CHAPTER 326.

DEPOSITIONS, OATHS AND AFFIDAVITS.

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326.01 Oaths, who may administer. (1) WITHIN THE STATE. An oath or affidavit required or authorized by law (except oaths to jurors and witnesses on a trial and such other oaths as are required by law to be taken before particular officers), may be taken before any judge, court commissioner, resident United States commissioner who has complied with section 235.19, clerk, deputy clerk or calendar clerk of a court of record, notary public, town clerk, village clerk, city clerk, justice of the peace, police justice, county clerk or his deputy within the territory in which such officer is authorized to act; and, when certified by such officer to have been taken before him, may be read and used in any court and before any officer, board or commission. Oaths may be administered by any person mentioned in subsections (3) and (4) of section 325.01 to any witness examined before him.

(2) WITHOUT THE STATE. Any oath or affidavit required or authorized by law may be taken in any other state, territory or district of the United States before any judge or commissioner of a court of record, master in chancery, notary public, justice of the peace or other officer authorized by the laws thereof to administer oaths, and in case the same shall have been properly certified by any such officer to have been taken before him, and shall have attached thereto a certificate of the clerk of a court of record of the county or district within which such oath or affidavit was taken, under the seal of his office, that the person whose name is subscribed to the jurat was, at the date thereof, such officer as he is therein represented to be, was empowered by law as such officer to administer the oath or affidavit, and that he believes the name so subscribed is the signature of such officer, such oath or affidavit may be read or used in any court within this state and before any officer, board or commission authorized to use or consider the same. Whenever any such oath or affidavit is certified by any notary public or clerk of a court of record and an impression of his official seal is thereto affixed no further attestation shall be necessary.

(3) OFFICER IN ARMED FORCES. In every instance where an officer in the armed forces is authorized by s. 235.19 (11) to take an acknowledgment, he may administer an oath.

History: 1951 c. 703; 1953 c. 61.

326.02 Duty to administer official and election oaths; no fees. (1) It shall be the duty of every person thereto authorized by law to administer and certify, on demand, any official oath and any oath required on any nomination paper, petition or other instrument used in the nomination or election of any candidate for public office, or in the submission of any question to a vote of the people.

(2) No fee shall be charged by any officer for administering or certifying any official oath, or any oath to any person relative to his right to be registered or to vote.

326.025 Testimonial oath. (1) In all judicial proceedings the witnesses shall be sworn before testifying, and the oath may be administered substantially in the following form: Do you solemnly swear that the testimony which you shall give in [here indicate the action, proceeding or matter on trial or being inquired into], shall be the truth, the whole truth and nothing but the truth, so help you God.

(2) The assent to the oath by the person being sworn may be manifested by the uplifted hand.

326.03 Oath, how taken. Any oath or affidavit required or authorized by law may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn.

326.04 Affirmations. (1) Every person who shall declare that he has conscientious scruples against taking the oath, or swearing in the usual form, shall make his solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in [here indicate the action, proceeding or matter on trial or being inquired into] shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

(2) The assent to the affirmation by the person making it may be manifested by the uplifted hand.

326.05 Depositions, may be taken. (1) Depositions (including that of a party taken on his own behalf) may be taken to be used before any court, magistrate or any other person authorized to hear testimony, in any civil action, matter or proceeding whatever, or on any motion therein.

(2) No deposition shall be taken before any officer or commissioner who is the attorney or of counsel for any party or person interested, or is himself otherwise interested in the action, matter or proceeding in or for which the deposition is taken, except by written consent of the parties.

A deposition cannot be used on the trial against one who was not a party to the action when it was taken. Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

326.06 Depositions in criminal proceedings. (1) WHEN TAKEN. If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(2) NOTICE OF TAKING. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(3) DEFENDANT'S COUNSEL. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel.

(4) HOW TAKEN. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(5) ATTENDANCE OF DEFENDANT; WAIVER OF RIGHT TO FACE WITNESS. (a) If the state or a witness procures such an order, the notice shall inform the defendant that he is required to personally attend at the taking of the deposition and that his failure so to do is a waiver of his right to face the witness whose deposition is to be taken; and failure to attend shall constitute such waiver unless the defendant was physically unable to attend.

