

NOTICE OF COMMENT PERIOD

The Nebraska Supreme Court Committee on Practice and Procedure submitted a proposed new rule, Neb. Ct. R. Disc. § 6-330(A) entitled “Interstate depositions and discovery” that includes an Appendix A, as well as proposed amendments to Neb. Ct. R. Disc. § 6-328(e) entitled “Depositions for Use in Foreign Jurisdictions.” The Nebraska Supreme Court directed that the proposed new rule and appendix and the proposed amendments be published for a public comment period.

The Nebraska Supreme Court invites interested persons to comment on the proposed new rule and amendments. Anyone desiring to comment should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to wendy.wussow@nebraska.gov, with the rule section(s) listed in the subject line, no later than December 31, 2020.

The full text of the proposed amendments is available below, or a paper copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

CHAPTER 6: TRIAL COURTS

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Article 3: Nebraska Court Rules of Discovery in Civil Cases.

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§ 6-328. Persons before whom depositions may be taken.

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(e) Depositions for Use in Foreign Jurisdictions. Rule 30A applies when ~~When~~ the deposition of any person is to be taken in this state for use in proceedings in ~~pursuant to the laws of~~ another state, When the deposition of any person is to be taken in this state for use in proceedings in ~~or of the United States or of another country for use in proceedings there,~~ witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as may be employed for the purpose of taking testimony in proceedings pending in this state. The district court for the county where the deponent is found may make such orders as could be made if the deposition were intended for use in this jurisdiction, having due regard for the laws and rules of ~~such foreign jurisdiction~~ the other country.

COMMENT TO RULE 28

. . . Subsection (e) follows the language of former Neb. Rev. Stat. § 25-1267.18 (Repealed 1982), in establishing a procedure for taking a deposition in Nebraska for use in another state.

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[PROPOSED RULE:]

§ 6-330(A). Interstate depositions and discovery.

(a) Definitions. In this rule:

(1) “Foreign jurisdiction” means a state other than this state.

(2) “Foreign subpoena” means a subpoena issued in a civil proceeding under authority of a court of record of a foreign jurisdiction.

(3) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) “Subpoena” means a document, however denominated, issued under authority of a court of record that requires a person to:

(A) testify at a deposition;

(B) produce for inspection, copying, testing, or sampling designated books, papers, documents, tangible things, or electronically stored information in the possession, custody, or control of the person; or

(C) allow entry upon designated land or other property that is in the possession or control of the person.

(b) Issuance of Subpoena. To request issuance of a subpoena under this rule, a party must submit to the clerk of the district court for the county in which discovery is sought to be conducted a Request for the Issuance of a Nebraska Subpoena for a Proceeding in a Foreign Jurisdiction. The content of the request must be substantially the same as the content of the form in the Appendix to this rule.

The party must attach to the request (1) a foreign subpoena and (2) a list of the names, addresses, telephone numbers, and e-mail addresses of all counsel of record and self-represented parties in the proceeding to which the subpoena relates. The party must also pay to the clerk of the district court a fee of \$75 for the issuance of the subpoena.

When a party submits a foreign subpoena to a clerk of a district court in this state, the clerk, in accordance with the district court’s procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

A subpoena issued under this rule must:

(1) include as an attachment a copy of the list required by this subsection;

(2) accurately incorporate the time, place, and method of the discovery requested in the foreign subpoena; and

(3) if the subpoena commands the person to produce designated documents, electronically stored information, or tangible things, the subpoena must either accurately incorporate the commands from the foreign subpoena or attach the foreign subpoena and state that the person must produce the documents, information, or things designated in the attached foreign subpoena.

(c) Service of Subpoena. A deposition subpoena issued by a clerk of court under this rule must be served in compliance with Neb. Rev. Stat. § 25-1226(1) and the return made in compliance with § 25-1228(1). A subpoena for discovery from a nonparty without a deposition must be served and the return must be made in compliance with Rule 34(A)(a)(4).

(d) Deposition, Production, and Entry Upon Land. The statutes and rules of this state, including the Nebraska Court Rules of Discovery in Civil Cases, apply to subpoenas issued and discovery conducted pursuant to this rule.

(e) Appearance, Certification, and Acknowledgment.

(1) A request for the issuance of a subpoena or engaging in discovery pursuant to such a subpoena does not constitute an appearance in the courts of this state or the unauthorized practice of law in this state.

(2) By submitting a request for a subpoena, attorneys or self-represented parties certify that the foreign subpoena was properly issued under the laws or rules of the foreign jurisdiction. By submitting a request for a subpoena, attorneys who are not admitted to practice in Nebraska further certify that they are admitted to practice in the foreign jurisdiction in which the proceeding is pending and that they have not been disbarred or suspended from practice in any jurisdiction.

(3) By submitting a request for a subpoena, attorneys or self-represented parties acknowledge that the district court has jurisdiction to impose sanctions on them for false certifications made in obtaining the subpoena and for any conduct related to the subpoena that violates the Nebraska Court Rules of Discovery in Civil Cases.

(f) Motions. A motion for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under this rule must comply with the statutes and rules of this state and must be filed with the district court for the county in which the discovery is to be conducted. Such a motion may be filed or opposed only by an attorney admitted to practice in this state or by a self-represented individual.

