

# OBTAINING EVIDENCE ABROAD

**DISCLAIMER:** THE INFORMATION IN THIS CIRCULAR RELATING TO THE LEGAL REQUIREMENTS OF SPECIFIC FOREIGN COUNTRIES IS PROVIDED FOR GENERAL INFORMATION ONLY AND MAY NOT BE TOTALLY ACCURATE IN A PARTICULAR CASE. QUESTIONS INVOLVING INTERPRETATION OF SPECIFIC FOREIGN LAWS SHOULD BE ADDRESSED TO FOREIGN COUNSEL.

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C. **GENERAL PROVISIO:** When evidence sought is in a foreign country, it is necessary to observe not only applicable state or federal rules, but also the laws and regulations of the foreign country where the evidence is located. Procedures may vary in civil, criminal and administrative cases. Some countries view the taking of any form of evidence, even voluntary depositions, as an infringement on their judicial sovereignty. This applies to party and non-party witnesses. Telephone depositions are prohibited in many countries. Many countries do not permit the pre-trial discovery of documents. Attempting to obtain evidence without following the requirements of the foreign country may result in the arrest, detention, deportation or imprisonment of participants, including American counsel. The blocking statutes of some countries even extend to informal contact (See Moore's Federal Practice, 28.16). But see ALI's Restatement (Third) of Foreign Relations Law of the United States, Sec. 442, Reporters' Note 1 (1987). Since foreign laws and practices vary considerably, consult the Department of State, Office of American Citizens Services (ACS) country-specific material available through our autofax service and on our home page on the Internet.

#### D. VOLUNTARY DEPOSITIONS OF WILLING WITNESSES

**1. Informal Deposition Arrangements on Stipulation:** Many depositions conducted abroad are taken by stipulation of the parties (Rule 29, Fed. R. Civ. P.) at a time and location of mutual convenience and frequently do not involve any participation by a U.S. consular officer. This of course presupposes that the foreign country permits a deposition taken under these circumstances. Such depositions are frequently conducted by American attorneys in the offices of a foreign attorney or solicitor who has the power to administer oaths in the foreign country, hotel or some other venue, or by telephone from the United States and involve no U.S. consular involvement. In countries where this is not permitted, it is necessary to arrange for a deposition before a U.S. consular officer. Note that the authority to administer oaths in foreign countries is a matter of foreign law. Consular conventions empower U.S. consular officers to administer oaths abroad. Certain officers of the U.S. military have authority to administer oaths abroad under Status of Forces (SOFA) agreements. This may not extend to the taking of depositions on U.S. military bases abroad, which may not be permitted by the SOFA agreement or the laws of the particular foreign country. Other persons authorized to administer

oaths in the United States, such as notaries public, "cyber notaries", commissioners of deeds, or officers of the court may have no independent authority to do so abroad under the laws of the foreign country. See Wright and Miller, Sec. 277, Sec. 2462, (1995 Supp.); **Blackmer v. U.S.**, 1932, 52 S. Ct. 252, 284 U.S. 421, 76 L. Ed. 375.

**2. Consular Authority:** 22 U.S.C. 4215; 22 USC 4221; 18 U.S.C. App. Fed. R. Civ. P., Rules 15 and 17; 28 U.S.C. Fed. R.Civ. P., Rules 28-31; 22 CFR 92.55 - 92.66 (general authority). Article 5(f), Vienna Convention on Consular Relations, 21 UST 77; 596 UNTS 261; TIAS 6820 (where applicable). Chapter II, Articles 15-22, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555; TIAS 7444; 847 UNTS 231 (where applicable). Bilateral Consular Conventions (where applicable). The consular officer may act on the request to take the deposition on notice or commission provided that the testimony is voluntary and local (foreign) law does not preclude such action. See **United States v. Paraffin Wax**, 2255 Bags, 23 FRD 289 (ED NY 1959). Oral depositions and depositions on written questions may be taken before a U.S. consular officer "on notice" (Rule 28(b)(1), Fed. R. Civ. P.) or pursuant to a court order or commission (Rule 28(b)(2) Fed. R. Civ.P.). See Ristau, International Judicial Assistance Civil and Commercial, Vol. 1, International Law Institute, Sec. 3/2/1 - 3-2-8, p. 76-93; Sec. 5-3-1 - 5-3-4, p. 232-240 (1995 Supp.); Moore's Federal Practice, 28 App. 06 (1993). Wherever possible, U.S. consular officers now simply administer oaths to the witnesses and court reporter/interpreter and withdraw, based on stipulation between the parties (See 22 C.F.R. 92.56). Questions are actually asked by attorneys from the U.S. and counsel in the foreign country.

