2004

Taking and Using Depositions Before Action or Pending Appeal in Federal Court

Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

Publication Information
Jay E. Grenig, Taking and Using Depositions Before Action or Pending Appeal in Federal Court, 27 Am. J. Trial Advoc. 451 (2004).

Taking and Using Depositions Before Action or Pending Appeal in Federal Court

Jay E. Grenig[†]

Abstract

In this Article, Professor Grenig examines the procedures for taking or using a deposition or other methods of discovery before an action has commenced or pending an appeal.

I. Introduction

Normally, depositions and other methods of discovery are allowed only after commencement of an action.[1] However, situations may arise that delay the formal start of a lawsuit, creating a risk that potential evidence may be irrevocably lost. In addition, during the pendency of an appeal it may sometimes be necessary to take depositions for use in the event of further proceedings.

Rule 27 of the Federal Rules of Civil Procedure provides the procedure for perpetuating testimony for use in a future action or further proceeding in federal district court.[2] Under Rule 27, the petitioner can obtain

---

[†] B.A. (1966), Willamette University; J.D. (1971), Hastings College of the Law, University of California. The author is a Professor of Law at Marquette University Law School. This Article is adapted from a chapter in the book co-authored by Professor Grenig and Professor Jeffrey Kinsler titled, WEST'S HANDBOOK OF FEDERAL DISCOVERY AND DISCLOSURE (2d ed. 2002), and is used with permission from Thomson Publishing.

[1] Shore v. Acands, Inc., 644 F. 2d 386, 389 (5th Cir. 1981); *cf.* FED. R. CIV. P. 26(d) ("Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."); FED. R. CIV. P. 35(a) (stating that a "court in which the action is pending may order the party to submit to a physical or mental examination").

[2] *See* Nev. v. O'Leary, 63 F.3d 932, 935-36 (9th Cir. 1995) (dicta) (finding that the petitioner could not use Rule 27(a) to perpetuate testimony intended to be part of the administrative record); Louisville Builders Supply Co. v. Comm'r, 294 F.2d 333 (6th Cir. 1961) (holding that the Tax Court was not authorized to permit proceeding to perpetuate testimony). *But see In re* Checkosky, 142 F.R.D. 4, 6 (D.D.C. 1992), *remanded on other grounds*, Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994) (holding that Rule 27(a)(1)'s application to "any court of the United States" included "agency matters that might be brought directly in the Court of Appeals").

testimony by deposition, by an order for the inspection of documents and things, or by an order for a physical or mental examination.[3] Rule 27 is to be given a liberal construction.[4] The rule is also applicable in admiralty proceedings.[5]

Rule 27 applies in two basic situations. First, Rule 27(a) provides a procedure for persons expecting to be future litigants to perpetuate testimony in United States district courts.[6] Second, Rule 27(b) provides a procedure for perpetuation of testimony post-judgment but pre-appeal, or while an appeal is pending, for use in any future proceedings which may be necessary.[7]

Rule 27 is intended to be used for the preservation of testimony that might otherwise be lost, either before events have ripened to the point where a suit may be commenced or while the appellate process is pending.[8] It preserves known testimony against the danger of loss.[9] The rule is intended

> to apply to situations where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately, without waiting until after a suit or other legal proceeding is commenced. Such testimony would

---

[3] *See* FED. R. CIV. P. 27(a)(3).

[4] *In re* Ernst, 2 F.R.D. 447, 450 (S.D. Cal. 1942).

[5] Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1947).

[6] FED. R. CIV. P. 27(a).

[7] FED. R. CIV. P. 27(b).

[8] De Wagenknecht v. Stinnes, 250 F.2d 414, 416-17 (D.C. Cir. 1957) (stating that a Rule 27 proceeding "is an ancillary or auxiliary proceeding to prevent a failure or delay of justice, by preserving and registering testimony which would otherwise be lost before the matter to which it relates could be made ripe for judicial determination"); *see* Ariz. v. Cal., 292 U.S. 341, 347-48, 54 S. Ct. 735, 737-38, 78 L. Ed. 1298 (1934) (stating that, to sustain a bill in equity (before adoption of Rule 27) for perpetuation of testimony, "it must appear [1] that facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined will be material in the determination of the matter in controversy; [2] that the testimony will be competent evidence; [3] that depositions of the witnesses cannot be taken and perpetuated in the ordinary methods prescribed by law, because . . . the plaintiff is not in a position to start [a suit] in which the issue may be determined; and [4] that taking of the testimony on bill in equity is made necessary by the danger that it may be lost by delay"); *accord In re* Exstein, 3 F.R.D. 242, 243 (S.D.N.Y. 1942) (stating that Rule 27 was not intended to be used for purposes other than that permitted under old practice).

