

7 FAM 900 JUDICIAL ASSISTANCE ABROAD

7 FAM 910 CONSULAR JUDICIAL SERVICES

7 FAM 911 CONSULAR ROLE

(TL:CON-60; 6-17-94)

a. *Due to the growth in international trade, travel, cultural exchange, and crime, the demand for and complexity of consular judicial assistance continues to grow and affect significantly a broad range of U.S. policies and interests, including narcotics intervention, prosecution of terrorists, child abduction, and international banking.*

b. Judicial assistance is one of the many consular functions that demand rapid action and close attention to detail. Such action may be related to litigation, investigation, evidence gathering, and legal discovery on behalf of parties in the United States and in the host country. It may also involve such matters as reporting on travel to and from the United States by U.S. and host country personnel in pursuit of a legal action to be resolved in the United States or the host country.

c. Often a consular officer is called upon to provide information on the local availability of attorneys, translators, and other specialists who are needed by parties to an international legal matter.

d. When providing judicial assistance abroad, a consular officer must observe American and host country legal *procedures and sensitivities in rendering such assistance. When in doubt about how to perform unfamiliar judicial functions not described in this in this chapter, consult the Department (CA/OCS).*

7 FAM 912 AUTHORITY TO PERFORM JUDICIAL SERVICES

7 FAM 912.1 Depositions

(TL:CON-60; 6-17-94)

a. Federal Authority

Federal authority for consular officers to take depositions is contained in the following:

(1) 22 U.S.C., sections 4215 (notarial acts, oaths, affirmations, affidavits, and depositions; fees) and 4221 (depositions and notarial acts; perjury).

(2) Rules 28-31, Federal Rules of Civil Procedure (F.R. Civ. P., Rule 28(b)), expressly provide that depositions may be taken in foreign countries by any of the following methods: on notice, by commission, or pursuant to letters rogatory.

(3) Rules 15 and 17, Federal Rules of Criminal Procedure (F.R. Crim. P.).

b. State Authority

State laws pertaining to the role of consular officers in taking depositions for state court proceedings can be found in the Law Digest volumes of the Martindale-Hubbell Law Directory [see Appendix D].

c. Restrictions

(1) Procedures for obtaining evidence by deposition abroad may vary in civil, criminal, and administrative cases. Many countries do not permit pre-trial discovery of documents. Some countries, for example, Switzerland, prohibit the taking of voluntary depositions. In order to avoid violating principles of judicial sovereignty, evidence obtained abroad must not be gathered in contradiction of the laws of foreign jurisdiction.

(2) In cases where a deposition abroad is to be taken before a U.S. consular officer on notice or pursuant to a Commission [see sections 7 FAM 917 and 7 FAM 918], reasonable written advance notice must be given by the requesting authority to the deponent and opposing counsel as well as to the consular officer concerned.

7 FAM 912.2 Service of Process on Persons in Foreign Countries

(TL:CON-60; 6-17-94)

a. Federal authority pertaining to the service of civil process abroad is found in:

(1) 28 U.S.C. 1783 (subpoenas of persons in foreign countries); and

(2) 28 U.S.C. 1784 (contempt) [see section 7 FAM 964].

b. Information about service of process upon the U.S. Government, any of its agencies, or any of its employees may be found in 28 U.S.C. 1346 and 28 U.S.C. 2671-2680 (Tort Claims). Service of process in U.S. Federal or State litigation involving official activities of the Department of State or its employees must be made in accordance with 22 CFR, Part 172. These provide that only L/EX is authorized to accept service of process. If service is attempted upon the post, its officers or employees, in suits

brought either in U.S. or foreign courts, report the matter immediately by telegram to L/SFP. See also instructions in 1 FAM 745 and sections 2 FAM 226 , 2 FAM 230 , 2 FAM 250 , 2 FAM 283 , 2 FAM 512 , and 2 FAM 513 , as well as sections 7 FAM 991 and 7 FAM 992 .

7 FAM 912.3 Service of Process Upon Foreign State

(TL:CON-60; 6-17-94)

Pertinent Federal authority relating to service of process upon foreign states or political subdivisions thereof is located in 28 U.S.C. 1330, 1602-1611, and in 22 CFR, Part 93.

7 FAM 912.4 Privacy Act

(TL:CON-60; 6-17-94)

The Privacy Act of 1974, 5 U.S.C 552a, places certain restrictions on the release of personal information about U.S. citizens or U.S. resident aliens to other parties. When considering the release of information to foreign law enforcement officials, consular officers should comply with appropriate provisions of the Privacy Act. See 22 CFR 171.30ff., Chapter 5 of the Publication on Consular Management, and section 5 FAM 480 . For additional guidance, consult the Department (CA/OCS) as appropriate.

7 FAM 912.5 International Conventions

(TL:CON-60; 6-17-94)

a. The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters *provides for the taking of depositions in countries that are parties thereto.* This convention came into force for the United States on October 7, 1972. The official sources/citations for the Convention are 23 UST 2555; TIAS 7444; Martindale-Hubbell Law Directory, Law Digest volume, Selected International Conventions; Vol. 8, International Legal Materials 37 (1969), and 28 U.S.C.A. 1781 [see Appendix D].

b. *See 7 FAM 912 Exhibit 912.5b for the Convention text and a model for letters of requests to use when applicable. See also section 7 FAM 934.1 .*

c. Also applicable to the taking of depositions by consular officers is the Vienna Convention on Consular Relations, Article 5, Paragraphs (f), (i), and (j) [see 7 FAM 912 Exhibit 912.5c].

7 FAM 912.6 Selected Bilateral Agreements

(TL:CON-60; 6-17-94)

Selected bilateral agreements provide special arrangements for taking depositions. These agreements normally take the form of an exchange of diplomatic notes. Such agreements are in force, for example, between the United States and the Federal Republic of Germany (FRG), and between the United States *and each of the twelve successor states of the former USSR, that remain bound by an agreement done between the United States and the USSR.*

7 FAM 912.7 Other International Agreement

Article 7 of the 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, Vienna, December 20, 1988, permits evidence to be obtained from the countries party to it without the need for letters rogatory.