**3. Sample Notices, Orders or Commissions:** A commission or notice requesting that a United States consular officer take a deposition should be addressed to "Any Consul or Vice Consul of the United States of America at (Name of Locality)." See Wright & Miller, Federal Practice & Procedure, Civ., Sec. 2131, Sec. 2083 (1996 Supp.) For a sample notice or order/commission see Ristau, International Judicial Assistance Civil and Commercial, Sec. 3-2-3 - 3-2-5, p. 82-86; 5-3-4, p. 238.4, Vol. 1 (1995 Supp.); Moore's Federal Practice, Sec. 28.03, 28.04, 28.08, 28.13-28.14 (1993); West's Federal Practice Manual, Sec. 8250, 8231, 8234, Vol. 7 (1995).

**4. Arranging for Consular Depositions:** When a consular officer is needed to preside at the taking of a voluntary deposition at an American embassy or consulate, obtain the applicable judicial assistance information flyer via our Internet Home Page or Autofax Service. Scheduling depositions is done directly by our embassies and consulates at a time and date of mutual convenience. Please note that for administrative and security reasons, the U.S. embassy/consulate are not available for deposition taking outside of working hours 8:30 a.m. to 5:00 p.m. or on weekends or holidays. After reviewing the procedures described, contact the U.S. embassy or consulate directly via telephone, fax, letter or telex. The addresses, telephone numbers and fax numbers of our embassies and consulates are included in our Consular Information Sheets available via our Home Page on the Internet and via our Autofax Service. See also the home pages of U.S. embassies and consulates which are linked to the Department of State, Consular Affairs home page <http://travel.state.gov>. U.S. federal, state and local government officials interested in obtaining evidence abroad should contact the Office of American Citizens Services (ACS) at (202) 647-5226, which assists **these officials** in making the necessary arrangements for testimony of foreign officials, host country clearance and can assist them in retaining the services of stenographers, interpreters and video operators, where available.

**5. Contact the U.S. Embassy/Consulate:** Furnish the following information to the American Services Section of the Consular Section of the American embassy or consulate.

- a. Requesting counsel's full name, address, telex, fax and telephone number;
- b. A brief description of the nature of the case and any special aspect of the proposed deposition (trial date, telephone deposition, witness incarcerated, etc.)
- c. Full name and address of the persons to be deposed as well as their citizenship and a statement that the witnesses' appearance is voluntary;
- d. Suggested dates for taking the deposition or a period within which the deposition should be taken;
- e. Proposed location for the deposition (U.S. Embassy or Consulate, hotel, solicitor's chambers, corporate offices, military base, etc.).
- f. Whether the deposition will be oral or based on written questions;
- g. Who will attend the taking of the deposition (e.g., requesting counsel, opposing counsel, number of witnesses, stenographer, interpreter, video-operator, etc. (This may be important when the size of the room available to conduct the deposition is a problem.)
- h. Whether the consular officer will be required to preside at the entire proceedings or may administer the appropriate oath(s) and withdraw subject to recall.
- i. Include in the fax, letter, telegram, or telex authorization for a return collect cable/call from the consular officer to confirm arrangements.
- j. Attach to the letter, or fax a copy of the commission or notice, or forward separately when available. For Depositions on Written Questions attach the interrogatories and any special instructions. For both oral depositions and depositions on written questions, make arrangements to forward the requisite fees before the depositions begin as explained below.