[9] *See In re* Exstein, 3 F.R.D. 242, 243 (S.D.N.Y. 1942).

> thereby be perpetuated or kept in existence and, if necessary, would be available for use at some subsequent time.[10]

Rule 27 is not itself a discovery device, but rather serves the limited purpose of preserving evidence either through oral and written depositions, production of documents or inspection under Rule 34, or physical and mental examination under Rule 35.[11]

Rule 27 "does not limit the power of a court to entertain an action to perpetuate testimony."[12] Rather than creating a separate ancillary or auxiliary proceeding as in Rule 27(a), "Rule 27(c) simply recognizes that the existence of such a proceeding does not abolish the power of a federal district court to entertain an action that is in substance the former bill in equity to perpetuate testimony."[13] The Advisory Committee's Notes to Rule 27 indicate that Rule 27(c) was intended to preserve "the right to employ a separate action to perpetuate testimony under 28 U.S.C. § 644."[14] This section was repealed in 1948.[15]

This Article examines the procedures for taking or using a deposition or other methods of discovery before an action has commenced or pending an appeal. Section II discusses the discretion of the court, jurisdiction and venue, and appeals. Section III examines depositions before an action, including petitions to take pre-action depositions, notice and service of the petition, and court orders. Section IV explores depositions pending appeal, including motions and court orders (and the criteria a court should consider in determining whether to grant a petition or motion for discovery under Rule 27, which includes expectancy of future liti-

---

[10] *In re* Ferkauf, 3 F.R.D. 89, 91 (S.D.N.Y. 1943).

[11] *See In re* Boland, 79 F.R.D. 665, 668 (D.C.D.C. 1978); *Ferkauf*, 3 F.R.D. at 91-92; *cf. In re* Nabors Loffland Drilling Co., 142 F.R.D. 295, 296 (W.D. La. 1992) (holding that Rule 27(a)(3) "authorizes the Court to enter orders of inspection under Rule 34 and independent medical examination under Rule 35"); *In re* Thomas, 155 F.R.D. 124, 126 (D. Md. 1994) (stating that Rule 27 allows perpetuation of evidence by deposition or through use of Rules 34 and 35).

[12] FED. R. CIV. P. 27(c).

[13] Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981); *see* Ariz. v. Cal., 292 U.S. 341, 34 S. Ct. 735, 78 L. Ed. 1298 (1934).

[14] FED. R. CIV. P. 27(c) advisory committee's note ("This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, [former] § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.").

[15] Act of 1948, c. 646, § 29, 62 Stat. 992; *see* Nev. v. O'Leary, 63 F.3d 932, 937 (9th Cir. 1995).

gation, inability to bring an action, materiality and competency of the evidence, and perpetuation of evidence). The procedure for taking and using a deposition to perpetuate testimony is discussed in Section V.

II. Background

A. Discretion of Court

"What circumstances show a possible failure or delay of justice sufficient to call for the issuance of an order [perpetuating testimony] is obviously a matter for the sound discretion of the district court."[16] "The right to this relief . . . does not depend upon the condition of the witness, but upon the situation of the party (petitioner) and his power to bring his rights to an immediate investigation."[17]

In a motion to perpetuate testimony pending appeal, the court has discretion to allow the motion where it is "proper to avoid a failure or delay of justice."[18] The court should consider (1) whether perpetuation of testimony is proper to avoid a failure or delay of justice in the case, and (2) whether the evidence sought to be perpetuated is likely to be lost while the appeal is pending as well as whether the witness is likely to become unavailable to give testimony should further proceedings become necessary.[19]

B. Jurisdiction and Venue

Rule 27(a) does not require an independent basis for federal jurisdiction in a proceeding to perpetuate testimony. However, it must be shown that federal jurisdiction would exist in the contemplated action for which

---

[16] Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1947); *see In re* Eisenberg, 654 F.2d 1107, 1111 (5th Cir. 1981) (holding that the trial court had the discretion to consider a foreign relations aspect of a petition to perpetuate testimony).

[17] *Mosseller*, 158 F.2d at 382 (quoting Hall v. Stout, 4 Del. Ch. 269, 274 (1871)).

[18] FED. R. CIV. P. 27(b); *see* Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 976 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); Murr v. Stinson, 582 F. Supp. 230, 231 (E.D. Tenn. 1984).