7 FAM 912.8 Mutual Legal Assistance Treaties

(TL:CON-60; 6-17-94)

As of January 1, 1994, Mutual Legal Assistance Treaties relating to legal assistance in criminal matters ("MLATS"), are in force between the United States and a number of other countries (Argentina, the Bahamas, Canada, Italy, Mexico, The Netherlands, Spain, Switzerland, Thailand, Turkey and the United Kingdom) (concerning the Cayman Islands, Anguilla, British Virgin Islands, Monserrat, and Turks and Caicos Islands). These treaties provide for direct communication between the Ministry of Justice of the foreign state and the U.S. Department of Justice. Consular officers may be called on to assist U.S. prosecutors in making arrangements for obtaining evidence under such agreements. This assistance usually takes the form of arranging appointments, providing office space, administering oaths, and so forth. MLAT negotiations are in progress with Belgium, Colombia, Jamaica, Nigeria, Panama and Uruguay.

7 FAM 912.9 Where No Applicable Treaty Exists

(TL:CON-60; 6-17-94)

In countries where the right to take depositions is not secured by treaty, consular officers may take depositions only if the laws or authorities of the receiving state do not prohibit them from doing so. For example, consular officers may not take depositions in Switzerland, even if the witness is willing to be deposed.

7 FAM 913 DEFINITIONS

(TL:CON-60; 6-17-94)

These terms are commonly used in judicial assistance:

a. "Action": *A law suit or other proceeding pending before a court or a quasi-judicial body or a body acting in such a capacity.*

b. "Affidavit": *A written statement made voluntarily and confirmed either by (1) the oath or affirmation of the party making it, taken before an officer having the authority to administer such oaths [see 22 CFR 92.22], or (2) by conforming to the rules of a particular court for signing an affidavit without the use of a notary or equivalent (e.g., declaring a statement to be true under penalty of perjury; see section 7 FAM 913 f.).*

c. "Affirmation": *A solemn and formal declaration that an affidavit is true or that the witness will tell the truth; this declaration may usually be substituted for an oath in proceedings in U.S. courts [see 22 CFR 92.18(b)].*

d. "Commission": *A written authorization issued by a court of justice or a quasi-judicial body, or by a body acting in such a capacity, giving power to take the testimony of witnesses who cannot appear personally to be examined in the court or before the body issuing the commission [see 22 CFR 92.53].*

e. "Counsel" or "legal counsel" means *a person licensed or otherwise authorized to practice law in a particular jurisdiction, by handling the trial or management of a case in court and/or advising and representing an individual or corporate client in legal matters.*

f. "Declaration under penalty of perjury": *A simple declaration used instead of a notarized oath or affirmation which, when permitted, eliminates the need for an oath before the consular officer [see section 7 FAM 831].*

g. "Default judgment": *A judgment rendered in consequence of the nonappearance of the defendant or for failure to take some required step to defend against the charges or claim in a specific action.*

h. "Deposition": *The testimony of a person, whether a party or not (often referred to as a deponent), given under oath or affirmation before a designated or appointed individual other than the judge, jury, or other body that will adjudicate the claim, in response to questions, oral or written, by a party to the litigation, and recorded for later use. A deposition is usually recorded in writing but is sometimes videotaped or tape recorded, where not prohibited by host country law [see 22 CFR 92.49].*

i. “Discovery”: *Pretrial procedures that can be used by one party to obtain facts and information about the case from the other party or from third parties in order to assist the party’s preparation for trial.*

j. “Disinterested party”: *A person with no stake in the outcome of the action for which the testimony is sought, and unconnected with the parties or witnesses.*

k. “Interrogatories”, *in broad usage, mean, questions posed to a person or entity. Normally, in connection with litigation, the term means written questions given to one party to an action by another party that require response in writing under oath.* “Cross-interrogatories” are questions posed by the opposing party or the attorney of the opposing party.

l. “Letter rogatory”: *A formal request for judicial assistance from a court in one country to a court in another country [see 22 CFR 92.54].*

m. “Notice”: *A written declaration by a party to a lawsuit to the opposing party of intent to take some action in connection with the litigation, such as a notice to take a deposition [see 22 CFR 92.52].*

n. “Oath”: *Broadly, any form of attestation by which persons signify that they are bound in conscience to perform an act faithfully and truthfully [see 22 CFR 92.18 (a)]. With respect to testimony and statements in connection with litigation, it is an affirmation of the truth of a statement that renders one punishable for perjury if one willfully makes untrue statements.*

o. “Order to show cause”: *A court order to present reasons why a person who failed to comply with a prior court directive should not be held in contempt of that court, and/or why an earlier directive should not be confirmed or take effect.*

p. “Party”: *For purposes of this chapter, one who is engaged in a legal proceeding: a plaintiff or defendant in a law suit, or the counsel of record. A party may be an individual or an organization.*

q. “Service of process”: *The delivery or legal equivalent of delivery of a complaint, summons, or subpoena, upon a person or entity with the result that the person must respond. Service of process frequently refers to the legal effective delivery of the complaint and summons, commencing a lawsuit to the defendant.*

r. “Subpoena”: *A written command issued under the authority of a court, requiring the attendance of a person or the production of specified documents before the court or grand jury, with potential penalties for failure to comply.*

s. “Summons”: *A document by which a party is summoned to answer a complaint filed with a court.*

t. "Testimony": *The oral statements of a witness under oath or affirmation, usually in court proceedings.*

u. "Tort claim": *A claim of one person against another person alleging an injury, offense, or wrongful act, not including breach of contract, for which the claimant is entitled to compensation.*

7 FAM 914 ASSISTANCE TO U.S. STATE AND LOCAL GOVERNMENT AGENCIES

(TL:CON-60; 6-17-94)

Consular officers should provide assistance to U.S., State, and local government agencies in judicial assistance matters, *bearing in mind the need to observe host country legal procedures and sensitivities, as well as any limitations prescribed by U.S. law or policy. Child custody cases, for example, generate numerous requests for legal assistance from parents as well as authorities in the United States. Guidance in child custody disputes will be contained in the future Chapter 7 FAM 1700 . If the consular officer has doubts about a request for legal assistance, refer the matter to the Department (CA/OCS).*

7 FAM 915 PROCTORING EXAMINATIONS

(TL:CON-60; 6-17-94)

Consular officers may occasionally be requested to proctor examinations for agencies or instrumentalities of the Federal Government of the United States. *Any such request received from an agency or instrumentality of the Federal Government or from private organizations should be reported to Department (CA/OCS) for guidance.*