**6. Arranging Appearance of Witness:** Requesting counsel must make arrangements with the witness to insure his or her appearance for the deposition (travel fees, witness fees, etc.) The embassy/consulate does not arrange the appearance of witnesses for private attorneys.

**7. Consular Deposition Fees:** U.S. consular fees for the taking of depositions are set forth at Federal Register, January 30, 1998, Vol. 63, No. 20, pp. 5097-5103. They include the following:

SERVICES	FEE	Item #
Non-Refundable Deposition Scheduling Fee		
2 hours consular time required for scheduling, communication with counsel, and local authorities as applicable. Additional 2 hour fee charged	\$400.00	41

to reschedule

### Hourly Deposition Fee

Generally \$200.00 (one hour consular time) x number of days payable in advance of taking of deposition. If further consular participation required, hourly rate charged accordingly, payable in advance

	\$200.00	41
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<b>Notarial Service for Closing Certificate</b>	\$ 55.00	35
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### Postage for Return of Transcript

Deposit payable in advance prior to taking of deposition based on consular officer's estimate for usual costs	Actual	
	Costs	

### Packaging and Preparing Certification for Lengthy Deposition

	\$180.00	70
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One hour of consular time payable in advance of taking of deposition

**Fees for Government Requests:** No fees are charged for depositions at the request of U.S., state or local government officials (Schedule of Fees items 38(a) and (b).)

**Estimating Time Required to Take Deposition:** Notify the embassy/consulate of the estimated length of time necessary to take the deposition, allowing for the additional time required for translating questions and answers. Be aware that if the witnesses will be deposed in a foreign language, the use of interpreters will approximately double the time required.

**Payment of Fees:** Payment should be made by international money order or certified bank check payable to the American Embassy or to the appropriate American consulate (corporate or personal checks not acceptable). Any unused portion from your deposit will be refunded. As federal regulations prohibit the performance of consular services in advance of payment of statutory consular fees, depositions cannot be convened until all the required funds have been deposited. Should the deposition require more time than anticipated, additional fees and expenses must be paid by requesting counsel before the completed deposition will be released by the U.S. embassy or consulate.

#### E. Host Country Clearance Required for Certain "Official" Participants:

**1. U.S. Federal, State or Local Government Participants:** If a U.S., state or local Government official is to participate in a deposition before a U.S. consular officer, special host country clearance must be obtained for the travel. Such Government officials should contact the Office of American Citizens Services, Department of State, (202) 647-5226, fax (202) 647-2835 to initiate the process of obtaining the host country clearance. A copy of the host country clearance questionnaire will be faxed to you. It will also be available via our Internet Home Page and Autofax Service. See also U.S. Attorney's Manual (USAM) Title 9, Sections 2.151 and 13.534, and Title 3, Section 3.730.

**2. Special Masters:** See also, Rule 53, Fed. R. Civ. P. (Role of Special Master in general). If a Special Master is to be used in taking the deposition, please advise the U.S. consular officer. In general no special host country clearance is generally required for participation of Special

Masters (See Note re Judges below or U.S. or state officials above). However, if particular foreign countries have problems or questions about the practice, the Department of State, Office of American Citizens Services can assist in explaining the role of the Special Master.