(b) If the defendant is not in custody, he shall be paid witness fees for travel and attendance. If he is in custody, his custodian shall, at county expense, produce him at the taking of the deposition. If the defendant is in custody, leave to take a deposition on motion of the state shall not be granted unless all states which the custodian will enter with the defendant in going to the place the deposition is to be taken have conferred upon the officers of this state the right to convey prisoners in and through them.

(6) USE OF DEPOSITION. At the trial or upon any hearing, a part or all of a deposition (so far as otherwise admissible under the rules of evidence) may be used if it appears: That the witness is dead; or that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(7) OBJECTION TO ADMISSIBILITY. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

326.07 Depositions when authorized. Except in the cases covered by section 326.06, the deposition of a witness may be taken when:

(1) He shall live more than thirty miles from the place of trial or hearing of the action, proceeding or matter in which his testimony is wanted or beyond reach of the subpœna of the court.

(2) When he shall be about to go out of the state, not intending to return in time for the trial or hearing.

(3) When he is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial or hearing.

(4) When he shall be a member of the legislature, if any committee of the same or the house of which he shall be a member, shall be in session, provided he waive his privilege.

(5) When his testimony is material to any motion or other similar proceeding in any court of record, and he shall have refused to make affidavit of the facts, within his knowledge, in reference thereto.

(6) When he has been examined adversely under section 326.12.

326.08 Deposition; attendance of witness. Any witness may be subpœnaed and compelled to give his deposition at any place within twenty miles of his abode, under the same penalties as he may be subpœnaed and compelled to attend as a witness in any court.

326.09 Oral depositions; when taken, before whom, notice, absence of officer. (1) ORAL DEPOSITIONS IN THIS STATE. (a) Such deposition, in this state, may be taken by a justice of the peace, notary public, court commissioner or other person authorized to take depositions, at any time after the action or proceeding is commenced or after a submission to arbitration.

(b) Notice in writing shall be given to the adverse party, his attorney or agent, that the deposition of the witnesses named will be taken before the named officer, at a time and place appointed therein, for a statutory cause, specifying the cause; and three days' notice shall be given of the taking of such deposition, and additional time at the rate of one day for each three hundred miles or fraction thereof after the first thirty miles from the place where the notice is served. No notice need be given to a defendant who, having been served with process, shall not have appeared, if the time for appearance has expired.

(c) One day's notice shall be sufficient to authorize the taking of depositions of additional witnesses desired to be examined, given during the course of the taking of any deposition where the parties on each side appear.

(d) In case the officer designated shall not attend at the time and place noticed for taking the deposition, it may be taken before any other officer, authorized to take depositions, designated by the party who served the notice of taking deposition, and notice of such designation to the opposite party, in sufficient time to attend before the officer so designated if the opposite party shall have appeared at the time and place mentioned in the first notice; but if he shall not so appear, the moving party may, after waiting one hour, proceed to take such deposition before such other officer without further notice.

(2) ORAL DEPOSITIONS WITHOUT THIS STATE. (a) Such deposition may be taken orally without this state by any notary public or justice of the peace or by any judge or justice, court commissioner or master in chancery of any court of record of the United States or any state or territory thereof, or by any commissioner appointed pursuant to section 137.02, within the territory in which such officer is authorized to act.

(b) In a foreign country such deposition may be taken before any judge or clerk of a court of such country, any notary public, or any consul, vice consul, deputy consul or consular agent of the United States, resident in such country, or by any officer authorized by the laws of the United States to take depositions.

(c) Such deposition without the state may be taken, certified, returned, filed and used in the manner and under the provisions of law applicable to depositions taken within the state.

326.095 Ex parte deposition in county court. In proceedings in the county court where there is no contest, depositions may be taken for use therein in such manner as the court directs, either within or without the state.