7 FAM 916 RESTRICTIONS ON VISITS OF FOREIGN GOVERNMENT OFFICIALS

(TL:CON-60; 6-17-94)

a. *Pursuant to 18 U.S.C. 951, persons who act as agents of foreign governments are required to notify the Attorney General whenever they travel to the United States. Upon learning of the travel plans of such agents, consular officers should advise the officials concerned how to effect notification. Should the travel of an agent of a foreign government to the United States raise questions of significant political or legal ramifications, consult the Department (CA/OCS). Failure of agents of foreign governments to notify the Attorney General may violate 18 U.S.C. 951, and may result in fines and/or imprisonment, or both.*

b. *It is the responsibility of individuals covered by 18 U.S.C. 951 to ensure their compliance with the statute. Consular officers have no statutory responsibility under 18 U.S.C. 951, hence the providing of information as described above may be limited to those agents of foreign governments who travel to the United States while engaged in judicial investigations pursuant to treaties or other mutual assistance requests, or engaged in law enforcement investigations or regulatory agency activity.*

c. *Agents engaged in judicial activity shall provide notification in the form of a letter, telex, or FAX, addressed to the Attorney General, and directed to The Office of International Affairs, Criminal Division, Department of Justice, 1400 New York Ave. N.W. Washington, D.C. 20530, FAX: (202) 514-0080.*

d. *Notification made by agents engaged in law enforcement investigations shall be made to the Attorney General in a similar manner and directed to the attention of INTERPOL, United States National Central Bureau, Department of Justice, Washington, D.C. 20520, FAX: (202) 272-5941.*

e. *See 28 CFR 73 and section 7 FAM 944 of this chapter.*

7 FAM 917 DEPOSITIONS ON NOTICE

(TL:CON-60; 6-17-94)

a. *A deposition on notice is a deposition scheduled as the result of one party giving notice to the other of intent to take a deposition [see 22 CFR 92.52].*

b. *According to Rule 30, F. R. Civ. P., the notice shall be given in writing, stating the time and place for taking the deposition and the name and address of each person to be examined, if known. If a name is not known, the notice must contain a general description sufficient to identify the person or the particular class or group to which that person belongs (for example, "Custodian of records of Jones Mfg. Inc.").*

c. *A notice of deposition may be either a formal-looking document containing the case caption and title, e. g., Notice of Intent to Take Deposition, or a less formal letter. A copy of the notice from one attorney to the other constitutes notice for the purpose of the consular officer's taking of a deposition. Notification by telex, telegram, facsimile, or other writing can also constitute notice.*

7 FAM 918 DEPOSITIONS PURSUANT TO A COMMISSION

(TL:CON-60; 6-17-94)

a. A commission to take depositions is a written authority issued by a U.S. court for purposes of a deposition in a foreign country. Such a commission empowers *a person* to administer any necessary oath and to take the testimony of the *deponent* [see 7 FAM 918 Exhibit 918a].

b. A commission or notice should, if possible, identify the officer who is to take the deposition by official title only, in the following manner:

Any Consul or Vice-Consul of the United States of America at (name of city).

c. When the officer is designated by name as well as by title, only the officer so designated may take the deposition. In either case, the officer must be a disinterested party as prescribed in Rule 28 (c), F.R. Civ P. [see section 7 FAM 913 *for a definition of disinterested party*].

7 FAM 919 UNASSIGNED

7 FAM 912 Exhibit 912.5b

(TL:CON-60; 6-17-94)

THE 1970 HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

III

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions -

CHAPTER I - LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify -

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia -

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into the language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this

declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence -

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or at the instance of the requested authority has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that -

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature. Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so.

When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II - TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence without compulsion of nationals of the State in which he exercises his functions or of a third State in aid of proceedings commenced in the courts of a State which he represents, if -

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16, or 17, may apply to the competent authority designated by the declaring state for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Article 15, 16, or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, inter alia, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16, or 17 to take evidence -

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III - GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A contracting State may designate other authorities in additions to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority. Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from -

- (a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
- (b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
- (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from -

- (a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- (b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following -

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16, and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23, and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law. It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands. The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Section 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following -

(a) the signatures and ratifications referred to in article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on theday of....., 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

ANNEX I
MODEL FOR LETTERS OF REQUEST RECOMMENDED FOR
USE IN APPLYING THE HAGUE CONVENTION OF
18 MARCH 1970 ON THE TAKING OF EVIDENCE
ABROAD IN CIVIL OR COMMERCIAL MATTERS

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT
TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE
TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of other languages.

In order to avoid confusion, please spell out the name of the month in each date.

I (Items to be included in all Letters of Request.)

- 1 Sender _____(identity and address)____

- 2 Central Authority of the Requested State _____(identity and address)____

- 3 Person to whom the executed request is to be returned _____(identity and address)____

II (Items to be included in all Letters of Request.)

4 In conformity with article 3 of the Convention, the undersigned applicant has the honor to submit the following request:

- 5 a Requesting judicial authority _____(identity and address)____
(article 3, a) _____

- b To the competent authority of _____(the requested State)____
(article 3, a) _____

6 Names and addresses of the parties and their representatives
(article 3, b)

a Plaintiff

b Defendant

c Other parties

7 Nature and purpose of the proceedings and summary of the facts
(article 3, c)

8 Evidence to be obtained or other judicial act to be performed
(article 3, d)

III *(Items to be completed where applicable.)*

9 Identity and address of any person to be examined
(article 3, e)

10 Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined
(article 3, f)

____ *(or see attached list)* ____

11 Documents or other property to be inspected
produc-
(article 3, g)

____(specify whether it is to
ed copied, valued, etc.)____

12 Any requirement that the evidence be given on oath or affirmation and any special form to be used
(article 3, h)

____(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)____

- 13 Special methods or procedure to be followed
(articles 3, i and 9) _____

- 14 Request for notification of the time and place for
the execution of the Request and identity and address
of any person to be notified (article 7) _____

- 15 Request for attendance or participation of judicial
personnel of the requesting authority at the execution
of the Letter of Request
(article 8) _____

- 16 Specification of privilege or duty to refuse to give
evidence under the law of the State of origin
(article 11, b) _____

- 17 The fees and costs incurred which are reimbursable
under the second paragraph of article 14
or under article 26 of the Convention
will be borne by _____ *(identity and address)* _____

- IV *(Items to be included in all Letters of Request.)*
- 18 Date of request _____
- 19 Signature and seal of
the requesting authority _____

7 FAM 912 Exhibit 912.5c

(TL:CON-60; 6-17-94)

EXCERPT, VIENNA CONVENTION ON CONSULAR RELATIONS

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 6820

(Reprint of English text only)

VIENNA CONVENTION ON CONSULAR RELATIONS AND OPTIONAL PROTOCOL ON DISPUTES

Between the UNITED STATES OF AMERICA AND
OTHER GOVERNMENTS

Done at Vienna April 24, 1963



MULTILATERAL

Vienna Convention on Consular Relations and
Optional Protocol on Disputes

Done at Vienna April 24, 1963;

Ratification advised by the Senate of the United States of
America, October 22, 1969;

Ratified by the President of the United States of America
November 12, 1969;

Ratification of the United States of America deposited with
the Secretary-General of the United Nations
November 24, 1969;

Proclaimed by the President of the United States of America
January 29, 1970;

Entered into force with respect to the United States of
America, December 24, 1969.