**3. American Judges:** 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 the host country authorities. Such actions may violate the judicial sovereign of the host country. This proviso also applies to depositions or other proceedings conducted at U.S. embassies/consulates abroad and U.S. military bases abroad. See, Cumulative Digest of United States Practice in International Law, 1981-1988, Vol. II, 1400, 1402, Department of State (1994). But see, Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Vol. III, Judges' Manual, February 1988, trans. 2, vol. III, chap. XV, p. 3, Sec. B.1.c. which provides that "By a resolution of the Judicial Conference of the United States, a judge may not be reimbursed for expenses of travel to a foreign country to preside over the taking of depositions." This instruction cross references the Reports of the Proceedings of the Judicial Conference of the United States held at Washington, D.C. March 9-10, 1978 and September 21-22, 1978, Proceedings, September 1978, p. 4-5. Those proceedings provide that "the Conference, upon consideration of the report of the 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**, United Kingdom: House of Lords Decision in Westinghouse Electric Corporation Uranium Contract Litigation, 16 I.L.M. 784 (1977); Merhige, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States. The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence, 13 Int'l Law. 19 (1979). Wilkey, Symposia: Transnational Litigation, Part I: Transnational Adjudication: A View From the Bench, 18 Int'l Law. 541 (1984). For more information, contact the Office of General Counsel, Administrative Office of the U.S. Courts. The Department of State, Office of American Citizens Services will assist in attempting to obtain permission from foreign governments for such travel. See also section of this flyer regarding U.S. federal, state and local government officials participating in depositions abroad.

F. Telephone/Teleconference Depositions: If counsel desires to conduct telephone depositions, please check with the U.S. embassy or consulate first to confirm that such procedures are permitted in the foreign country and that electrical and telephonic equipment in the foreign country and at the U.S. embassy/consulate is adequate for this purpose. See, Rule 30(b)(7) F. R. Civ. P. which provides that depositions by telephone are authorized by Rule 29, upon stipulation of the parties; The final sentence added to make clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the question. See 85 F.R.D. 521, 529. For this reason, telephone depositions conducted of witnesses located abroad may only be taken where the foreign country permits telephone depositions. See **Rehau, Inc. v. Colortech, Inc.**, D.C. Mich. 1993, 145 F.R.D. 444. See also, Moore, Moore's Federal Practice, Rule 30(b)(7); 30.09(5). But see, Cumulative Digest of United States Practice in International Law, Department of State, Vol. II, 1429, 1430 (1994).

G. Recording Depositions:

**1. Video Operations and Other Equipment:** Counsel should also be aware that video-taping is not permitted in many foreign countries. U.S. consular officers do not have professional expertise in the technical or legal aspects of recording depositions by other than stenographic means. Requesting counsel must provide video-tape operators with specific instructions on any special procedures to be followed. U.S. Consular officers can advise videotape operators

that any specific instructions provided by American attorneys on stipulation by the parties/participants be included in the record of the deposition (22 C.F.R. 92.56 (special instructions)). American equipment may need special adapters, generators, etc. to function on different foreign electrical currents. Consult the U.S. embassy or consulate for particulars.

**2. Foreign Customs Requirements:** If counsel intends to utilize video-tape equipment for the purpose of recording the deposition (Rule 30(b)(4) Fed. R. C.P.), please note that special foreign customs clearances must be obtained from the foreign country before such video equipment is transported into the foreign country or the equipment may be confiscated by the foreign authorities. Contact the embassy of the foreign country in the United States for guidance regarding customs requirements. The address and telephone number of the foreign embassies are included in our Consular Information Sheets regarding foreign travel under "Entry Requirements" which are available via our Home Page or through our Autofax Service .