326.10 Depositions; how taken and returned. The deponent shall be sworn to testify the truth, the whole truth and nothing but the truth relating to the action, proceeding or matter for which his testimony is taken, and his testimony shall be taken in writing, or in shorthand by a stenographer approved by the officer taking the same, or by all parties in interest, and by such stenographer reduced to longhand. There must be inserted therein every answer or declaration of the witness and every oral interrogatory which any party

requires to be inserted. The deposition must be read to or by the witness and subscribed by him, unless the parties represented shall stipulate, upon the record (which they may do), that the reading of the deposition to or by the deponent and his signature thereto are waived, and that the deposition may be used with like force and effect as if read and subscribed by him. The attendance of the deponent for the purpose of reading and subscribing his deposition may be compelled in the same manner that his attendance to be examined may be compelled. The deposition shall in all cases be delivered or transmitted by the officer by whom the same is taken to the clerk of the court, the magistrate, board or officer before whom the action, proceeding or matter is pending, securely sealed, and shall remain sealed until opened by such court, clerk, magistrate, board or officer.

326.11 Depositions, court rules for taking. Additional rules may be prescribed by courts of record in respect to actions and proceedings therein, concerning the issuing and return of commissions, the taking, return, safe-keeping and opening of depositions or any other matters connected therewith, including depositions to perpetuate testimony, taken within or without the state, not inconsistent with law and such rules as may be prescribed by the supreme court.

326.12 Discovery examination before trials. (1) PERSONS SUBJECT THERETO. The adverse examination of a party, or any person for whose immediate benefit any civil action or proceeding is prosecuted or defended, or his or its assignor, officer, agent or employe, or of the person who was such officer, agent or employe at the time of the occurrence made the subject of the examination, may be taken by deposition at the instance of any adverse party upon oral or written interrogatories in any civil action or proceeding at any time before final determination thereof, but the deponent shall not be compelled to disclose anything not relevant to the controversy. Each of said persons may be so examined once and no more, except when examined before issue joined, in which case he may be again examined after issue joined, upon all the issues. If the examination is taken after the complaint is served, but before issue is joined, it may extend to all the allegations of the complaint.

(2) PROCEDURE SAME AS FOR OTHER DEPOSITIONS, EXCEPTIONS. Except as provided otherwise by this section, such examination may be had within or without the state, and may be instituted and conducted under and pursuant to the laws and rules regulating the taking of other depositions for use in actions or proceedings.

(3) TIME, PLACE, NOTICE; OFFICERS EMPOWERED TO TAKE. Such examinations shall be taken in counties within this state having a population in excess of 500,000 before a court commissioner or judge at chambers and elsewhere before any officer authorized to take depositions by the laws of the state where the deposition is taken on previous notice to all adverse parties or their respective attorneys of at least 5 days. If the person to be examined is a nonresident party to the action or proceeding, or is a nonresident president, vice president, secretary, treasurer or managing agent of a corporation that is a party, the court may upon just terms fix the time and place of such examination, and he shall attend at such time and place and submit to the examination, and, if required, attend for the reading and signing of such deposition, without service of subpoenas. Such examination shall not be compelled in any county other than that in which the person examined resides, except that any nonresident subject to examination may be examined in any county of this state in which he is personally served with notice and subpoena. The court may fix another place for such an examination in the case of a person who is physically unable to attend the examination in the county of his residence. When a party has instituted suit in any county of this state, he shall be subject to adverse examination in such county whether he resides in such county or not provided a subpoena is served upon him within such county.

(4) DISCOVERY NEEDED TO PLEAD. If discovery is sought, to enable the plaintiff to frame a complaint, the notice of taking the examination shall be accompanied by the affidavit of himself, his attorney or agent, stating the general nature and object of the action or proceeding; that discovery is sought to enable him to plead, and the subjects upon which information is desired; and the examination relative thereto shall be permitted unless the court or presiding judge thereof shall, before the examination is begun, further limit the subjects to which it shall extend, which may be done on one day's notice.