(1)

TIAS 6820

VIENNA CONVENTION ON CONSULAR RELATIONS

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations (1) concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961, (2)

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

¹ TS 993; 59 Stat. 1031.

² 500 UNTS 95.

Article 3
Exercise of consular function

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4
Establishment of a consular post

1. A consular post may be established in the territory of the receiving State only with that State's consent.
2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.
3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.
4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.
5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 5
Consular functions

Consular functions consist in:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
- (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
- (l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 6

Exercise of consular functions outside the consular district

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7

Exercise of consular functions in a third State

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8

Exercise of consular functions on behalf of a third State

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

7 FAM 918 Exhibit 918a

(TL:CON-60; 6-17-94)

SAMPLE OF A COMMISSION TO TAKE A DEPOSITION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	92-CIV-115
)	
v.)	COMMISSION TO ANY CONSUL
)	OR VICE CONSUL OF THE
MAXWELL Z. ALLENBY et al.,)	UNITED STATES ASSIGNED TO
)	LONDON, UNITED KINGDOM
)	
Defendants)	

You have been duly appointed and are hereby authorized to cause *Walter Nelson Sorrentino* to come before you and then and there to examine *Walter Nelson Sorrentino* as a witness in the above entitled action pending in this court, under oath (or affirmation) upon the interrogatories and cross-interrogatories annexed to this commission (or orally); to reduce his testimony to writing and to make such books, papers, or other articles that said witness may produce and identify as Plaintiff's Exhibits or the Defendant's Exhibits in the manner indicated in the interrogatories or cross-interrogatories (or on oral examination), to close the deposition under your signature and seal and to endorse upon the envelope the title of this action, and to state on the envelope that it contains the deposition of said witness.

When the commission is executed in accordance with the directions attached, the commission and the deposition are to be returned to the Clerk of this court with all speed.

WITNESS the Honorable *Herbert I. Chesterton*, Judge of said court, the fifteenth day of July, 1993.

Charlotte Prince Kempelman,

Clerk

(Seal)

By: _____

Raymond A. Granger,

Deputy Clerk.

7 FAM 920 OBTAINING TESTIMONY BY DEPOSITION

7 FAM 921 PROCEDURES FOR ORAL EXAMINATION OF WITNESSES

(TL:CON-60; 6-17-94)

a. *Procedures for oral and written depositions are similar [see 7 FAM 921 Exhibit 921a for guidelines for taking depositions at post]. Written depositions are those where counsel are not present, but have provided questions in writing which are posed by the consular officer and answered orally by the deponent. Oral depositions are those where counsel are present and pose the questions themselves. They are preferred because counsel can adjust questions in light of the deponent's answers. If attorneys agree, the consular officer may withdraw after the necessary oaths are taken.*

b. A deposition should be scheduled for a date and time mutually agreeable to the consular officer, counsel, and witness(es).

c. *While the duties of a consular officer include contacting the witness(es) and acting as, or retaining, an interpreter/translator and stenographer, resource constraints generally require that requesting counsel arrange for the presence or appearance of the witness, stenographer, and interpreter at the consular section for the taking of the deposition. Consular officers assist only as necessary.*

d. If requesting counsel, citing 22 CFR 92.56, asks the consular officer to make all such arrangements, point out that the consular officer has other statutory *duties* that must take *precedence*. In addition, the consular officer is responsible for emergency services. Consequently, arrangements for the logistics of a deposition may take the consular officer more time than they would requesting counsel.

e. The consular officer administers the oaths to the witness(es), the stenographer and, if present, the interpreter *or translator*. After the oaths have been taken, the consular officer must ensure that *any withdrawal or objection is recorded, noting the agreement of the attorneys and whether the officer was subject to recall*. The names of all persons present should also be *included* in the record.

f. The consular officer must ensure that the stenographer is instructed by the parties' counsel to transcribe the proceedings *verbatim* and to give the transcript to the witnesses for correction and signature. Counsel can waive this requirement by mutual consent in certain cases.

g. When the transcript has been made, the stenographer must execute before the consular officer an affidavit certifying that the record in the matter is a true and accurate transcription from notes made by the stenographer [see sample Certification of True Copy, 7 FAM 837 Exhibit 837.1]. This affidavit must give the date on which the notes were taken and indicate whether the transcribed testimony was given to the witnesses for correction and, if so, whether any changes were made and in what manner. It must be attached to the testimony.

h. The consular officer must also prepare a certification indicating that the witnesses (listed by name) were duly sworn by the consular officer and that, in accordance with an agreement of the parties, the officer withdrew, subject to recall, as reflected in the attached notice of commission. This certification must also refer to the stenographer's affidavit of accuracy [see section 7 FAM 925.1 e].

i. Consular officers must charge the current fees for administering each oath, for handling and returning the deposition, and for performing any other services for which fees are customarily charged [see *Schedule of Fees*, 22 CFR 22.1]. Do not charge the deposition fee unless the officer was recalled periodically during the taking of the deposition. *Bear in mind that:*

(1) A minimum deposit of \$410.00 must be paid to the Embassy or Consulate before a deposition can be scheduled. If the consular officer believes the fees will far exceed the minimum deposit, a larger deposit should be requested. The fee should be in the form of a certified check or money order payable to the post concerned. It is used to cover consular officer and staff time in scheduling the deposition, and is not refundable if the deposition is canceled. If rescheduled, another deposit should be collected. Submit the deposit to the post's class B cashier for placement in a post SDA (Suspense Deposit Abroad 19x6809) account, to be drawn upon for deposition fees as required.

