

SUPREME COURT OF WISCONSIN

NOTICE

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No. 05-06

In the matter of Proposed Amendment to Wis.
Stat. § 887.26

FILED**APR 29, 2008**

David R. Schanker
Clerk of Supreme Court
Madison, WI

On June 15, 2005, the Judicial Council filed a petition proposing certain amendments to Wis. Stat. § 887.26, relating to requirements for depositions conducted outside the state of Wisconsin. On November 14, 2005, the court conducted a public hearing on this matter. The court and the petitioner concluded that the petition required certain revisions to clarify that § 887.26, as amended, would permit the taking of both oral and written depositions. The petition was returned to the Judicial Council. An amended petition was filed on June 12, 2006. At its open administrative conference on March 21, 2007, the court adopted the petition, as amended, effective July 1, 2008.

Therefore,

IT IS ORDERED that, effective July 1, 2008, 887.26 of the statutes is amended as follows:

Section 1. 887.26 (title) and (1) of the statutes are amended to read:

887.26 (title) **Depositions ~~without this~~ outside state by commission.** (1) HOW TAKEN. In any civil action, proceeding, or matter in which depositions may be taken within this state, the deposition of any witness ~~without~~ outside the state may be taken before any officer as provided in s. 804.03 (1) or (2) or as provided in the rules of the state or country where taken. Depositions outside the state may be taken orally or upon written ~~interrogatories~~ questions as provided in this section.

Section 2. Section 887.26 (4) of the statutes is amended to read:

887.26 (4) COMMISSION TO TAKE. A commission may issue from any court of record to take the deposition of any witness ~~without~~ outside the state, ~~where an issue of fact has been joined or the time therefor has expired,~~ after commencement of the action, except as provided in s. 804.015 or as provided in s. 804.02 (1), for any cause ~~which shall be~~ that is deemed sufficient by the court, or when required for use on any trial or hearing or upon any motion or proceeding. The commission shall be signed by the clerk and sealed and shall be accompanied by a copy of subs. (4), (5), and (6).

Section 3. Section 887.26 (5) (a) of the statutes is renumbered 887.26 (5) (bm) 1. and amended to read:

887.26 (5) (bm) 1. The ~~party~~ person desiring a commission shall prepare interrogatories a notice of intent to obtain a commission and state in the caption ~~thereof~~ of the notice of

intent the name of the ~~commissioner proposed by the party,~~ the name of the witness and the his or her residence of each with particularity, and shall serve a copy thereof of the notice of intent on the opposite party, with a notice that, at the expiration of ~~10~~ 5 days from the date of ~~such service~~ the notice of intent, a commission will be issued ~~to take the deposition of the witness,~~ directed to the court of jurisdiction of the residence of the witness, requesting that a subpoena issue from that court compelling the deposition upon written questions of the witness, and specifying the reason for taking the same. The notice of intent shall be accompanied by the questions. Within ~~such time~~ the 5-day period, the opposite party may file with the clerk and serve upon the other ~~his or her~~ party any objections, ~~to the interrogatories proposed and to the competency of the witness and~~ to the issuance of the commission and serve his or her ~~cross-interrogatories~~ cross-questions; and state the name and residence of any person whom the opposite party desires to act as an additional commissioner, who must reside in the county in which the commissioner first named resides, and may serve any objections to the questions and any cross-questions.

Section 4. Section 887.26 (5) (am) of the statutes is created to read:

887.26 (5) (am) *Oral Depositions*. 1. The person desiring a commission shall prepare a notice of intent to obtain a commission and state in the caption of the notice of intent the name of the witness and his or her residence with particularity, and shall serve a copy of the notice of intent on the opposite

party, with a notice that, at the expiration of 5 days from the date of the notice of intent, a commission will be issued directed to the court of jurisdiction of the residence of the witness, requesting that a subpoena issue from that court compelling the oral deposition of the witness, and specifying the reason for taking the same. Within the 5-day period the opposite party may file with the clerk and serve upon the other party objections to the issuance of the commission.

2. At the expiration of the 5 days, and no objection being received or sustained, the commission shall issue as provided in sub. (4). At the noticing person's expense, the commission shall be transmitted to the court of jurisdiction of residence of the witness, for issuance of the deposition subpoena in accord with the rules applicable to that court. No commission shall issue if the witness's residence is not given as required.