(5) USE OF DEPOSITION. Such portions of any such deposition as are relevant to the issues may be offered by the party taking the same, and shall be received when so offered upon the trial of action or proceeding in which it is taken, notwithstanding the deponent may be present.

(6) DEPOSITION FOLLOWING EXAMINATION. At the conclusion of the adverse examination the deposition of the witness may be taken without previous notice and before the

same officer by any party, and the same may be used in like cases and with like effect as if taken upon notice.

History: 1953 c. 371; 1955 c. 197.

Where the defendants had the full benefit of the adverse examination of the plaintiff, in that they were permitted on cross-examination to examine into its contents for impeachment purposes and discovering of admissions against interest, the exclusion of the adverse examination itself, on objection made by an insurance company which was not a party to the action when the adverse examination was taken and did not have notice thereof, was not prejudicial to the defendants. Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

Where a party has given testimony at the trial which conflicts with the testimony given by such party at an adverse examination, such conflicting testimony, in the absence of established perjury, presents a jury issue as to its weight, with the members of the jury free to accept whichever of the 2 versions of such testimony they believe to be true. See also note under 263.43, citing this case. Maxwell v. Fink, 264 W 106, 58 NW (2d) 415.

An affidavit for a discovery examination to enable the plaintiffs to plead, stating that the action was one for damages arising out of the defendants' fraudulent representations in regard to the sale of a photography business, and that the matters on which discovery was sought were, among others, the defendants' interest in the photography business and premises prior to the date of possession taken by the plaintiffs, and the defendants' interest therein from such date, was sufficient under (4), so that the trial court, although it might have limited the scope of the examination in some respects, erred in suppressing the examination entirely on the ground that the plaintiffs knew as well as the defendants what the representations were. Hiller v. Perssion, 264 W 143, 58 NW (2d) 676.

In a proceeding on objections made by sons of a testator to the probate of his will on the grounds that he lacked mental capacity to make a will and that the execution of the will was procured by undue influence exercised on him by another son and the latter's wife, the testator was not a "party" nor a "person for whose benefit" the proceeding was had, and the objectors were not parties "adverse' to the testator, and an attorney who had drafted the will and was a subscribing witness thereto was not subject to adverse examination by the objectors before trial under this section as an "agent'" of the testator, or otherwise. (Estate of Landauer, 261 W 314; Estate of Smith, 263 W 441, distinguished.) Will of Block, 264 W 471, 59 NW (2d) 440.

See note to 274.33, citing Will of Block, 264 W 471, 59 NW (2d) 440.

Where defendants were afforded the opportunity to examine plaintiffs adversely by oral interrogatories, by an order imposing conditions within the discretion of the court to impose, but defendants chose not to comply with such order and did not appeal therefrom, an order enjoining defendants' attorneys from proceeding with a subsequently proposed adverse examination of a nonresident plaintiff by written interrogatories, without prejudice to the right of defendants to examine such plaintiff adversely on the trial, was not an improper suppression of an examination to which defendants were entitled and was within the discretion of the court. Mackey v. Trombetta, 264 W 621, 60 NW (2d) 389.

In a condemnation proceeding by a city, the property owners can examine adversely a city employe who participated in and supervised the annexation proceeding. Milwaukee v. Schomberg, 266 W 174, 63 NW (2d) 50.

(1) is sufficiently broad to permit the adverse examination of former officers of a town consolidated with a city, as well as an officer of the defendant city in charge of community development and annexation, for the purpose of discovering information to enable the plaintiffs to prepare their complaint, even though their action to contest the validity of the consolidation proceedings was properly dismissed as against the town. Toman v. Lake, 268 W 239, 67 NW (2d) 356.

On the adverse examination of an attorney, information within the knowledge of the client, and to which his adversary is not entitled, is not made available to the later by the mere fact that it is also within the knowledge of the attorney and has come to the attorney by means of a communication made to him by a third person. Tomek v. Farmers Mut. Automobile Ins. Co. 268 W 566, 68 NW (2d) 573.

The right to an adverse examination before trial is granted by statute and not by order of the court, so that an order refusing to limit or suppress an adverse examination does not grant or continue a provisional remedy. Appleton v. Sauer, 271 W 614, 74 NW (2d) 167.