(2) Payment in full should be received prior to the departure of the attorneys. Exception: if large sums of money are necessary, a written acknowledgment for the debt should be executed by the requesting counsel in the form of an affidavit.

*(3) If depositions are taken outside consular premises at some distance, charge appropriate fees for consular transportation costs [see *Schedule of Fees*, 22 CFR 22.1, item 94].*

j. The consular officer, as a rule, may not serve as interpreter or translator. *While* 22 CFR 92.56 states that consular officers may act as interpreters/translators, few officers are fluent enough in technical aspects of languages to do so. When necessary and practicable, the officer may see to it that a qualified interpreter is engaged. Counsel must agree about the fees appropriate for such private persons and *should pay for the services*. If a U.S. Government agency requests retention of such services, *it should furnish* a Federal appropriation number and fund code.

k. *If no qualified interpreter or translator is available in the host country, the witness being deposed must have the questions posed and the responses translated by a competent person engaged outside the host country by the requesting counsel. In the case of written interrogatories, the questions must always be submitted both in English and in translation in the native language of the deponent. The deponent(s) may record responses in writing in their native language. Funds for translating the questions and the deponent's responses into English must be provided by the requesting party.*

l. Requesting parties often bring a stenographer from the United States in oral deposition proceedings. In the case of written interrogatories, if no stenographer is available locally, the witnesses may write out their own responses. If appropriate, a Foreign Service national employee or Foreign Service secretary may act as stenographer, charging fees set forth in 22 CFR 22.1, Schedule of Fees, item 69(b).

m. *The consular officer should administer oaths with the appropriate solemnity.*

(1) Oath for Witnesses:

Do you solemnly swear (or affirm) that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several *questions* now to be put to you?

(2) Oath for Stenographer:

Do you solemnly swear (or affirm) that you *know the English and (name of appropriate language) languages and that you will truly and impartially reduce to writing or (take down notes and faithfully transcribe) the questions to be asked of the witness and the testimony of (witness' name), a witness now to be examined?*

(3) Oath for Interpreter or Translator:

Do you solemnly swear (or affirm) that you know the English and (name of) languages and that you will truly and impartially interpret (or translate) the oath to be administered and *questions* to be asked of (name of witness), a witness, now to be examined, out of the English into the (name of) language, and that you will truly and impartially interpret (or translate) the answers of (name of witness) out of the (name of) language, into the English language?

n. Counsel for the party requesting an oral deposition has the right to conduct a direct examination of the witness without interruption, except in the form of objection by the opposing counsel. The opposing counsel has the same right on cross-examination. Cross-examination may be followed by re-direct and re-cross-examination until the interrogation is completed.

o. The consular officer should try to restrain counsel from indulging in *lengthy conversations among themselves*, *digressions from the principal line of argument*, or *asides*, and attempts to mislead the witness. Some witnesses may wish to be accompanied by an attorney to protect their interests.

p. The consular officer has no authority to sustain or overrule objections but should *ensure that they are recorded, as provided in section 7 FAM 922*.

7 FAM 922 PROCEDURES FOR WRITTEN EXAMINATION OF WITNESSES

(TL:CON-60; 6-17-94)

a. *While written depositions are now only rarely taken by consular officers, it remains important to follow carefully procedures in obtaining testimony [see 22 CFR 92.58]. When a witness does not understand the meaning of a question, the consular officer should explain it, if possible, taking special care to elicit an answer strictly responsive to the question.*

NOTE: While 22 CFR uses the term “interrogatories”, the Federal Rules of Civil Procedure has been changed to use the term “questions”. This subchapter reflects the change, which is more easily understood by witnesses.

b. Do not give the witness a copy of the questions, or allow the witness to examine them, before the questioning. It may be necessary for the officer to indicate the general nature of the evidence being sought, but the officer should not give this information in sufficient detail to permit the witness to formulate answers in advance.

c. The written questions should not be repeated in the record, but references to them should be made as follows:

To the first question, the witness responded that. . . .

d. All written questions must be put to the witness, even if the witness disclaims further knowledge of the subject.

e. When counsel for all the parties attend an examination conducted on written *questions*, the consular officer may, if counsel consents, permit oral examination of the witness following the examination on written *questions*. The oral examination should be conducted in the manner and order as if no written examination had preceded it.

f. To refresh a faded memory, permit a witness to refer to notes, papers, or other documents. Such occurrences must *be noted in the record of the testimony [see 22 CFR 9260(b)]*.

g. When a witness confers with the *accompanying attorney* before answering an interrogatory, the consular officer should also *include* that fact in the record [*see 22 CFR 9260 (c)*].

h. The consular officer *should request* the witness not to leave the officer's presence or the presence of the counsel asking the questions during the examination, except during recesses for meals, rest, and similar purposes. *Note* in the record failure of the witness to comply with this request.

i. If examination of a witness requires several hours or days, *permit* recesses for reasonable periods and for sufficient reasons.

j. The consular officer must mark, by exhibit numbers or letters, all documents identified by a witness or counsel and submitted for the record.

7 FAM 923 ROLE OF U.S. JUDGES

(*TL:CON-60; 6-17-94*)

a. Judges from U.S. Federal, State, or local courts, including administrative law judges, should not perform official functions in foreign countries without the express consent of host country authorities. Such actions may violate the judicial sovereignty of the host country.

b. Judges occasionally attempt to "hold court" in U.S. embassies and consulates during the taking of depositions. Consular officers should report such incidents to the Department (CA/OCS).

c. In March 1978 the Judicial Conference of the United States, Committee on Court Administration, disapproved, as a matter of policy, the practice of Federal judges traveling abroad to take testimony or depositions in cases pending before them. *See also* section 7 FAM 942 .

7 FAM 924 ROLE OF SPECIAL MASTERS

(TL:CON-60; 6-17-94)

a. A Special Master is an officer appointed by a court to act as its representative in some limited or specific legal function. Federal Special Masters are appointed pursuant to Rule 53 of the Civil Procedure. Like judges of U.S. Courts, Special Masters should not perform official functions in foreign countries without host country consent.

b. The use of Masters is to aid judges in performance of special duties as they may arise in a case. Their appointment and activities are only for the purpose of assisting the court to get at the facts in cases of complicated litigation, usually where special knowledge or expertise is required.

c. The word "Master" includes a referee, an auditor, a commissioner, and an assessor. Participation of a Special Master in depositions in complicated matters can be very helpful to consular officers who generally are not attorneys and who do not have expertise in the subject matter of the deposition.

d. When a Special Master participates in a deposition, the consular officer should instruct the court reporter/stenographer to include in the record any objection the participants may have to any of the actions of the Master.

