

UNITED STATES DISTRICT COURT
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United States District Judge

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February 3, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
United States District Court for the
Southern District of Florida

Re: Proposed Amendment to Civil Rule 28

Dear Robin,

As you know from our prior discussions, I have been working on a proposal to include the general topic of “cross border discovery” into the Federal Rules.

This letter will enclose my first draft of a revised Rule 28. I had originally thought it would be best to amend or supplement Rule 44.1. However, after discussion with Professor Steven Gensler, Professor at the University of Oklahoma Law School, author of an excellent treatise on civil procedure, and also a former member of the Civil Rules Committee, he suggested approaching this by an Amendment to Rule 28, which already provides for depositions in foreign countries.

I have forwarded to you Steve’s email today, which makes some excellent suggestions for moving forward.

The approach I am proposing here would be to amend and supplement a Rule 28 to basically incorporate the principles behind Rule 34 into discovery of overseas information, subject to certain limitations.

I assume you will list this topic on the agenda for the next Committee meeting, as we have discussed. Professor Gensler has advised me that he plans to attend at least part of that meeting.

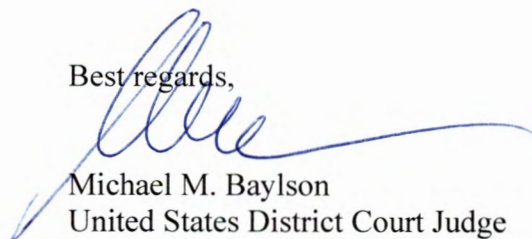
I emphasize that this is very much a first draft and a “working draft” that I hope your committee will consider and perhaps you will appoint a subcommittee to specifically concern themselves with this proposal.

As Steve suggests, prior to the next committee meeting, we plan to send you an updated draft and also some background explanation of our extensive involvement in this topic.

Also, I mention that the Sedona Conference WG6, which had its most recent meeting in London, attended by Steve Gensler and me, has long considered cross border discovery and has developed principles for use on this important topic for lawyers involved in litigation with clients and concerning valuable information overseas. These Sedona principles and background will be of great value to your committee.

Best personal regards.

Best regards,

A handwritten signature in blue ink, appearing to read 'Mike', with a long horizontal flourish extending to the right.

Michael M. Baylson
United States District Court Judge

CC: Professor Steven Gensler

Proposed Amendment to Rule 28(b) (Baylson Draft 2/2/23)

(1.) A deposition may be taken in a foreign country, and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

(2.) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

[The definitions and procedures set forth in Rule 34 may be incorporated by reference].

New (3.) This Rule may be invoked by a party seeking documents, electronically stored information, or other data, relevant to the dispute, located in a foreign country. In considering the notice of deposition, request, and any objection, a court shall take into account the existence of any treaty or foreign law, and principles of comity.

New (4.) This rule may be invoked by noticing the deposition, or issuing a letter of request, or other document, to the custodian(s) of the documents or electronically stored information, located in a foreign country.

New (5.) The Court may require redaction of information protected by principles of personal privacy, either in the laws of the country in which the information is located, or for other good cause.

New (6.) The principles underlying the provisions of 28 U.S.C. § 1782 (“Assistance to foreign and international tribunals and to litigants before such tribunals”) shall be considered in making the request.

New (7.) A court may allocate the costs of providing the information depending on burden, relevance, and other material factors.