

7 FAM 900 INTERNATIONAL JUDICIAL ASSISTANCE

7 FAM 910 INTRODUCTION AND AUTHORITIES

*(CT:CON-126; 01-25-2006)
(Office of Origin: CA/OCS/PRI)*

7 FAM 911 CONSULAR ROLE

(CT:CON-126; 01-25-2006)

- a. Due to the growth in international trade, travel, cultural exchange, private international law, and crime, the demand for and complexity of consular judicial assistance is growing and is often of critical importance with respect to a broad range of U.S. policies and interests as diverse as narcotics intervention, prosecution of terrorists, child adoption and abduction, and international banking.
- b. Judicial assistance is one of the many consular functions that may demand rapid action and close attention to detail. It may relate to litigation, investigation, evidence gathering, and legal discovery on behalf of parties in the United States and in the host country.
- c. Consular Officers are often called upon to provide information on the local availability of attorneys, translators, and other specialists who may be needed.
- d. When providing judicial assistance abroad, a consular officer must observe U.S. 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 chapter, you should consult with the Department (CA/OCS/ACS). Legal questions may be addressed to CA/OCS/PRI at ASKPRI@state.gov. CA/OCS/PRI will consult with the Office of the Legal Adviser and the U.S. Department of Justice as appropriate.

7 FAM 912 AUTHORITY TO PERFORM

JUDICIAL SERVICES

7 FAM 912.1 Depositions

(CT:CON-126; 01-25-2006)

- a. **Federal Authority:** Federal authority for consular officers to take depositions is established in:
 - (1) 22 U.S.C. 4215 (notarial acts, oaths, affirmations, affidavits, and depositions; fees) and 22 U.S.C. 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; and
 - (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.
- 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, China, prohibit the taking of voluntary depositions. In order to avoid violating principals of judicial sovereignty, evidence obtained abroad must not be gathered in contradiction of the laws of foreign jurisdiction; and
 - (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 7 FAM 920), 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

(CT:CON-126; 01-25-2006)

- 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 7 FAM 950).
- 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).
- c. 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. 7 FAM 970 provides information regarding litigation against the United States and 7 FAM 980 provides information regarding subpoena for consular testimony or records.

7 FAM 912.3 Service of Process Upon Foreign State

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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

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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 5 FAM 480. For additional guidance, consult the Department (CA/OCS) as appropriate. (See 7 FAM 060).

7 FAM 912.5 International Treaties and Conventions

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- 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. For a full discussion of the convention, see 7 FAM 935.1.
- b. Also applicable to the taking of depositions by consular officers is the Vienna Convention on Consular Relations, Article 5, Paragraphs (f), (i),

and (j)

7 FAM 912.6 Selected Bilateral Agreements

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- a. Many bilateral consular conventions include provisions regarding taking testimony, transmitting letters rogatory and service of process. See Treaties in Force, the CA/OCS Intranet treaties feature and the Departments internet travel site, bilateral consular conventions database.
- b. 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 former USSR.

7 FAM 912.7 Other International Agreement

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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

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7 FAM 960 provides guidance about Mutual Legal Assistance (MLAT) treaties.

7 FAM 912.9 Where No Applicable Treaty Exists

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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 Russia, even if the witness is willing to be deposed.

7 FAM 913 DEFINITIONS

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These terms are commonly used in judicial assistance.

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

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 7 FAM 856).

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)).

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).

Counsel or legal counsel. 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.

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 7 FAM 856).

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.

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).

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.

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.

Interrogatories. 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.

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).

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).

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.

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.

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

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.

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.

Summons. A document by which a party is summoned to answer a complaint filed with a court.

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

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 THROUGH 919 UNASSIGNED