7 FAM 925 PREPARATION OF THE RECORD

7 FAM 925.1 Transcription and Signing of the Record

(TL:CON-60; 6-17-94)

a. Depositions are usually recorded by a stenographer or court reporter, but other means, such as tape recording or videotaping, may be used. [For information about how to prepare the record in such cases, see section 7 FAM 926.3 e.]

b. After examination of a witness is completed, the stenographic record of the deposition must be fully transcribed, and the transcript attached securely to any document or documents to which the testimony in the record pertains.

*c. The transcription must then be submitted to the witness for examination by and read to or by the witness, unless the examination and reading are waived by the witness. Any changes in form desired by the witness must be entered on the record, at the end of the record of the deposition, by the consular officer, with a statement of the reasons given by the witness for the changes. No substantive changes can be made, but additions or clarifications may be added. *The deponent, however, may**

provide a statement correcting previous testimony, or otherwise protect against a charge of perjury.

d. The witness must then sign the transcript and initial in the margin each correction made at the witness's request. *Since the witness may depart before the transcript is completed, the consular officer should request counsel to send the original transcript to the witness with instructions to return it to the consular officer in person to sign it.*

e. The stenographer and interpreter must execute affidavits certifying the accuracy of their work [see 7 FAM 925 Exhibit 925.1e].

f. Some U.S. States require the witness and the officer taking the deposition to sign each page. *Do so only on the explicit instructions of the requesting counsel [see the sample record of a deposition in 7 FAM 925 Exhibit 925.1f].*

g. Charge appropriate fees and note them on the statement of account [for a sample statement, see 7 FAM 925 Exhibit 925.1g].

h. The consular officer should prepare a closing certificate of the deposition [see 7 FAM 925 Exhibit 925.1h].

7 FAM 925.2 Arrangement of Papers

(TL:CON-60; 6-17-94)

a. Unless special instructions to the contrary are received, *arrange* the papers forming the completed record of the deposition in the following order from the bottom of the packet to the top:

(1) Commission to take depositions (or notice of taking depositions), *with written questions, if any*, exhibits, and other supporting documents fastened to it;

(2) Statement of fees charged;

(3) *Transcript of the deposition of the various witnesses*, including any exhibits the witnesses may have submitted;

(4) Stenographer/interpreter affidavits; and

(5) Closing certificate [see 7 FAM 925 Exhibit 925.1h].

b. *Fasten* all the above papers together, and *affix* the consular officer's seal to the closing certificate. *Use* ribbons and wafer seals only if requested.

7 FAM 925.3 Filing of Depositions

(TL:CON-60; 6-17-94)

a. *Place the above papers in an envelope and seal it with the wax engraving seal of the post or rubber stamp seal with the signature of the consular officer across the envelope flap. The envelope must be endorsed with the title of the action and marked and addressed to the clerk of the court.*

b. *Send the sealed envelope by registered mail to the counsel for the party that asked for the deposition unless the consular officer is instructed by counsel to send it to the court where the action is pending. If returned to the court, the envelope must indicate the title of the action [see 7 FAM 925 Exhibit 925.3b]. When the action is a Federal criminal case, send it to the Department (CA/OCS) for onward transmission.*

c. *If international registered mail is unreliable in the host country, return depositions by pouch through the Department (CA/OCS) for relay to the court. Registered APO mail may also be used.*

7 FAM 925.4 Furnishing Copies

(TL:CON-60; 6-17-94)

a. *Do not send the original completed depositions to any of the parties to the action or to their attorneys. The consular officer may provide a copy of a deposition to the deponent or to any party to the action upon payment of the copying fees. Such copies may also be presented to the parties of action directly by the stenographer employed by counsel. If State rules require depositions to be sent to requesting counsel, comply with such a request.*

b. *If a deponent desires certification under official seal that the copy is a true copy, also charge the certification fee prescribed in the Schedule of Fees.*

7 FAM 926 UNUSUAL PROCEDURES FOR RECORDING AND TAKING DEPOSITIONS

7 FAM 926.1 Impact of Advancing Technologies

(TL:CON-60; 6-17-94)

The growing trend toward the use of telephones, videotape, tape recording and other more sophisticated ("High Tech") means of obtaining evidence abroad compels the consular officer to observe carefully the pertinent legal procedures, if any, of the host country. Obtaining evidence under certain circumstances may place additional burdens on the consular

officer's time, especially when arrangements must be made for the use of dedicated international telephone lines and special telephone conference systems. When in doubt about recording or taking testimony under unusual circumstances, consult CA/OCS.

7 FAM 926.2 Taking Depositions by Telephone

(TL:CON-60; 6-17-94)

a. Rule 30(b)(7) F.R. Civ. P. states that:

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28 (a), 37(b)(1), and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions propounded to him.

b. Consular officers may be called upon to administer oaths to witnesses, generally on consular premises, who will then be deposed by telephone from the United States. Charge only the fee for administering oaths, since the requesting counsel will ask the questions by telephone and responses will be recorded in the United States by stenographic or other means.

7 FAM 926.3 Recording Depositions by Nonstenographic Means

(TL:CON-60; 6-17-94)

a. Rule 30(b)(4), F. R. Civ. P. states that:

The parties may stipulate in writing or that court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own, or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in writing to accompany a deposition recorded by nonstenographic means.

*b. At present, the nonstenographic means referred to in Rule 30(b)(4) are tape recording and videotaping. The consular officer should amend the wording of the certification to state the means used to record the deposition. See 7 FAM 926 Exhibit 926.3b for guidelines on recording depositions by a nonstenographic *method (tape recording)*.*

c. Counsel are responsible for providing their own tape recording and videotape equipment. Embassy equipment, when available, may be used to make a duplicate recording of the deposition *but advise* counsel that the consular officer will assume no responsibility for the quality of the recording.

d. Transporting electronic equipment of the kinds used in recording depositions is not permissible in some foreign jurisdictions. Be prepared to advise requesting counsel of the possibility that the host country government may confiscate the *equipment or otherwise require its pre-clearance into the host country.*

e. In filing depositions executed by nonstenographic means, the consular officer should prepare written certification about both the administration of an oath to the witness and the video camera operator or operator of the recording device. Attach the certification to the videotape or tape recording, place it in an envelope, and seal it similar to the sealing of a deposition [see 7 FAM 925.2 b]. Then send it to counsel or the court of pending action.