Under (3), the trial court properly denied the defendant's motion for an adverse examination in Wisconsin of nonresident officers of the plaintiff Wisconsin corporation. Any order directing such nonresidents to attend adverse examinations in Wisconsin would be void and unenforceable. Midwest Broadcasting Co. v. Dolero Hotel Co. 273 W 508, 78 NW (2d) 898.

326.13 Deposition, when not used. Except as provided in section 326.12, no deposition shall be used if it shall appear that the reason for taking it no longer exists, unless the party producing it shall show other sufficient cause then existing for its use.

326.14 Deposition, when may be used. Except as otherwise provided in section 326.12 every deposition taken in pursuance of a stipulation or after due notice may be used on the trial by any party, if the same shall have been filed with the clerk of the court and the other party notified thereof, or if filed with a justice of the peace, without such notice, before the commencement of the trial and the same be otherwise unobjectionable. But in an action or proceeding in courts of record, unless such notice be given or the deposition be filed at least five days before the time set for the trial at which it is sought to be used, the opposite party shall be entitled to a continuance for good cause shown, at the cost of the party desiring to use the deposition, unless he will forego the use of it.

326.15 Deposition, objections to. All objections to the validity or admissibility of any deposition shall be made before entering on the trial; but any deposition may be suppressed after the trial is begun if any sufficient cause appear which is not disclosed in the deposition and accompanying papers. No deposition which shall have once been used on the trial of an action shall be suppressed upon any retrial of the same action for any cause unless objection for such cause was made thereto on the former trial or such cause is not

disclosed in the deposition and accompanying papers and shall have been discovered since the former trial.

326.16 Objections to witness and question. Every objection to the competency of the witness, or to the propriety of any question put to him, or the admissibility of any testimony given by him may be made when the deposition is produced, in the same manner as if the witness were personally examined on the trial and without being noted upon the deposition unless the objection is to the form or order of a question, when the objection must be noted in the deposition before it is answered.

Where at the start of the trial, counsel stated that he was raising the question of failure to have a deposition read and signed, but after a conference in chambers, he permitted it to be read into evidence without objection, the alleged errors are deemed waived, and counsel's statement is insufficient to preserve an exception for appeal. Timm v. Rahn, 265 W 280, 61 NW (2d) 322.

326.17 Deposition, use of in other actions. When a deposition shall have been lawfully taken in any action it may be used in any trial, inquiry or assessment therein, and it may also be used in any other action between the same parties, including their respective legal representatives, involving the same controversy, if it shall have been duly filed in the first mentioned action and have since remained in the custody of the clerk of the court where the same was pending, subject to the same objections as if originally taken for such other action.

326.18 Deposition may be used on appeal. When an action or proceeding shall have been appealed from one court to another all depositions lawfully taken to be used in the court below may be used in the appellate court; but if any such deposition was offered in the court below, then subject to the same objections for informality or irregularity, and none other, which were duly taken in writing in such court below.

326.20 Deposition in justice court. The justice of the peace before whom any civil cause is pending may, on any day on which a trial may be had, after an application has been made for adjournment and before making an order for an adjournment, on the application of either party, showing any cause provided by law therefor, proceed to take the deposition of any witness then in attendance before the justice; and no prior notice shall be required.

326.21 Deposition; order of examination. The party producing the deponent shall, in all cases, be allowed first to examine him, either upon verbal or written interrogatories, on all points which he shall deem material, and then the adverse party may examine the deponent in like manner, after which either party may propose such further interrogatories as the case may require.

326.22 Form of certificate. The officer shall annex to the deposition a certificate substantially as follows:

STATE OF WISCONSIN, }
.... County. } ss.