**3. Guidelines for Video Recording Testimony:** See Guidelines for Pre-Recording Testimony on Videotape Prior to Trial, Federal Judicial Center, Washington, D.C., December 1976, 2d, FJC Pub. No. 76-3, FJC Information Service. But see, Cumulative Digest of United States Practice in International Law, Department of State, Vol. II, 1429, 1430 (1994). Selected Cases (Not Comprehensive): See *Wescott v. Neeman*, 55 F.R.D. 257 (D.C. Neb. 1972) (Guidelines for Recording Depositions by Non-Stenographic Means); *Colonial Times Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975); *In the Matter of Daniels*, 69 F.R.D. 579 (N.D. Ga. 1975); *Marlboro Products Corp. v. N. Am. Phillips Corp.*, 54 F.R.D. 487 (S.D.N.Y. 1972); *Kallen v. Nexus Corp.*, 54 F.R.D. 610 (N.D. Ill. 1972); *Buck v. Bd. of Education of the City of New York*, 16 Fed. R. Serv. 2d 112, 113 (E.D.N.Y. 1972); *Carson v. Burlington Northern Inc.*, 52 F.R.D. 492 (D. Neb. 1971). Selected Articles: Barber & Bates, Videotape in Criminal Proceedings, 25 Hastings L.J. 1017 (1974); Cunningham, Videotape Evidence: Technological Innovation in the Trial Process, 36 Ala. Lawyer 228 (1975); Darnieder, Videotaped Depositions, a Court Reporter's View, 34 Nat's Shorthand Rep. 13 (June 1973); Kornblum, Videotape in Civil Cases, 24 Hastings L.J. 9 (1972); Miller, Videotaping the Oral Deposition, 18 Prac. Law. 45 (1972); Valentino, Practice, Procedure and Forms under the Nebraska Videotape Deposition Statute, 8 Creighton L. Rev. 314 (1975); Annot., Recording of Testimony at Deposition by Other than Stenographic Means Under Rule 30(b)(4), 16 A.L.R. Fed. 969 (1973); Case Note, Evidence -- Admission of Videotape (Hendricks v. Swenson), 38 Mo. L. Rev. 111 (1973); Note, Review of Discovery Order Under F.R. Civ. P. 30(b)(4), 22 Wayne L. Rev. 179 (1975); Modernizing Trial Techniques and Management: Audio-Visual Testimony, Excerpt from Proceedings of the Judicial Conference of the Sixth Judicial Circuit of the United States, 58 F.R.D. 221 (May 1972).

**4. Court Reporters/Interpreters:** The U.S. Embassy/Consulate may be able to provide information concerning interpreters, translators and audio/video operators. Private counsel must make their own arrangements to retain the services of interpreters, translators and audio/video operators. Attorneys for local or state government of the U.S. government may contact the Office of American Citizens Services or contact U.S. embassies and consulates directly for assistance in retaining these services. **Note: not all foreign countries have court reporters, interpreters and translators.** American embassies and consulates do not have staff personnel available to perform such functions. It may be necessary to bring your own experts in these fields from the United States.

H. Depositions on Written Questions: U.S. consular officers can conduct depositions on written questions (22 CFR 92.58). Such depositions are scheduled at a date and time of mutual

convenience to the witness and the U.S. consular officer. It is the responsibility of requesting counsel to contact the witness and the U.S. consular officer to make these arrangements, and to take necessary measures to retain a court reporter and interpreter. It is also possible, on stipulation, to arrange that the witness will write down the answers to the questions directly after having been placed under oath by the U.S. consular officer. The consular officer will prepare the deposition closing certificate and requesting counsel can arrange for the translation at a later date. A copy of the notice or commission should accompany the written questions and any translations. See Moore's Federal Practice, Chapter 28; Ch. 31 (1993).

**I. COMPULSION OF EVIDENCE:** When a witness is not willing to testify or produce documents or other evidence voluntarily, the assistance of foreign authorities generally must be sought. The customary method of compelling evidence is by letter rogatory or "letter of request", unless the country in question is a party to the Hague Evidence Convention. For prosecutors, bilateral Mutual Legal Assistance treaties (MLATs) are another option. (See our separate flyer on MLATs). Some foreign countries have domestic discovery laws which offer simpler, more timely solutions. If, however, the witness or custodian of records is subject to the U.S. court's personal jurisdiction, other alternative methods of extraterritorial discovery may be available. All of these procedures are discussed below.