COMMENTS TO RULE 30(A)

[1] This rule is promulgated pursuant to the authority granted to the Supreme Court by § 25-1237 and is modeled on the Uniform Interstate Depositions and Discovery Act drafted by the National Conference of Commissioners on Uniform State Laws. The purpose of the rule is to provide a simple, uniform, and efficient procedure under which a party to a civil proceeding pending in a foreign jurisdiction can have a subpoena issued in Nebraska to obtain discovery for the foreign proceeding. For purposes of this rule, the term “foreign jurisdiction” means the courts of another state, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, and the territories of the United States. It does not include another country. Discovery for proceedings in other countries is governed by Rule 28(e).

[2] The act of the clerk of the district court in issuing the subpoena is administrative. In effect, the clerk reissues the foreign subpoena as a Nebraska subpoena and assigns the matter a number. The only

documents that need to be presented to the clerk are the request, the foreign subpoena, and a list of counsel and unrepresented parties. Although the rule does not require the requesting party to submit a draft Nebraska subpoena, the party may choose to do so in order to expedite the process.

[3] It is not the responsibility of the clerk to ensure that the foreign subpoena was properly issued under the laws or rules of the foreign jurisdiction. It is instead the responsibility of the requesting lawyer or self-represented party. The lawyer or self-represented party must certify in the request that the foreign subpoena was properly issued. A false certification may result in the imposition of sanctions under subsection (e) of this rule. Sanctions should not be imposed, however, if the foreign subpoena was improperly issued as a result of a reasonable, good faith mistake.

[4] A lawyer admitted in a foreign jurisdiction does not need to retain local counsel or be admitted pro hac vice in order to have the subpoena issued. The request for the issuance of the subpoena does not constitute the unauthorized practice of law in this state. The same is true of taking a deposition or obtaining other discovery pursuant to the subpoena. See Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2) (“[a] lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer . . . is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized”); Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2), Comment 10 (taking deposition in Nebraska is reasonably related to pending proceeding in another jurisdiction).

[5] During a deposition, lawyers may sometimes seek a telephonic ruling from the court on an objection or instruction not to answer. Lawyers may not do so during a deposition taken pursuant to this rule unless the lawyers are all admitted to practice before the court from which the ruling is sought.

[6] Nebraska law applies to discovery undertaken pursuant to this rule. That means that Nebraska’s procedural, evidentiary, and conflicts law apply. Nebraska has a significant interest in protecting its residents from any unreasonable or unduly burdensome discovery requests when they become targets of discovery requests for actions pending in a foreign jurisdiction. This interest is best served by requiring that any discovery motions must be decided under the laws of Nebraska and that all motions that directly affect the person from whom discovery is sought must be filed in Nebraska.

[7] Motions that affect only the parties to the action can be made in the foreign jurisdiction. For example, any party can apply for an order in the foreign jurisdiction to bar the deposition of a Nebraska deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of the district court in this state.

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Appendix to Rule 30A – Request Form

IN THE DISTRICT COURT OF _____ COUNTY, NEBRASKA

)	No. _____
)	
)	
[insert case title of proceeding])	REQUEST FOR THE ISSUANCE OF A
)	NEBRASKA SUPOENA FOR A
)	PROCEEDING IN A FOREIGN
)	JURISDICTION
)	

I am an attorney and represent [insert name] who is party to the following civil proceeding [or I am a self-represented party to the following civil proceeding]:

Title of Case:

Case Number:

Court:

A. The Foreign Subpoena

I have attached (1) a [insert jurisdiction] subpoena that was issued in the above-mentioned civil proceeding and (2) a list of the names, addresses, telephone numbers, and e-mail addresses of all counsel of record in the proceeding to which the subpoena relates and of any self-represented party. I hereby certify that the attached subpoena was properly issued under the laws or rules of [insert jurisdiction].

B. The Nebraska Subpoena

Pursuant to Neb. Ct. R. Disc. § 6-330A, I request the clerk of this court to issue a Nebraska subpoena:

_____ for a deposition [Neb. Rev. Stat. § 25-1223].

_____ for a deposition and production of documents [Neb. Rev. Stat. § 25-1225].

_____ for discovery of documents or tangible items from a nonparty [Neb. Ct. R. Disc. § 6-334A].

_____ for entry upon land or other property [Neb. Ct. R. Disc. § 6-334A].

After the clerk of this court issues the Nebraska subpoena, I request the clerk to deliver the subpoena:

_____ to the Sheriff of [insert county name] County, Nebraska, for personal service on the recipient. I understand that it is my responsibility to contact the Sheriff's Office regarding payment of the service fee.

_____ to me for personal service or certified mail service on the recipient in accordance with Neb. Rev. Stat. § 25-1223(9), § 25-1226(1), and § 25-1228(2).

C. Certification and Acknowledgment

_____ I hereby certify that I am admitted to practice in the jurisdiction in which the proceeding is pending and that I have not been disbarred or suspended from practice in any jurisdiction. [*Delete if request is made by a self-represented party.*]

I hereby acknowledge that the district court has jurisdiction to impose sanctions on me for any false certifications that I made in this request and for any violations of the Nebraska Court Rules of Discovery in Civil Cases that I commit while engaging in discovery in Nebraska pursuant to the subpoena issued by the clerk of this court.

[Date]

[Signature Block]

[*Note: If submitted by an attorney, the signature block must contain the attorney's bar number and the jurisdiction in which the attorney is admitted.*]