[19] *Murr*, 582 F. Supp. at 231.

the testimony is being perpetuated, and thus is a matter that may be cognizable in the federal court.[20]

The petitioner may file a petition in the federal judicial "district of the residence of any expected adverse party."[21] The fact that some of the adverse parties are not residents of the specific district does not preclude the petitioner from filing a petition in the district of residence of one of the adverse parties.[22] If the expected adverse parties are nonresident aliens, the petitioner may file a petition in any district court so long as there is adequate notice and service.[23]

C. Appeals

With respect to appealability, an order authorizing or rejecting the taking of a deposition to perpetuate testimony for use in an action to be subsequently commenced is a "final order."[24] A court of appeals may decline to proceed with an appeal from an order granting a petition to perpetuate testimony where the action in which the depositions were taken has been filed.[25] The standard of review on appeal is abuse of discretion.[26] In a proceeding under Rule 27(b), a party who unsuccessfully seeks to perpetuate testimony pending appeal has the burden of demonstrating why the requested testimony must be perpetuated.[27]

---

[20] FED. R. CIV. P. 27(a)(1); Dresser Indus. v. United States, 596 F.2d 1231, 1238, *reh'g denied*, 601 F.2d 586 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980); *see Nabors*, 142 F.R.D. at 296 (holding that no diversity jurisdiction existed where the petitioner's attorney filed a signed memorandum alleging that a nondiverse contemplated a defendant would be party in the contemplated litigation).

[21] FED. R. CIV. P. 27(a)(1); *see* Martin v. Reynolds Metals Corp., 297 F.2d 49, 54 (9th Cir. 1961) (holding that the United States District Court for the District of Oregon had jurisdiction over petition to perpetuate evidence where the petitioner was a Delaware corporation with its principal office in Virginia, and adverse parties were cattle raisers who were Oregon citizens); *In re* Haussler, 10 F.R.D. 134, 135 (E.D.N.Y. 1950) (stating that Washington, D.C. was the official residence of the Attorney General, who was the only possible adverse party).

[22] De Wagenknecht v. Stinnes, 250 F.2d 414, 417-18 (D.C. Cir. 1957).

[23] *Id.*

[24] *Mosseller*, 158 F.2d at 383; Ash v. Cort, 512 F.2d 909, 912 (3d Cir. 1975).

[25] *In re* Price, 723 F.2d 1193, 1194-95 (5th Cir. 1984).

[26] Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995); *Price*, 723 F.2d at 1194.

[27] *Ash*, 512 F.2d at 913.

D. Stipulations

Prospective parties can stipulate to the perpetuation of testimony under Rule 27.[28] Once a valid stipulation is entered into, a party to the stipulation may not be permitted to withdraw from it where the party has received a substantial benefit in return for allowing perpetuation of the testimony.[29]

III. Depositions Before Action

A. Generally

Rule 27 provides a limited exception for discovery before an action is commenced in order to prevent a failure or delay of justice.[30] A deposition to perpetuate testimony may be appropriate when the person seeking discovery expects to be sued and wishes to preserve evidence of a third person who may be unavailable after the lawsuit is filed. A deposition to perpetuate testimony may also be appropriate when a potential plaintiff, in fear of death, contemplates a lawsuit.

In order to make the provisions of Rule 27(a) operational, the following conditions must be met:

(1) "[T]he petitioner [must] expect[] to be a party to an action cognizable in a court of the United States."
(2) The petitioner must be "presently unable to bring [the action] or cause it to be brought."
(3) A substantial danger must exist that testimony sought to be preserved would otherwise become unavailable or irrevocably lost before the complaint could be filed.[31]

Although the procedure under Rule 27(a) is most often used in connection with depositions, it may also be used for pre-action production of

---

[28] *In re* Sinclair Oil Corp., 881 F. Supp. 535, 538 (D. Wyo. 1995).

[29] *Id.*

[30] *See In re* Town of Amenia, 200 F.R.D. 200, 203 (S.D.N.Y. 2001) (allowing a deposition to perpetuate testimony where municipalities wished to take the deposition of an elderly witness to perpetuate his testimony regarding alleged hazardous waste disposal in a landfill).

[31] *See* FED. R. CIV. P. 27(a)(1).

documents or inspection of land[32] as well as physical and mental examinations.[33] The Ninth Circuit explained this interpretation of Rule 27 as follows:

> The purpose is to make Rules 34 and 35 applicable in proceedings to perpetuate testimony. Common sense says that there will be cases in which they should be applicable where a deposition is not necessary or appropriate. It may frequently occur that the only thing likely to be lost or concealed is a paper or object that should be subject to inspection, etc., under Rule 34, or the physical or mental condition of a party, who should be subject to physical or mental examination by a physician under Rule 35. In such cases, the party seeking to perpetuate such evidence should not be required to couple his request with a request that a deposition be taken. We do not think that the language of amended Rule 27(a)(3) compels such a requirement .... The conjunctive form of the sentence can and should be interpreted to mean that the right to a Rule 34 order, like the right to take a deposition, depends upon the making of a proper showing, mentioned in the preceding sentence.[34]

Rule 27(a) allows the filing of a petition to perpetuate testimony regardless of whether the petitioner will be a potential plaintiff, defendant, or third party.[35] In addition, Rule 27(a) applies to actions by or against the United States government.[36]

The scope of discovery available under Rule 27(a) is not as broad as that provided for discovery generally under Rule 26.[37] The Ninth Circuit has explained this principle as follows:

---

[32] *See* FED. R. CIV. P. 34.