**1. Compulsion Evidence Via Letters Rogatory:** A letter rogatory, now more commonly known as a "letter of request", is a formal request from a court in one country to "the appropriate judicial authorities" in another country requesting compulsion of testimony or documentary or other evidence. (28 U.S.C. 1781; 22 C.F.R. 92.66(b)&(c); 28 U.S.C. Fed. R.Civ. P., Rule 28(b); Article 5(j), Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 UNTS 261; TIAS 6820 (where applicable); Bilateral Consular Conventions (where applicable). Letters rogatory or letters of request can also be used to request service of process. Most foreign countries will only accept letters rogatory from a court, and will not recognize a request from an administrative law judge. Letters rogatory can be used in civil and criminal matters, and have been used in administrative matters. The execution of a request for judicial assistance by the foreign court is based on comity between nations, unless a specific treaty obligation exists such as the Hague Evidence Convention or MLAT treaties. For additional information regarding the preparation of letters rogatory or letters of request, see our flyers on "Preparation of Letters Rogatory" and our country-specific judicial assistance flyers. See "Additional Information" below. Letters rogatory are a cumbersome, time consuming mechanism which should not be used unless there is no other alternative.

**2. Hague Evidence Convention - Civil/Commercial/Administrative Matters:** HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, (23 U.S.T. 2555; T.I.A.S. 7444; 847 UNTS 231; 28 U.S.C.A. 1782 (1975 Cum. Supp.); 28 U.S.C.A. 1781 (Supp. 1979); 8 I.L.M. 37 (1969); Martindale-Hubbell Law Directory, Law Digest Volume, Selected International Conventions). It is possible to conduct depositions in countries party to the Convention. Consult our flyer on the Convention and our country specific flyers available via our Internet Home Page or Autofax Service and consult the declarations and reservations found in the Martindale-Hubbell Law Directory, Law Digest Volume, Selected International Conventions. To compel testimony under the Hague Evidence Convention, a letter of request (similar to a letter rogatory) sent directly to a foreign central authority by the court or litigant in the United States is used. Consult our flyer on the Convention for details. **In Force\*:** *ANGUILLA, ARGENTINA (excludes recognition of the extension of the Convention by the United Kingdom to the MALVINAS, SOUTH GEORGIA and SOUTH SANDWICH ISLANDS), ARUBA, AUSTRALIA, BARBADOS, CAYMAN ISLANDS,*

*CYPRUS, CZECH REPUBLIC, DENMARK, DJIBOUTI, ESTONIA, FALKLAND ISLANDS, FINLAND, FRANCE, FRENCH GUIANA, FRENCH POLYNESIA, GERMANY, GIBRALTAR, GUADELOUPE, GUERNSEY, HONG KONG, ISLE OF MAN, ISRAEL, ITALY, JERSEY, LATVIA, LUXEMBOURG, MACAO, MARTINIQUE, MEXICO, MONACO, NETHERLANDS, NORWAY, POLAND, PORTUGAL, SAINT PIERRE AND MIQUELON, SINGAPORE, SLOVAK REPUBLIC, SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA, SPAIN, SWEDEN, SWITZERLAND, UNITED KINGDOM, UNITED STATES, VENEZUELA. \* See our specific flyer on the Hague Evidence Convention for annotations regarding extension of accession to the Convention to territories and overseas possessions which have since been declared independent, and other footnotes on particular countries, names and addresses of foreign central authorities, etc. See also the country specific flyers available on the Internet at our home page and via our automated fax service discussed below under "Additional Information".*

**3. Service of Federal Subpoena for Witness Abroad (28 U.S.C. 1783):** The statute provides for service of a federal subpoena or order to show cause on a U.S. citizen or permanent resident alien abroad requiring the appearance of the witness before a court in the United States. See 22 CFR 92.86, 92.87, 92.88. See also, Born & Westin, 273, note 37; Moore's Federal Practice, Sec. 28.17 (1993). It is not possible to compel the testimony of a witness at a deposition abroad by service of an American subpoena.