7 FAM 927 THROUGH 929 UNASSIGNED

7 FAM 921 Exhibit 921a

(TL:CON-60; 6-17-94)

GUIDELINES FOR TAKING DEPOSITIONS

GUIDELINES FOR TAKING DEPOSITIONS

THINGS TO REMEMBER CONCERNING THE SCHEDULING OF A DEPOSITION:

1. *Are depositions permitted by host country law? If so, is notification to the Foreign Ministry required?*
2. Is the requesting attorney an official of U.S. State, local or Federal government? If so, obtain host country clearance from the Foreign Ministry as appropriate.
3. Is the witness willing to be deposed?
4. Will the deposition be done with oral or written questions?
5. What date is proposed for taking the deposition? Is the date compatible with the consular officer's schedule?
6. How many people will be attending the deposition?
7. Will the deposition take place on consular premises? If so schedule the use of a room large enough to accommodate the deposition.
8. Will a consular officer be needed to administer oaths *to witnesses and others*? Will the officer's presence be required throughout the proceeding or can the officer withdraw after administering the oaths, subject to recall?
9. Will the services of a stenographer or interpreter/translator be required? Are such services available in the host country or must they be retained in the United States?
10. *Is the evidence to be obtained using nonstenographic means, such as telephone, videotape, or more advanced technology? If so, obtain host country authority, if appropriate.*
11. *Who will arrange for the witness, stenographer, and interpreter to meet counsel at the post at a designated hour? (Preferably requesting counsel.)*
12. *Who is paying for the deposition? Obtain a deposit or Federal appropriation number and fund code.*

THINGS TO REMEMBER CONDUCTING THE DEPOSITION:

1. Administer oaths to stenographer, interpreter/translator, and witness as appropriate.
2. Consular officer withdraws, if appropriate, after instructing stenographer to record departure, enumerate names of those present, transcribe proceedings, and give transcript to the witness for review.
3. Stenographer and interpreter/translator execute affidavits of accuracy before consular officer.
4. Witness signs record of deposition before consular officer.
5. *At close of deposition* consular officer prepares final statement of account and closing certificate.
6. Consular officer collects *fees required under the Schedule of Fees for Consular Services (22 CFR 22.1)*.
7. Deposition documents are arranged and fastened together.
8. Deposition is placed in a sealed envelope *correctly* endorsed and addressed, bearing the post's seal, and is registered if mailed.

7 FAM 925 Exhibit 925.1e

(TL:CON-60; 6-17-94)

AFFIDAVIT OF STENOGRAPHER

VENUE.

Brazil)
(Name of Country))
)
)
State of Planalto Central)
(Name of County, Province, etc.))
)
City of Brasilia)
(Name of City))
)
Embassy of the United States of)
America)
(Name of Foreign Service Post))

ss:

Before me, *Mercedes Y. Benevento*, Consul of the United States of America at *Brasilia, Brazil*, personally appeared the individual named below who, being duly sworn, made the following statements (or, the statements set forth in the attached instrument):

I, *Carlos deJ. Barbosa*, certify that I am a stenographer; that I faithfully transcribed the responses to the questions posed to the witness, *Mr. Lucas Silva Quintanilla*, as interpreted from English to Portuguese by Mr. Francisco Torres Ligiero, interpreter, and that the responses transcribed accurately record the witness' statements as interpreted.

(Signature of Stenographer)

Carlos deJ. Barbosa

(Typed Name of Stenographer)

September 30, 1992

(Date)

(Signature of Consular Officer)

Mercedes Y. Benevento

(Typed Name of Consular Officer)

Consul of the United States of America

(Title of Consular Officer)

(SEAL)

September 30, 1992

(Date)

VENUE.

Brazil)
 (Name of Country))
)
)
State of Planalto Central)
 (Name of County, Province, etc.))
)
)
City of Brasilia)
 (Name of City))
)
)
 Embassy of the United States of)
 America)
 (Name of Foreign Service Post))

ss:

Before me, Mercedes Y. Benevento, Consul of the United States of America at Brasilia, Brazil, personally appeared the individual named below who, being duly sworn, made the following statements (or, the statements set forth in the attached instrument):

I, Francisco Torres Ligiero, certify that I understand the English language and the Portuguese language. To the best of my knowledge and belief I did faithfully act as interpreter during the taking of the deposition of Mr. Lucas daSilva Quintanilla, translating the English interrogatories into Portuguese and the Portuguese responses into English; and that the responses transcribed by Mr. Carlos deJ. Barbosa, stenographer, accurately record the witness's statements as interpreted by me.

(Signature of Interpreter)

Francisco Torres Ligiero
(Typed Name of Interpreter)

September 30, 1992
(Date)

(Signature of Consular Officer)

Mercedes Y. Benevento
(Typed Name of Consular Officer)

Consul of the United States of America
(Title of Consular Officer)

(SEAL)

September 30, 1992
(Date)

7 FAM 925 Exhibit 925.1f

(TL:CON-60; 6-17-94)

RECORD OF A DEPOSITION

VENUE

Brazil)
(Name of Country))
)
Federal District)
(State/Province/District))
)
City of Brasilia)
(Name of City))
)
Embassy of the United States of)
America)
(Name of Foreign Service Post)

ss:

Deposition of a witness, taken before me, *Merrill J. Grover*, Consul of the United States of America at *Brasilia, Brazil*, under a commission (or notice) in a certain cause pending in the United States District Court for the Southern District of New York in the matter of the United States of America v. *Ricardo Alexander, et al.* CR-93-2893.

Because it appeared that the witness, *Mr. Lucas daSilva Quantanilla*, could not understand the English language (or could not intelligently testify in the English language) but understood well the *Portuguese* language, *Mr. Francisco Torres Ligiero*, interpreter, who understands both languages well, was sworn in as follows (quote the oath, Section 7 FAM 921 m(3)) and interpreted accordingly.