[33] *See* FED. R. CIV. P. 27(a)(3); FED. R. CIV. P. 35; *see, e.g.*, Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[34] *Martin*, 297 F.2d at 56.

[35] *See* Nev. v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995); *Martin*, 297 F.2d at 55.

[36] Mosseller v. United States, 158 F.2d 380, 382-83 (2d Cir. 1946) (allowing a suit against the United States to proceed under the Suits in Admiralty Act); Fay v. United States, 22 F.R.D. 28, 29-30 (E.D.N.Y. 1958) (allowing an action "to recover damages for personal injuries allegedly sustained by libelants while employed by independent contractors" aboard United States vessels); *see also In re* Ernst, 2 F.R.D. 447, 450 (S.D. Cal. 1942) (allowing perpetuation of testimony in a tax refund action in the Board of Tax Appeals).

[37] *See* Ash v. Cort, 512 F.2d 909, 911 (3d Cir. 1975); *O'Leary*, 63 F.3d at 936; *In re* Exstein, 3 F.R.D. 242, 243 (S.D.N.Y. 1942) (holding that Rule 27 did not enlarge the scope of an old practice for perpetuating testimony); *see In re* Boland, 79 F.R.D. 665, 668 (D.D.C. 1978); *see also* 8 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2071 (1994).

> When the Advisory Committee drafted Rule 27, it cited with approval in its Advisory Committee Notes a Supreme Court decision, issued before the enactment of the Civil Rules, requiring that the testimony sought under prior equity practice be material and competent. One authoritative treatise has concluded that given that Advisory Committee citation with approval, and the language of the Rule itself, "the most reasonable view is that the old limitation should still be applied."[38]

The Sixth Circuit has interpreted Rule 27(a) as providing that

> the testimony to be perpetuated must be relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact. A determination that the evidence is absolutely unique is not necessary. There must, of course, be a reasonable showing of the need to perpetuate the testimony lest it be lost because of the commencement of litigation.[39]

The Sixth Circuit also concluded that nothing in Rule 27(a) "indicates that the requirement that petitioner 'show' certain matters means the 'showing' must include material proffered in a form admissible at trial."[40]

Normally, a party may not take a deposition under Rule 27(a) for the purpose of deciding whether to file a lawsuit or to obtain information to frame a complaint.[41] After a complaint has been filed, discovery proceedings under Rules 28 through 36 are then available to ascertain additional facts.[42] However, in *In re Alpha Industries*, a federal district court held

---

[38] *O'Leary*, 63 F.3d at 936 (citing Ariz. v. Cal., 292 U.S. 341, 54 S. Ct. 735, 78 L. Ed. 1298 (1934) (quoting WRIGHT ET AL., *supra* note 37, § 2072, at 659)).

[39] *In re* Bay County Middlegrounds Landfill Site, 171 F.3d 1044, 1047 (6th Cir. 1999).

[40] *Id.*

[41] *Ash*, 512 F.2d at 911-12 (reiterating that Rule 27 is not a substitute for discovery); Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995); *In re* Ford, 170 F.R.D. 504, 506 (M.D. Ala. 1997); *In re* Checkosky, 142 F.R.D. 4, 7 (D.D.C. 1992), *remanded on other grounds*, Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994); *In re* Sitter, 167 F.R.D. 80, 82 (D. Minn. 1996); *In re* Gary Constr. Co., 96 F.R.D. 432, 433 (D. Colo. 1983); *In re* N. Carolina, 68 F.R.D. 410, 412 (S.D. N.Y. 1975); *In re* Ferkauf, 3 F.R.D. 89, 91 (S.D.N.Y. 1943); *In re* Exstein, 3 F.R.D. 242, 243 (S.D.N.Y. 1942). *But see In re* Alpha Indus., 159 F.R.D. 456, 457 (S.D.N.Y. 1995) (granting a pre-action order to perpetuate testimony in an order to permit a manufacturer to ascertain whether the wrongdoer was respondent or one of the petitioner's own distributors).