**4. Invoking Foreign Domestic Discovery Laws More Expeditious than Letters Rogatory or Hague Evidence Convention Requests:** Some common law countries have domestic laws which provide for a solicitor to obtain an order from a local (foreign) court compelling a witness to appear at a solicitor's office. See also, country-specific flyers for the United Kingdom, Hong Kong, Canada, etc. for information about this process or consult local foreign counsel. See, Black, *Discovery in Great Britain: The Evidence (Proceedings in Other Jurisdictions) Act*, 11 Cornell Int'l L. J. 344 (1978). Lipstein, *The Evidence (Proceedings in Other Jurisdiction) Act 1975: An Interpretation (Foreign Evidence in English Courts)*, Int'l and Comp. L. Q., 120, 135 (1990).

#### J. EXTRATERRITORIAL DISCOVERY:

**1. Restatement of Foreign Relations Law of the United States (Revised)(Third), Sec. 442 (1987).** The American Law Institute (ALI)'s Restatement (Second) of the Foreign Relations Law of the United States (Second Restatement) sets forth a balancing test to assist courts in solving jurisdictional conflicts. Section 40 of the Second Restatement lists five nonexclusive factors that courts should consider to resolve jurisdictional conflicts. The ALI's Third Restatement restructured the Second Restatement's extraterritorial discovery balancing test in several ways. Section 442 of the Third Restatement provides five factors for the U.S. courts, under the principle of international comity, to balance when determining whether the requested documents are directly relevant, necessary, and material to an investigation conducted by a government agency or to any court discovery action. Section 442(1)(a) of the ALI's Third Restatement provides "A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside of the United States." Sec. 442 also provides for sanctions for failure to comply with an order.

**2. Selected Commentary:** Robinson, *Symposia: Transnational Litigation, Part I, Compelling Discovery and Evidence in International Litigation*, *The Int'l Law.*, Vol. 18, No. 3, 533 (1984).

Cumulative Digest of United States Practice in International Law, 1981-1988, Vol. II, 1522 (1994); Born & Westin, 302, 305; Rosenthal & Yale-Loehr,

Two Cheers for the ALI Restatement's Provisions on Foreign Discovery, 16 N.Y.U.J. Int'l L. & Pol. 1075 (1984).; Houck, Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions, 20 Int'l Law. 1361 (1986). Van Brauman, Foreign Evidence Gathering and Discovery for U.S. Civil Tax Determination Purposes, 30 Int'l Law. 589, 619 (1996). Plaster, The Hague Evidence Convention: The Need for Guidance on Procedures and Resolution of Conflicts in International Discovery, Vanderbilt Journal of Transnational Law, Vol. 27, No. 1, pp. 185-217 (1994).

**3. Selected Illustrative Cases: (Not Comprehensive): *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 107 S. Ct. 2542 & N. 28 (1987). *Grand Jury Proceedings: The Bank of Nova Scotia II, In re*, 740 F.2d 817 (11th Cir. 1984), cert. den., 469 U.S. 1106 (1985); 105 S. Ct. 778 (1985); *United States v. Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 103 S. Ct. 3086 (1983); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348 (D. Conn. 1991); *Reinsurance Co. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990); *In Re Grand Jury Proceedings Yanagihara*, 709 F. Supp. 192 (C.D. Cal 1989); *United States v. Rubin*, 836 F.2d 1096 (8th Cir. 1988); *Hudson v. Hermann Pfanter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158 (C.D. Cal. 1983); *Hong Kong and Singapore Bank Corp. v. Commissioner*, 85 T.C. No. 41 (Nov. 5, 1985); *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *United States v. Vetco*, 691 F.2d 1281 (9th Cir.) cert. denied, 454 U.S. 1098 (1981); *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); *In re Westinghouse Elec. Corp. Uranium*, 563 F.2d 992 (10th Cir. 1977); *Federal Maritime Commission v. DeSmedt*, 366 F. 2d 464 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).**