I, A. B. (add official designation), in and for said county, do hereby certify that the above deposition was taken before me at my office, in the .... of ...., in said county, on the .... day of ...., 19.., at .... o'clock, ... noon; that it was taken at the request of the plaintiff (or defendant, or other person procuring it), upon verbal (or written) interrogatories; that it was reduced to writing by myself (or by ...., a disinterested person, in my presence, and under my direction, or was taken in shorthand by ...., approved by me, or by all parties in interest and by him reduced to longhand); that it was taken to be used in the action of A. B. vs. C. D., now pending in .... court (or to be used in some proceeding or matter, mentioning it), and that the reason for taking it was (here state the true reason); that .... attended at the taking of such deposition (or that a notice, of which the annexed is a copy, was served upon .... on the .... day of ...., 19..; or that the deposition was taken in pursuance of the annexed stipulation); that said deponent, before examination, was sworn to testify the truth, the whole truth and nothing but the truth relative to said cause, and that said deposition was carefully read to (or by) said deponent and then subscribed by him (or the parties attending the taking of the deposition stipulated on the record, that the reading of the deposition by or to the deponent and his signature thereto is waived and that it may be used as if read and signed).

A. B. (adding official designation).

326.23 Deposition relative to public institutions. (1) WHO MAY REQUIRE. The state department of public welfare, the state board of health, the state superintendent, the board of regents of the university, or the board of regents of state colleges may order the deposition of any witness to be taken concerning any institution under his or its government or superintendence, or concerning the conduct of any officer or agent thereof, or concerning any matter relating to the interests thereof. Upon presentation of a certified

copy of such order to any justice, notary public or court commissioner, such officer shall take the desired deposition in the manner provided for taking depositions to be used in actions. When any officer or agent of any institution is concerned and will be affected by the testimony, 2 days' written notice of the time and place of taking such deposition shall be given him. Any party interested may appear in person or by counsel and examine the witness touching the matters mentioned in the order. The deposition, duly certified, shall be delivered to the authority which ordered it.

(2) FEES. Every officer who takes a deposition, and every witness who appears and testifies under this section, shall be paid the fees allowed on the taking of other depositions, and the account of the expenses incurred in taking any such deposition, being duly certified, shall be paid out of the state treasury and charged to the appropriation of the authority which ordered the deposition.

History: 1953 c. 61.

326.24 Deposition; for use in other states. Any witness may be subpœnaed and compelled to attend and give his deposition before any person authorized to take depositions in this state, or before any commissioner appointed under the authority of any other state, territory or country, or any court thereof, in any action, cause or proceeding pending in such other state, territory or country; provided, its laws contain provisions similar to this section, requiring persons within its borders to give their testimony by deposition in actions pending in Wisconsin.

326.25 Witnesses sent to other states. (1) Upon presentation to any judge of a court of record in Wisconsin of the certificate of the judge or the clerk of any foreign court of record, under seal, stating that any person being or residing in Wisconsin is believed to be a necessary witness in any civil action pending in that court, such judge (if satisfied by such proof as he shall require that the testimony of such witness is necessary to the trial of such action) shall issue and attach to such certificate a subpœna commanding such witness to appear in the court where such action is pending, at the time and place stated therein, or show cause, before such judge, at a time and place fixed in such subpœna, why he should not appear as therein commanded. Such judge may refuse to issue a subpœna or may vacate the subpœna after it is issued, if it appear that compliance will cause undue hardship to the witness.

(2) If any person on whom such subpœna has been served, and to whom has been tendered the sum of ten cents for each mile to be traveled to and from the court, together with the sum of five dollars for each day that his attendance is required, shall neglect to attend and testify at such trial, he shall be punished as for a criminal contempt unless such subpœna shall be vacated.

(3) This section shall not apply to any action pending in any state, territory or country whose laws do not contain provisions similar to this section, requiring persons within their borders to attend for the purpose of testifying in any civil or criminal action pending in this state.

Cross Reference: For extradition of witnesses in criminal cases, see 325.33.

326.26 Depositions without this 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 the state may be taken upon written interrogatories as provided in this section.

(4) COMMISSION TO TAKE. A commission may issue from any court of record to take the deposition of any witness without the state, where an issue of fact has been joined or the time therefor has expired, for any cause which shall be 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 subsections (4), (5) and (6).