[42] *Cf.* Ill. S. Ct. Rule 222 (allowing independent action for discovery for purpose of ascertaining identity of one who may be responsible in damages).

that a manufacturer was entitled to an order perpetuating an exporter's testimony so that the manufacturer could ascertain whether the wrongdoer was the exporter or one of the manufacturer's own distributors.[43] The court explained that the petitioner would be a plaintiff in a copyright or trademark infringement action under federal law, but could not bring the suit immediately because Rule 11 prohibited the manufacturer from bringing an action against all of its many distributors where it did not know the identity of the distributors.[44] In the alternative, the manufacturer would be a plaintiff in an action against the exporter-respondent for selling counterfeit goods, but the manufacturer could not be sure whether the respondent was selling counterfeit goods.

The decision in *Alpha* was rejected in *In re Sitter*.[45] In *Sitter*, the petitioner, a deceased patient's former wife, sought leave under Rule 27(a) to conduct discovery in advance of filing the summons and complaint in a medical malpractice action.[46] State law required her to serve "'with the summons and complaint an affidavit' that expresses a qualified expert's opinion that the defendant [had] 'deviated from the applicable standard of care'" and caused injury to the patient.[47] The petitioner "contend[ed] that this statutory requirement effectively preclud[ed] her commencement of a lawsuit since the pertinent medical records are insufficient to permit an expert to responsibly conclude that her husband's death was caused by professional malpractice."[48] She sought "leave to take the depositions of five individuals who may have information which would assist her in evaluating the propriety of a malpractice claim."[49]

Relying on *Alpha*, the petitioner "contend[ed] that she [was] unable to determine the legitimacy of any lawsuit against [the respondents] unless [she could] explore the recollections of the [respondents'] health care professionals who attended to [the deceased patient's] medical needs."[50] The court declined to accept the holding in *Alpha* "as a correct

---

[43] 159 F.R.D. 456, 457 (S.D.N.Y. 1995).

[44] *Alpha*, 159 F.R.D. at 456.

[45] 167 F.R.D. 80, 81 (D. Minn. 1996).

[46] *Sitter*, 167 F.R.D. at 81.

[47] *Id.* (quoting MINN. STAT. § 145.682 (2003)).

[48] *Id.*

[49] *Id.*

[50] *Id.* at 82; *see* FED. R. CIV. P. 27(a)(3).

statement of the controlling law, as the reasoning which led to that result is unconvincing."[51]

A party seeking to take the pre-action deposition should set forth in some detail the substance of the testimony it needs to preserve. This should be done in order to demonstrate that the deposition is being used for a purpose other than attempting to decide whether a lawsuit should be filed or to obtain information so as to frame a complaint.[52]

B. Petition to Take Pre-Action Deposition

The person seeking to take a pre-action deposition "may file a verified petition" for an order authorizing the deposition of the persons named in the petition.[53] The petition must be filed in the district of the residence of any expected adverse party.[54] Under Rule 27(a)(1), the petition must be entitled in the name of the petitioner and must show the following information:

(1) that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought,
(2) the subject matter of the expected action and the petitioner's interest therein,
(3) the facts which the petitioner desires to establish and the reasons for desiring to perpetuate it,
(4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so afar as known, and
(5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.[55]

---

[51] *Sitter*, 167 F.R.D. at 82.

[52] *See* Nev. v. O'Leary, 63 F.3d 932, 936-37 (9th Cir. 1995); Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995).

[53] FED. R. CIV. P. 27(a)(1), (a)(3).

[54] FED. R. CIV. P. 27(a)(1).

[55] *Id.*; *see, e.g.*, *In re* Bay County Middlegrounds Landfill Site, 171 F.3d 1044, 1046 (6th Cir. 1999) (stating that nothing in Rule 27(a)(1) requires the petitioner show certain matters means the "showing must include material proffered in a form admissible at trial"); *O'Leary*, 63 F.3d at 936 (stating that a petitioner must show substance of testimony sought to be elicited); *In re* Checkosky, 142 F.R.D. 4, 7-8 (D.D.C. 1992), *remanded on other grounds sub nom.* Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994) (holding that Rule 27(a)(3) requires a petitioner to "make a particularized showing that the testimony needs to be taken in advance of the contemplated action").