**4. Direct Extraterritorial Discovery Under Subpoena Provisions of Rule 45, F.R. Civ. P.:** Compulsion of documentary evidence located abroad has been sought by U.S. courts if the court has in personam jurisdiction of the person in possession or control of the material. Wright & Miller, Sec. 2209, 2454, 2462, p. 65-67 (1970). See Born & Westin, International Civil Litigation in United States Courts, 266, 273 (1989). See also, ***United States v. Bank of Nova Scotia***, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); ***In re Marc Rich & Co.***, 707 F.2d 663 (2d Cir), cert. denied, 463 U.S. 1215 (1983). But see, ***Afram Export Corp. v. Metallurgiki Halyps, S.A.***, 772 F.2d 1358, 1365-66 (7th Cir. 1985) regarding court's refusal to issue Rule 45(d) F.R.Civ. P. subpoena for testimony of witness located abroad, and its decision to order the deposition in the United States, not in the foreign country. See Born & Westin, 274, 276. But see, ***FTC v. Compagnie de Saint Gobain-Pont-a-Mousson***, 636 F. 2d 1300 (D.C. Cir. 1980).

K. ADDITIONAL INFORMATION: The Office of American Citizens Services has available general information flyers on international judicial assistance many of which are available through our automated fax system or via our Internet Consular Affairs Home Page. These topics include country-specific information about service of process and obtaining evidence abroad.

**Using the Autofax System:**

\* Dial (202) 647-3000 using the phone on your fax machine.

\* Follow the prompt to obtain a printed index of judicial assistance topics. There are four indexes.

Travel Information - Index of Countries - Press 1  
Passports and Visas - Index of Flyers - Press 2  
Judicial Assistance - General and Country Specific - Press 3  
Child Custody and Adoption - Index of Flyers - Press 4

\* Enter the four digit code for the document desired as listed in the index.

\* When the prompt identifies the document and asks if you want that document, enter Y (9) for yes or N (6) for no.

\* If you want another document, enter the four digit code, using the same procedures noted in the previous step.

\* When you finish selecting, press the # key on the phone keyboard and press the start button on your fax machine.

\* After a brief delay of up to a minute, the documents will print automatically on your fax machine.

**Using the Internet:**

Many of our judicial assistance flyers are also available on the Internet via the Department of State, Bureau of Consular Affairs Home Page at the URL: <http://travel.state.gov> under "judicial assistance" or via the main State Department home page at <http://www.state.gov> under "travel".. See also, the Department of State, Office of the Legal Adviser for Private International Law (L/PIL) Home Page at <http://his.com/~pildb/> for information about the work of the Hague Conference on Private International Law and the OAS in private international law unification. See also the home pages for many of our embassies which are linked to the Consular Affairs home page..

**L. Treaty Databases on the Internet: Information on which countries are party to a particular treaty is available from the following databases:**

United States Department of State, Office of the Legal Adviser, Treaty Affairs, List of Treaties and Other International Agreements of the United States In Force:  
<http://www.acda.gov/state/>.

United Nations (UN): <http://www.un.org/> under Databases/Treaties at <http://www.un.org/Depts/Treaty/>;

Council of Europe (COE): <http://www.coe.fr:80/index.html> under Texts/Treaties  
<http://www.coe.fr.80/eng/legaltxt/treaties.htm>;

Organization of American States (OAS): <http://www.oas.org/> under Public Information/Documents/Treaties at <gopher://oasunix1.oas.org:70/11/pub/english/treaties>.

U.S. House of Representatives Internet Law Library Treaties and International Law: <http://law.house.gov/89.htm>.

M. QUESTIONS: For additional information, contact the appropriate geographic division of the Office of American Citizens Services and Crisis Management at telephone (202) 647-5226.

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