The *questions, cross questions*, and answers of the witness (or where the *questions* are written, the answers of the witness to the written questions) were taken down and transcribed by *Mr. Carlos deJ. Barbosa*, stenographer, who was sworn in as follows (quote oath, section 7 FAM 921.m(2)). The transcript was then read by the witness (or to the witness by interpreter) and was signed by the witness in my presence. *Mr. Lucas da Silva Quantanilla, of Rua Padre Joao Cordeiro, 523 Brasilia, Brazil, a hospital pharmacist*, of lawful age, after being duly sworn by me (quote section 7 FAM 921 m(1)) deposes and says:

To the first question: My name is Lucas daSilva Quantanilla.

To the second question: I am employed at the Sacred Heart Hospital as senior *pharmacist*.

(AND SO FORTH)

(If more than one witness is being deposed in a given case, the venue and the first paragraph citing the name of the case need not be repeated. Begin record of deposition of the second witness with repetition of the interpreter/stenographer paragraphs.)

Witness's Signature:

(Signature of Witness)

Lucas daSilva Quantanilla

(Typed Name of Witness)

(SEAL)

7 FAM 925 Exhibit 925.1g

(TL:CON-60; 6-17-94)

STATEMENT OF ACCOUNT

STATEMENT OF ACCOUNT

Tariff of Fees

Item No.

69(a)	Services of a diplomatic or consular officer, \$140.00 per hour or fraction thereof (3 hours)	\$420.00
69(b)	Services of FS Staff member as typist, per hour or fraction thereof (1 hour)	\$ 65.00
76	Photocopying or otherwise duplicating a document, \$0.25 per copy of each page (50 pages -- deposition Exhibit A)	\$ 12.50
	TOTAL CONSULAR FEES FOR TAKING DEPOSITION	\$497.50
	Postage for mailing original to Clerk of Court (name and address)	\$ 10.00
	Commercial Interpreter Fees (name and address) (\$50 per hour x 3 hours)	\$150.00
	Commercial Stenographer Fees (name and address) (\$20.00 per hour x 3 hours)	<u>\$ 60.00</u>
	TOTAL COST OF DEPOSITION	\$717.50

STATEMENT OF COST OF ONE COPY OF DEPOSITION

Tariff of Fees

Item No.

76	Photocopying or otherwise duplicating a document \$0.25 per copy of each page (75 pages total: 25 page deposition plus 50 pages Exhibit A)	\$ 18.75
	Certifying under official seal that a copy or extract made from a private document is a true copy	<u>\$ 10.00</u>
	TOTAL FEES FOR ONE CERTIFIED COPY OF SEVENTY FIVE PAGE DEPOSITION AND EXHIBITS	\$ 28.75

7 FAM 925 Exhibit 925.1h

(TL:CON-60; 6-17-94)

CLOSING CERTIFICATE OF A DEPOSITION

VENUE

Brazil)
(Name of Country))
Federal District)
(State/Province/District))
City of Brasilia)
(Name of City))
Embassy of the United States of)
America)
(Name of Foreign Service Post))

ss:

I do hereby certify that pursuant to a commission issued by the United States District Court for the Southern District of New York (or notice of the taking of a deposition), I examined Mr. Lucas DaSilva Quantanilla under oath (quote Section, 921 m. (1)) at my office in Brasilia, Brazil. The witness, known to me to be the person named and described in the questions and commission, was sworn by me (quote oath, Section 921 m. (1)) and acted as interpreter. Evidence was taken down by Mr. Carlos deJ. Barbosa, stenographer, who was sworn by me (quote oath, Section 921 m. (2)) and after being read over and corrected by the witness, was signed by the witness in my presence. I further certify that I am satisfied that neither Mr. Ligiero, Mr. Barbosa or myself are in any way related to any of the parties to this cause or in any manner interested in the result thereof.

In witness whereof I have signed this certificate and affixed the seal of the Embassy of the United States of America at Brasilia, Brazil.

(Signature of Consular Officer)

Mercedes Y. Benevento
(Typed Name of Consular Officer)

Consul of the United States of America
(Title of Consular Officer)

(SEAL)

September 30, 1992
(Date)

7 FAM 925 Exhibit 925.3b

(TL:CON-60; 6-17-94)

**SAMPLE OF A FORMAT FOR ENVELOPE
RETURNING A DEPOSITION**

United States District Court
for the District of Southern
California

Modular Concepts of CA, Plaintiff)

)

v.)

)

)

)

)

Starr Specialists, Inc., Defendant)

CIV-File No. 93-67379
Deposition of *Job Ross
Silversmith*

7 FAM 926 Exhibit 926.3b

(TL:CON--60; 6-17-94)

GUIDELINES FOR RECORDING DEPOSITIONS BY NONSTENOGRAPHIC MEANS

GUIDELINES FOR RECORDING DEPOSITIONS BY NONSTENOGRAPHIC MEANS

1. The *recording equipment* shall be of such quality as to produce an accurate and trustworthy record, *and shall be provided by the requesting party.*
2. An independent operator, after being duly sworn, shall operate and monitor the *recording equipment* to ensure that a recording of the testimony is being made.
3. Each participant in the deposition shall be equipped with an individual microphone.
4. Two original *recordings* shall be made, each on a separate *recording* machine, and each receiving its signal from the microphones. Specifically, one is not to be the re-recording of the other.
5. The two recording machines upon which the originals are made are to be operated in tandem. They shall be equipped with digital counters to facilitate the making of a log index.
6. Counsel *must* keep in mind that one of the significant problems with the use of tape recorders is the identification of the speaker. The record must accurately reflect the parties to the deposition, as well as identify the speakers at any particular time. *Prior to the start of direct examination, each person who speaks on record, including counsel, should identify himself or herself.* If the subsequent testimony is limited to an exchange between two parties, *no further words* identifying the speakers are necessary. However, any third party, such as opposing counsel, who interjects any statements must precede interjection with words of identification.
7. Objections should be made during the taking of the deposition.
8. The requesting party is to provide an independent third party operator, who shall, in addition to monitoring the equipment, be responsible for making a log-index. Such index must include the subject matter being discussed, cross-referenced to the reading on the digital counter, a listing of exhibits, and the names of all parties to the deposition.
9. At the close of the deposition, the independent third party's certification must be recorded orally. Thereafter, one of the originals shall be sealed in an appropriate container in the presence of counsel. The third party shall also certify the correctness and completeness of the recording in writing in the same manner a stenographic reporter certifies the typed record of a deposition. The original, with the certification attached thereto, shall be immediately filed with the clerk of the court. The original so filed may not be removed from the court's custody except upon written order of the court.
10. The independent third party is to retain possession of the other original, which may be used for the production of duplicates for parties to the suit.