The reasons for desiring perpetuation of testimony or evidence should be stated, explaining why the perpetuation of the testimony may prevent a failure or delay of justice,[56] or why there is a danger that the testimony or evidence will be lost if there is a delay until suit is or can be brought.[57]

If possible, the petition should indicate particular matters that could cause loss by delay.[58] For example, if the deposition is needed because a party or witness is gravely ill, a statement in the petition as to the nature or gravity of the illness may not be sufficient. It may be prudent to include affidavits or declarations from a physician indicating the proposed deponent's physical condition. The allegation that the petitioner expects to be a party to an action must be unequivocal, and there must be a factual showing sufficient to support an expectation of action.[59]

The petition should describe the subject matter of the expected action with sufficient particularity to indicate the petitioner's interest. In addition, the petition should explain the relationship of the expected action to the facts sought to be established by the taking of the depositions.[60] A showing of the facts the petitioner desires to establish must be stated separately from the substance of the testimony to be elicited.[61] The petitioner should set forth in some detail the substance of the testimony it needs to preserve in order to demonstrate that the deposition is being used for a purpose other than perpetuating testimony.[62] Although a complete narrative of the expected testimony is not required, the description of the

---

[56] *See* FED. R. CIV. P. 27(a)(3) ("If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order . . . .").

[57] *See* WRIGHT ET AL., *supra* note 37, § 2072; *see, e.g.*, *In re* Town of Amenia, 200 F.R.D. 200, 201-02 (S.D.N.Y. 2001); Block v. Super. Ct. of Los Angeles County, 219 Cal. App. 2d 469, 471, 33 Cal. Rptr. 205, 206 (1963) (finding that a pre-action discovery of the extent of a minor's injuries proper because suit on behalf of the injured minor might not have to be filed for years since the statute of limitations would not begin to run until the child reached age of majority).

[58] *See, e.g.*, 3A JAY E. GRENIG, WEST'S FEDERAL FORMS: DISTRICT COURT: CIVIL § 3291 (2002) (Certification of Good Faith).

[59] *See, e.g.*, *In re* Ingersoll-Rand Co., 35 F.R.D. 568 (S.D.N.Y. 1964); Rozek v. Christen, 153 Colo. 597, 606-07, 387 P.2d 425, 430 (1963).

[60] *See* WRIGHT ET AL., *supra* note 37, § 2072.

[61] *See, e.g.*, GRENIG, *supra* note 58, § 3291.

[62] *See* Nev. v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995) (involving a petitioner who was unable to satisfy FED. R. CIV. P. 27(a)(5) because the information was yet unknown); Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995).

substance of the testimony to be elicited should be sufficiently specific to apprise the adverse party of the subject matter of the suit and testimony. This enables the adverse party to defend the action through cross-examination.

The petition must be verified by the petitioner.[63] This exception to the normal rule of non-verification ensures that the allegations in the petition are made in good faith because the hearing under Rule 27(a)(3) is intended to be summary in nature. The petition also must ask for an order authorizing the petitioner to take the depositions of persons named in the petition for the purpose of perpetuating their testimony. The petition should indicate whether the petitioner desires a deposition upon oral examination or upon written questions or discovery under Rules 34 or 35.[64]

C. Notice and Service

Rule 27(a)(2) requires the petitioner to serve notice upon all persons named in the petition as expected adverse parties, together with a copy of the petition. The notice must (1) state that the petitioner will move the court at a time and place specified in the notice for the order described in the petition, and (2) be served at least twenty days before the date of the hearing in the manner provided in Rule 4(d) for the service of summons.[65]

If service cannot be made as required by Rule 4(d), "the court may make such order as is just for service by publication or otherwise."[66] The court must appoint an attorney to represent those persons not served in the manner provided by Rule 4(d).[67] In case they are not otherwise represented, the court must appoint an attorney to cross-examine the deponent.[68] "If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) [for representation by a guardian ad litem] apply."[69]

---

[63] FED. R. CIV. P. 27(a)(1).

[64] *See* FED. R. CIV. P. 27(a)(3).

[65] FED. R. CIV. P. 27(a)(2); FED. R. CIV. P. 4(d). *But see In re* Deiulemar Di Navigazione S.p.A., 153 F.R.D. 592, 593 (E.D. La. 1994) (stating that the court can modify the twenty-day period in appropriate circumstances).

[66] FED. R. CIV. P. 27(a)(2).

[67] *Id.*

[68] *Id.*

[69] *Id.*

A subpoena *duces tecum* may issue under Rule 45 in connection with a deposition taken under Rule 27.[70]

D. Court Orders

Rule 27(a)(3) provides that, "[i]f the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice," the court must make an order:

> (1) naming the persons from whom the depositions may be obtained;
> (2) setting forth the subject matter to be examined;
> (3) specifying whether the testimony shall be perpetuated by deposition, inspection under Rule 34, or physical examination or Rule 35;
> (4) if the testimony is to be perpetuated by deposition, specifying whether it will be written or oral; and
> (5) describing the person whose deposition may be taken where the actual name is unknown.[71]

The requirement that the court find "the perpetuation of testimony may prevent a failure or delay of justice" may be satisfied by showing (1) a substantial expectancy of a future action to which petitioner will be a party, and (2) a distinct possibility that either the testimony will become unavailable or its acquisition will cause substantial delay in the prospective litigation.[72]

IV. Depositions Pending Appeal

A. Generally

When a case is appealed from a district court, or before a timely appeal has been taken, Rule 27(b) authorizes the court to allow depositions to be taken to preserve testimony should there be further proceedings in that

---

[70] *In re* Ingersoll-Rand Co., 35 F.R.D. 122, 124 (S.D.N.Y. 1964) (stating that documentary evidence may be obtained for deposition under Rule 27, and there is no reason why a subpoena *duces tecum* should not issue under Rule 45(d) in connection with it).

