522-23 (11th Cir. 1995). While no court has limited “exceptional circumstances” to unavailability, the Fifth Circuit has suggested materiality of testimony and unavailability of witnesses as grounds for

granting such motions. See *United States v. Dillman*, 15 F.3d 384, 388 (5th Cir. 1994); *United States v. Farfan-Carreon*, 935 F.2d 678, 680 (5th Cir.1991).

Rule 15 does not set a deadline for filing deposition requests, but counsel should file the request as soon as the need is apparent. *Farfan-Carreon*, addressing a motion filed on the day of trial in which timeliness was not an issue, makes clear that court is well within its rights to reject such a motion as untimely even when exceptional circumstances would otherwise justify a court's granting the motion.

Rule 15(b) governs notice of depositions, providing specific details required including the deposition date and location and the name and address of each deponent. The notice must be in writing and served a reasonable time before the conduct of the deposition. It is recommended counsel simply adopt the general notice of deposition format used in civil cases.

A defendant has a right to be present at a deposition, but that right is without limitation. Rule 15(c) addresses that concern, with specific provisions addressed to a defendant in custody and not in custody.

Rule 15(e) indicates that, unless modified by court rule or order, a deposition will be taken in the same manner as a civil deposition. This consideration is likely the most time intensive aspect of foreign depositions as it will either require liaison with a United States embassy or foreign courts.

Federal Rule of Civil Procedure 28(b) delineates the relevant procedures for the taking of a foreign deposition. Rule 28(b) prescribes 4 measures to conduct a foreign deposition:

- (1) through an applicable treaty or convention;
- (2) through a letter of request, sometimes referred to as a "letter rogatory";
- (3) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or
- (4) before a person commissioned by the court to administer any necessary oath and take testimony.

The first two possibilities refer to procedures seeking the cooperation of the foreign government in which the deposition is to be taken. The latter two possibilities refer to the use of United States officials and facilities in the foreign country, specifically a United States embassy.

Discussion of treaties is beyond the scope of this brief review. As a matter of experience, it is recommended counsel touch base with the local embassy and attempt to arrange foreign depositions using United States officials if possible. The Secretary of State has a Web page, http://travel.state.gov/law/law_1734.html, detailing contact information, treaty information and assistance information that should prove invaluable in arranging foreign depositions. If counsel is required to resort to requests for assistance to a foreign government, assume the logistics of

arranging the deposition will become significantly more complex.

Counsel attempting to arrange a foreign deposition should consider consulting Linda F. Ramirez, *Federal Law Issues in Obtaining Evidence Abroad, Champion* (June 2007)(available at <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/e2680a3811a075e385257321005f04f5?OpenDocument&Highlight=0,forensic,forensics,evidence>), and Part 2 of that article published the second month. In her articles, Ms. Ramirez provides a more detailed review of foreign deposition considerations.

There are other civil rules applicable to the conduct of the foreign deposition, albeit rules of lesser importance than Rule 28. Federal Rules of Civil Procedure 30, providing procedures in the conduct of a deposition, should be followed as limited by Federal Rule of Criminal Procedure 15(e). While other civil rules, for example Rule 26 governing discovery and protective orders, and civil subpoena rules have conceivable application to a Rule 15 deposition, the requirements of Rule 15 make the need for these civil rules less apparent.

Practice Pointers

The taking of foreign depositions should not be considered a trivial procedure. As an alternative, consider bringing the witness to the United States. One option would be the Visa Waiver Program applicable to certain member countries (http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/vwp.xml). A past option has been the Special Interest Parole. *See United States v. Theresius Filippi*, 918 F.2d 244, 247 Cir. 1990) (failure of Government to request special interest parole violation of the Sixth Amendment right to compulsory process and, derivatively, the right to due process protected by the Fifth Amendment).

The Government will know certain details of the witness by virtue of Rule 15 procedures, thus much of the element of surprise will be lost. The use of procedures undertaken to bring the witness to the United States, assuming the witness does not have unresolved criminal issues pending, involves the Government in facilitating the testimony and bolsters the credibility of a Rule 15 requests if the Government refuses to assist or obstructs attempts to bring the witness for purposes of live testimony.

III. USE OF DEPOSITIONS OF GOVERNMENT WITNESSES WHO HAVE NOT BEEN PROVEN TO BE UNAVAILABLE FOR TRIAL

Rule 15 has been the subject of some confusion in the use of deposition testimony at trial. In previous versions of Rule 15, specific uses of the deposition were explicitly provided. The current version of Rule 15, Rule 15(f) provides only "A party may use all or part of a deposition as provided by the Federal Rules of Evidence." As such, the admissibility of deposition testimony is purely an evidentiary question and should not otherwise be viewed as an exceptional evidentiary issue. There is one caveat to this rule, Rule 15(g), which provides "A party objecting

to deposition testimony or evidence must state the grounds for the objection *during the deposition.*” It is anticipated the parties will conduct a complete examination, and the natural import of Rule 15(g) is a failure to object at the time of questioning bars subsequent objections to the recorded testimony at trial.