(5) PROCURING COMMISSION. (a) The party desiring a commission shall prepare interrogatories and state in the caption thereof the name of the commissioner proposed by him, the name of the witness and the residence of each with particularity, and shall serve a copy thereof on the opposite party, with a notice that, at the expiration of ten days from the date of such service, a commission will be issued to take the deposition of the witness, specifying the reason for taking the same. Within such time the opposite party may file with the clerk and serve upon the other his objections, to the interrogatories proposed and to the competency of the witness and to the issuance of the commission and serve his cross-interrogatories; and state the name and residence of any person whom he desires to act as an additional commissioner, who must reside in the county in which the commissioner first named resides.

(b) At the expiration of the time limited, the moving party may file the notice and interrogatories, with proof of service thereof and his objections to the cross-interrogatories.

He may also serve redirect interrogatories on the opposite party, who may, within three days after such service, file objections to such redirect interrogatories. Thereupon the commission shall be issued, with the interrogatories, 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 him to plead has expired, no notice is required to be given such defendant, and the commission may issue on filing the direct interrogatories. No commission shall issue if the residences are not given as required.

(6) DUTY OF COMMISSIONER. (a) The commissioner first named shall fix the time and place for executing the commission and give the other commissioner one day's notice thereof, when he resides in the same place, and when not, one day's notice in addition for every thirty miles of distance between his 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 two commissioners the commission shall be executed in the county where they reside, unless they agree upon another. The commissioner first named shall have charge of and return the deposition, which return shall be in the form and manner directed by the commission or as provided by section 326.22. 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 he must certify in his return that the other had due notice but failed to attend.

(b) One of the commissioners shall publicly administer an oath or affirmation to each witness that the answers which he shall make to each of the interrogatories propounded to him shall be the truth, the whole truth, and nothing but the truth. His answers to each interrogatory shall be reduced to writing. Each witness shall subscribe his name at the end of his answer and the commissioners shall subscribe their names at the foot of each page of the testimony. If any exhibit is produced and proved or referred to in the answer of any witness, it shall be marked as an exhibit, either by letter or number, by a commissioner, and referred to in the testimony of the witness, and annexed to and returned with the deposition. If the paper be a record or other document not in the control of either party, it shall be sufficient to annex a copy, stated by the witness in his answers to be a true copy thereof. The commissioners shall certify in their return that each witness, before giving his evidence, was duly sworn or affirmed, and shall state the time when the testimony was taken.

(c) The proper commissioner shall inclose the commission, the interrogatories, and the deposition with the return annexed in a sealed envelope, with the title of the action indorsed thereon and immediately transmit the same by mail or express to the clerk of the court from which the commission issued.

(d) Upon the receipt of such package, the clerk shall indorse the time and manner in which he received the same, and open it and file the contents thereof and give notice of the receipt of the same to the attorneys for the respective parties.

(7) FEES. The persons who take depositions and the witness shall be entitled to the fees allowed justices of the peace 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.

(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 part thereof as may be necessary, from the English into the language spoken by the witness; 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 translator shall append to all translations his affidavit that he knows the English and such foreign language, and that in making such translation he carefully and truly translated such proceedings from the English into such foreign language or from the latter into English, and that such translation is correct. Such translation shall have the same effect as if all the proceedings were in English, but the trial court, upon the deposition being offered in evidence, may admit the testimony of witnesses learned in such foreign language 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 discretion, continue the cause for the further taking of testimony.

326.27 Perpetuation of testimony. (1) REQUEST FOR. When any person desires to perpetuate testimony in this state he shall make a written statement of his title, claim or interest in or to the subject concerning which he desires to perpetuate the evidence and the names of all other persons interested or supposed to be interested therein, and the name

of the witness proposed to be examined, and shall deliver the statement to a judge of a court of record, requesting him to take the deposition of the witness.

(2) NOTICE OF TAKING. The said judge shall thereupon cause notice to be given of the time and place appointed for taking the deposition to all persons mentioned as interested; which notice shall be given in the manner prescribed by section 326.09.