[71] FED. R. CIV. P. 27(a)(3).

[72] *See* WRIGHT ET AL., *supra* note 37, § 2072.

particular court.[73] This provision is intended to avoid the technical problem resulting from the trial court's loss of subject matter jurisdiction over an action from the time of entry of the appealable order and personal jurisdiction of the parties upon perfection of the appeal.

Rule 27(b) recognizes that the lengthy interval between the conclusion of a trial and an appellate judgment may diminish the quantity and quality of evidence. Discovery under Rule 27(b) may become necessary in order to preserve the testimony of a newly discovered witness whose testimony would be helpful on retrial if the judgment is reversed, but whose availability to testify is uncertain because he is either ill, aged, or about to move away.

Rule 27(b) applies whether the appeal is before a court of appeals or before the United States Supreme Court.[74] Proceedings in the Supreme Court on certiorari are considered "appeals" within the meaning of Rule 27(b).[75] When a motion is filed under Rule 27(b), jurisdiction is instantly transferred from the lower court to the court of appeals.[76] When an order allowing depositions to be taken under Rule 27(b) is granted, the depositions are taken and used in the same manner and under the same conditions as depositions taken during the pendency of the action.[77]

B. Motions

If a party desires to perpetuate testimony pending appeal under Rule 27(b), it may make a motion for leave to take depositions in the district court from which the appeal is taken.[78] The party should make the motion either after an appeal has been taken or before the taking of a timely appeal.[79] The same notice and service requirements apply, as if the

---

[73] *See* W.H. Elliott & Sons, Inc. v. E. & F. King & Co., 22 F.R.D. 280, 281 (D.N.H. 1957).

[74] *Elliott & Sons*, 22 F.R.D. at 281; *see* Richter v. Jerome, 115 U.S. 55, 5 S. Ct. 1162, 29 L. Ed. 345 (1885).

[75] *Elliott & Sons*, 22 F.R.D. at 281.

[76] Jordan v. Fed. Farm Mortgage Corp., 152 F.2d 642, 644 (8th Cir. 1945); *Elliott & Sons*, 22 F.R.D. at 282.

[77] *See* FED. R. CIV. P. 28-32.

[78] *See* Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981) (holding Rule 27(b) inapplicable when there is no appeal).

[79] FED R. CIV. P. 27(b).

motion were at the district court level.[80] "The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; [and] (2) the reasons for perpetuating their testimony."[81] The motion must show that "perpetuation of the testimony is proper to avoid a failure or delay of justice" in the case and that the evidence is likely to be lost while the appeal is pending or that the witness will be unavailable to give testimony should further proceedings become necessary.[82]

C. Court Orders

Rule 27(b) specifies that the district court has discretion to enter an order identical to the orders available in proceedings to perpetuate testimony before an action.[83] Although the standard to be applied by the court is the same under Rules 27(a) and (b), Rule 27(a)(3) expressly provides that the court "shall make an order" if the standard is satisfied.[84] Rule 27(b), on the other hand, provides that the court "may make an order" if the standard is satisfied.[85]

If the court deems that justice will be delayed or not served altogether, without perpetuating the testimony, it may issue an order allowing the depositions to be obtained.[86] It may also make orders provided for by Rule 34 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes") and Rule 35 ("Physical and Mental Examination of Persons").[87]

Depositions taken in order to aid in collection of the petitioner's judgment if the defendant's appeal fails should be denied.[88] Preservation

---

[80] *Id.*; *see* FED. R. CIV. P. 5 ("Service and Filing of Pleadings and Other Papers"); FED. R. CIV. P. 6 ("Time").

[81] FED. R. CIV. P. 27(b).

[82] *Id.*; *see* Murr v. Stinson, 582 F. Supp. 230, 231 (E.D. Tenn. 1984).

[83] *Elliott & Sons*, 22 F.R.D. at 282.

[84] FED. R. CIV. P. 27(a)(3).

[85] FED. R. CIV. P. 27(b).