From the basic premise that Rule 15, with the one exception described above, has no bearing on the admissibility of the testimony contained in a written document or recording of the transcript at trial, counsel may resort to any evidentiary objection available traditionally for prior testimony. Even an ominous provision like 8 U.S.C. § 1324(d), providing

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

must be read “in conjunction with other rules governing the admission of deposition testimony in a criminal proceeding.” *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002). The Fifth Circuit has interpreted this provision as invoking Federal Rule of Evidence 804's definition of unavailability, and otherwise requiring government compliance with Confrontation Clause requirements. *Id.*

As a matter of unavailability, whether for purposes of Rule 15 or Federal Rule of Evidence 804, it is worth recounting the definition of unavailability set forth in Rule of Evidence 804(a). A witness is “unavailable” when he or she

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

The aforementioned circumstances should be considered a general guidepost for unavailability and not an exhaustive list. The burden for establishing unavailability falls on the proponent of the evidence, requiring a preliminary fact-finding by the court. If the Government offers the

deposition testimony as evidence at trial, it must “produce, or *demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant.” *United States v. Martinez-Perez*, 916 F.2d 1020, 1023 (5th Cir. 1990)(emphasis added); *see also Crawford v. Washington*, 541 U.S. 36, 57 (2004)(noting in case summary “we excluded the [prior] testimony where the government had not established unavailability of the witness”). Most recently, in *United States v. Tirado-Tirado*, No. 07-50670, 2009 WL 711921 (5th Cir. 3-19-2009) the Court found the government failed to show the material witness was unavailable for trial and the trial court erred in allowing the videotaped deposition over Defendant’s objection.

Rule 804(a) expressly excludes from its definition of unavailable a witness whose “exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” In the absence of evidence of wrongdoing, the lengths to which the Government must go to produce a witness at trial “is a question of reasonableness.” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.” *Id.*

The relevant Rules of Evidence for admitting deposition testimony are Rule 804(b)(1), providing for the admission of hearsay testimony if the declarant is unavailable, and Rule 801(d)(1), characterizing as non-hearsay prior statements of a testifying witnesses if (1) inconsistent with the declarant’s testimony and given in the course of a deposition, (2) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (3) one of identification of a person made after perceiving the person.

In considering potential uses of hearsay testimony in the form of a deposition transcript, one should consider the definition of hearsay provided in Rule 801(c), “a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*,” and consider Government attempts to admit such testimony for a purpose other than the truth of the matter asserted. *See United States v. Holmes*, 406 F.3d 337, 349 (5th Cir. 2005)(analyzing civil deposition offered by government under *Crawford v. Washington*, 541 U.S. 36 (2004), and alluding to this concern).

Relevant Statutes and Rules

Federal Rule of Criminal Procedure 15. Depositions

(a) When Taken.

(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) Detained Material Witness. A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) Notice.

(1) In General. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) To the Custodial Officer. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) Defendant's Presence.

(1) Defendant in Custody. The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant Not in Custody. A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant--absent good cause--waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(d) Expenses. If the deposition was requested by the government, the court may--or if the defendant is unable to bear the deposition expenses, the court must--order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) Manner of Taking. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) Use as Evidence. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) Objections. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) Depositions by Agreement Permitted. The parties may by agreement take and use a deposition with the court's consent.

Proposed Amendment to Rule 15

Rule 15. Depositions

(c) Defendant's Presence.

(1) Defendant in Custody. The officer who has custody of the defendant must produce the defendant at the deposition in the United States and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant Not in Custody. A defendant who is not in custody has the right upon request to be present at the deposition in the United States, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant - absent good cause- waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) Taking Depositions Outside the United States

Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all of the following:

(A) the witness's testimony could provide substantial proof of a material fact.

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained,

(C) the witness's presence for a deposition in the United States cannot be obtained,

(D) the defendant cannot be present for one of the following reasons:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location, or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing, and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses - government and defense witnesses both - live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. *New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before*

permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g., United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir.1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof-- by a preponderance of the evidence - as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means. Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

It is not the intent of the Committee to create any new rights by enactment of this rule, which establishes procedures to procure testimony from foreign witnesses who may be located beyond the reach of federal subpoena power. The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

Federal Rule of Civil Procedure 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer". The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a “letter rogatory”;

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed “To the Appropriate Authority in [name of country].” A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request--Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.