Section 5. Section 887.26 (5) (b) of the statutes is renumbered 887.26 (5) (bm) 3. and amended to read:

887.26 (5) (bm) 3. ~~At the expiration of the time limited, the moving party may file the notice and interrogatories, with proof of service thereof and the moving parties' objections to the cross interrogatories. The moving party may also serve redirect interrogatories on the opposite party, who may, within 3 days after such service, file objections to such redirect interrogatories. Thereupon~~ period under sub. (b) 1. and (b) 2., and if no objection to the issuance of the commission has been received or sustained the commission shall ~~be issued~~ issue, with the ~~interrogatories~~ written questions, direct, cross and

redirect, and all objections, and transmitted to the commissioner first named by mail or express at the expense of the moving party. But when any defendant shall not have appeared and the time for the defendant to plead has expired, no notice is required to be given such defendant, and the commission may issue on filing the direct ~~interrogatories~~ questions as provided in sub. (4). At the noticing person's expense, the commission shall be transmitted to the court of jurisdiction of the residence of the witness, for issuance of the subpoena in accord with the rules applicable to that court. No commission shall issue if the witness's ~~residences~~ residence is not given as required.

Section 6. Section 887.26 (5) (bm) (title), 2., 4. and (c) of the statutes are created to read:

887.26 (5) (bm) (title) *Written Questions.*

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

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

(c) *Before Commencement of Action.* When testimony is sought of a witness outside the state before commencement of an action as provided in s. 804.02 (1), the order issued under s.

804.02 (1) (c) shall also include a commission in the form provided by sub. (4) of this section.

Section 7. Section 887.26 (6) (title) of the statutes is amended to read:

887.26 (6) (title) DUTY OF ~~COMMISSIONER~~ COMMISSIONER-EXAMINATION AND CROSS-EXAMINATION; RECORD.

Section 8. Section 887.26 (6) (a) of the statutes is renumbered 887.26 (6) (cm) and amended to read:

887.26 (6) (cm) ~~The commissioner first named shall fix the time and place for executing the commission and give the other commissioner one day's notice if residing in the same place, and when not, one day's notice in addition for every 30 miles of distance between the place of residence and the place fixed for executing the commission. If the notice be by mail double time shall be allowed; but notice may be waived in writing or by appearance at the execution of the commission. If there be 2 commissioners the commission shall be executed in the county where they reside, unless they agree upon another. The commissioner first named~~ taking or transcribing the deposition shall have charge of and return the deposition, which return shall be in the same form and manner directed by the commission or as provided by s. 804.05 (7). If either commissioner shall not attend at the time and place so fixed, the other may execute the commission with like effect as if both were present, but such commissioner must certify in the return that the other had due notice but failed to attend.

Section 9. Sections 887.26 (6) (am) and (bm) of the statutes are created to read:

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

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

Section 10. Sections 887.26 (6) (b), (c) and (d) of the statutes are repealed.

Section 11. Section 887.26 (6) (cm) (title) of the statutes is created to read:

887.26 (6) (cm) (title) *Certification and Service by Officer; Exhibits; Copies; Notice of Service.*

Section 12. Section 887.26 (7) of the statutes is amended to read:

887.26 (7) FEES. The persons who take or transcribe the depositions and the witness shall be entitled to the fees allowed supplemental court commissioners reporters under s. ~~814.68~~ 814.69 (1) and witnesses for similar service by the law of this state, or ~~such~~ as may be prescribed by the law of the state or country where taken.

Section 13. Section 887.26 (8) of the statutes is amended to read:

887.26 (8) TRANSLATIONS. When the witness is unable to speak the English language, the judge of the court from which the commission issues may appoint some competent and disinterested person to translate ~~the commission, rules, interrogatories and cross interrogatories, or such,~~ at the expense of the noticing

person, the subpoena, rules, and deposition questions and answers, or any part thereof as may be necessary, from the English into the language ~~spoken~~ used by the witness or vice versa; and ~~such translation shall be sent to the commissioner in place of the original papers that have been translated. Upon the return of the commission and deposition, such judge shall in like manner cause the answers of the witness and the exhibits to be translated into English, as well as all other proceedings in a foreign language, and such translation to be filed~~ the translation shall be transcribed and maintained as part of the deposition transcript. The translator shall append to all translations the translator's affidavit that the translator knows ~~the~~ English and ~~such foreign~~ the language of the witness, and that in making such translation the translator carefully and truly translated ~~such~~ the proceedings from ~~the~~ English into ~~such foreign~~ the witness's language or from the witness's language into English, and that ~~such~~ the translation is correct. ~~Such~~ A translation under this paragraph shall have the same effect as if all the proceedings were in English, but the ~~trial~~ circuit court, upon the deposition being offered in evidence, may admit the testimony of witnesses learned in ~~such foreign~~ the language of the deposed witness for the purpose of correcting errors therein; and, if it shall appear that the first translation was in any respect so incorrect as to mislead the witness, the court may, in its discretion, continue the cause for the further taking of testimony.

IT IS FURTHER ORDERED that notice of these amendments be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

ANNETTE KINGSLAND ZIEGLER, J., did not participate.

Dated at Madison, Wisconsin, this 29th day of April, 2008.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

