

RULE 40 – DEPOSITIONS

Examination of person

- (1) By consent of the parties or by order of the court, a person may be examined on oath before or during trial, before an official reporter, or any other person the court may direct, in order that the deposition be available to be tendered as evidence at the trial.

Grounds for order

- (2) In exercising its discretion to order an examination under subrule (1), the court shall take into account:
 - (a) the convenience of the person sought to be examined;
 - (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence;
 - (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial; and
 - (d) the expense of bringing the person to the trial.

Subpoena

- (3) Where a party is entitled to examine a person under this rule, by serving on that person or a party a Subpoena in Form 25, the party may require the person or the party to bring to the examination:
 - (a) any document in the person's possession or control relating to the matters in question in the action, without the necessity of identifying the document; and
 - (b) any physical object in the person's possession or control, which the examining party contemplates tendering at the trial as an exhibit, but the subpoena shall identify the object.

Place of examination

- (4) Unless the court otherwise orders, or the parties to the examination consent, an examination under this rule shall take place at the office of an official reporter that is nearest to the place where the person to be examined resides.

Application of rule outside Yukon

- (5) So far as is practicable this rule applies to the examination of a person residing outside Yukon, and the court may order the examination of a person in the place and the manner it thinks just and convenient.

Where person willing to testify

- (6) If the person to be examined is willing to testify, the order shall be in Form 35 Order for Examination of Person(s) Outside the Jurisdiction and the Instructions to Examiner who has appointed in the order shall be in Form 36.

Where person not willing to testify

- (7) If the person to be examined is unwilling to testify, or if for any other reason the assistance of a foreign court is necessary, the order shall be in Form 37 Order for Issue a Letter of Request to Judicial Authority of Another Jurisdiction and the Letter of Request to Foreign Court for Examination of Witness out of Jurisdiction referred to in the order shall be in Form 38.

Letter of request

- (8) Where an order is made under subrule (7), the Letter of Request shall be sent by the party obtaining the order to the Under Secretary of State for External Affairs of Canada, or equivalent position (or, if the evidence is to be taken in Canada, to the Deputy Minister of Justice for Yukon), and shall have attached to it:
 - (a) any interrogatories to be put to the witness;
 - (b) a list of the names, addresses and telephone numbers of the lawyers or agents of the parties, both in Yukon and in the other jurisdiction; and
 - (c) a copy of the Letter of Request and any interrogatories translated into the appropriate official language of the jurisdiction where the examination is to take place and bearing the certificate of the translator that it is a true translation and giving their full name and address.

Filing of undertaking

- (9) The lawyer for the party obtaining the order shall file with the Under Secretary of State for External Affairs of Canada, or equivalent position (or the Deputy Minister of Justice for Yukon, as the case may be) their undertaking to be personally responsible for all the charges and expenses incurred by the Under Secretary (or the Deputy Minister of Justice, as the case may be) in respect of the Letter of Request and to pay them on receiving notification of the amount.

Notice of examination

- (10) Notice of examination of a person under this rule shall be given by the examining party delivering copies of the subpoena to the person to be examined and to all parties of record not less than 7 days before the day appointed for the examination.

Mode of examination

- (11) The examining party shall examine the witness, who shall be subject to cross-examination and re-examination, unless otherwise ordered.

Objection to question

- (12) If an objection is made to a question put to a witness in an examination under this rule, the question and the objection shall be taken down by the official reporter and the validity of the objection may be decided by the court, which may order the witness to submit to further examination.

Recording of deposition evidence

- (13) Unless otherwise ordered, the deposition shall be recorded either by:
- (a) the official court reporter in the form of questions and answers; or
 - (b) on video or film.

Perpetuating testimony

- (14) A person who, under the circumstances alleged by the person to exist, would become entitled, on the happening of any future event, to an estate or interest in property, the right or claim to which cannot be brought by the person to trial or hearing before the happening of the event, may apply by petition for an order to perpetuate any testimony which may be material for establishing the right or claim by examination under this rule.