(3) MANNER OF TAKING, CERTIFICATION. The deponent shall be sworn and examined and his deposition shall be written, read and subscribed, and his attendance may be required in the manner prescribed respecting the other depositions, and the judge shall annex thereto his certificate of the time and manner of taking it, and that it was taken in perpetual remembrance of the thing; and containing the names of the persons at whose request it was taken, and of all those who were notified to attend, and of all who did attend the taking thereof.

(4) DEPOSITION RECORDED. The deposition, the certificate and the written statement of the party at whose request it was taken, shall, within ninety days after the taking thereof, be recorded in the registry of deeds in the county where the land lies, if the deposition relates to real estate; otherwise, in the county where some of the parties reside.

(5) DEPOSITION, WHEN USED. The deposition or a certified copy of such record thereof may be used in any action or proceeding between the person at whose request it was taken and the persons named in the said written statement, or any of them, who were notified as aforesaid, or any person claiming under either of the said parties concerning the title, claim or interest set forth in the statement, in the same manner and subject to the same conditions and objections as if it had been originally taken for said action or proceeding.

326.28 Perpetuation of testimony without the state. (1) COMMISSION. Depositions to perpetuate the testimony of witnesses without the state may be taken upon a commission to be issued by any court of record in the manner hereinafter provided.

(2) APPLICATION. The applicant shall file a statement like that prescribed for taking such a deposition within this state; and if the proposed deposition relate to real estate within this state, the statement shall be filed in the county where the land or part thereof lies; otherwise, in the county where some of the parties reside.

(3) NOTICE. The court shall order a hearing and that fourteen days' notice thereof be given to all persons mentioned as adversely interested and living within the state.

(4) APPLICATION IN VACATION. The applicant may, at his election, file his statement in the clerk's office in vacation, and give notice thereof to the persons therein named as adversely interested by serving them with a certified copy of the statement, fourteen days before the next term of court; and the court may thereupon hear the parties.

(5) COMMISSION, WHEN TO ISSUE. If, upon such hearing, the court shall be satisfied that there is sufficient cause for taking the deposition, it shall issue a commission therefor in like manner as for taking a deposition to be used in any pending cause.

(6) HOW TAKEN. The deposition shall be taken upon written interrogatories and cross-interrogatories; and returned substantially as if taken to be used in a pending cause.

(7) HOW USED. All depositions taken according to the provisions of this section may be used in like manner as if taken within this state.

326.29 Perpetuation of testimony as against all persons. (1) COMMISSION. Depositions to perpetuate the testimony of witnesses, within or without the state, so that the same may be evidence against all persons, may be taken upon a commission to be issued by any court of record.

(2) APPLICATION. The commission may be applied for in the manner prescribed in section 326.28; and all proceedings thereon shall be as prescribed in said section except as herein otherwise provided.

(3) APPLICANT QUESTIONED; NOTICE. The court shall inquire, at discretion, as to all persons known or supposed to be interested; and shall, in the commission, direct the commissioner to publish in such newspaper or newspapers, or in such other manner as the court shall consider most effectual, notice of the time and place such depositions will be taken, and of the subject matter thereof; which notice shall be addressed, by name, to each person who is known or supposed to be interested, and generally to all others, and shall state that they may attend and cross-examine the witnesses; and the court may also require personal notice of the time and place of taking, and of the subject matter of such depositions to be given to such persons and in such manner as shall seem proper.

(4) RECORDING DEPOSITION. Such deposition, having been returned to the court, and being found by the court (after notice to the parties who have appeared in the matter), to have been taken according to law and the directions contained in the commission, the court shall order it recorded within thirty days in the registry of deeds for the county.

(5) USE OF DEPOSITION. Any deposition so taken and recorded or a certified copy thereof from the registry may be used by the person at whose request it was taken, or by any person claiming under him, against any person whatever in any action or proceeding wherein shall be brought in question the title, claim or interest set forth in the statement upon which the commission was founded in the same manner and subject to the same conditions and objections as if it had been originally taken for said action or proceeding.