[86] *Id. But, see, e.g.*, Central Bank of Tampa v. Transam. Ins. Group, 128 F.R.D. 285, 286 (M.D. Fla. 1989) (denying the deposition of a non-party to be taken under Rule 27(b) to support argument raised for first time in post-judgment motion).

[87] FED. R. CIV. P. 27(b).

[88] *See, e.g.*, *Murr*, 582 F. Supp. at 231.

of information for use in further proceedings in the district court, however, should be granted.

V. Considerations Governing a Grant or Denial of Petition or Motion

A. Generally

Petitioners must show that the perpetuation of the proposed deponent's testimony "may prevent a failure or delay of justice."[89] A showing of a possibility that the evidence might be lost should be sufficient to meet this requirement.[90] It is not a valid objection that the evidence is more readily available to the petitioner than to the expected adverse party.[91] Because the petition must present facts showing why the deposition is needed to prevent a failure or delay of justice, affidavits or declarations from a physician or other witness may be essential to establish those facts.

B. Expectancy of Future Litigation

Rule 27(a)(1) requires that the petitioner show that the petitioner expects "to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought."[92]

---

[89] *See* FED. R. CIV. P. 27(a)(3); *see, e.g.*, Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (noting the fact that a potential witness who was eighty years old had to be considered in determining whether there was sufficient grounds for perpetuating the potential witness's testimony). *But see In re* Checkosky, 142 F.R.D. 4, 7-8 (D.D.C. 1992) (denying petition because number of potential witnesses to same events drastically reduced risk that demise of any one witness would harm petitioners' case).

[90] WRIGHT ET AL., *supra* note 37, § 2072.

[91] *In re* Ernst, 2 F.R.D. 447, 451-52 (S.D. Cal. 1942).

[92] *In re* Eisenberg, 654 F.2d 1107, 1110 n.1 (5th Cir. 1981) (quoting FED. R. CIV. P. 27(a)(1)). *Compare* Nev. v. O'Leary, 63 F.3d 932, 935-36 (9th Cir.1995) (dicta) (affirming that the state of Nevada could not use Rule 27(a) "to make the material part of an administrative record"), *with Checkosky*, 142 F.R.D. at 6 (holding that Rule 27(a)(1) application to "any court of the United States" included "agency matters that might be brought directly in the Court of Appeals").

Although a "substantial expectancy" may suffice, the allegation that the petitioner expects to be a party to an action must be unequivocal and there must be a factual showing sufficient to support an expectation of action.[93]

The petitioner is not required to demonstrate that litigation is absolutely certain in order to file a petition under Rule 27(a).[94] The petitioner must "convince the court that there is, at least, reasonable ground to believe that a cause of action exists, and can be proved."[95] "Whether there is a sufficient likelihood that the expected litigation will eventuate is a matter for the sound discretion of the court" considering the petition.[96]

For example, in *Martin v. Reynolds Metals Corp.*, ranchers near an aluminum reduction plant claimed that fluorides produced by the plant were causing serious injury to their cattle.[97] Because the ranchers sold their cattle from time to time, the court found that this would impair the plant owner's ability to defend itself when suit was brought.[98] Accordingly, the court allowed the plant owner's petition to inspect the cattle and land.[99]

C. Inability to Bring Action

One of the elements required in order to obtain an order to perpetuate testimony in anticipation of a suit is that the petitioner is not in a position to commence an action in which the issue may be determined.[100] The

---

[93] *In re* Ingersoll-Rand Co., 35 F.R.D. 122, 124 (S.D.N.Y. 1964); *see also* Rozek v. Christen, 153 Colo. 597, 599, 387 P.2d 425, 426-27 (1963) (applying Colorado's version of Rule 27).

[94] *Penn Mut. Life Ins.*, 68 F.3d at 1374.

[95] Bowles v. Pure Oil Co., 5 F.R.D. 300, 303 (E.D. Pa. 1946).

[96] De Wagenknecht v. Stinnes, 250 F.2d 414, 417 (D.C. Cir. 1957) (citing Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946)).

[97] 297 F.2d 49, 52 (9th Cir. 1961).

[98] *Martin*, 297 F.2d at 52.

[99] *Id.* at 57. *But see O'Leary*, 63 F.3d at 936 (limiting the application of *Martin*).

[100] Shore v. Acands, Inc., 644 F.2d 386, 388 (5th Cir. 1981) (stating that a petition must show the petitioner is "presently unable to bring action in *any* court state or federal, *anywhere* in the United States" (emphasis added)); Bowles v. Pure Oil Co., 5 F.R.D. 300, 303 (E.D. Pa. 1946) (stating that it is necessary to show that the "proposed plaintiff 'is presently unable to bring' the action"); *In re* Ernst, 2 F.R.D. 447, 450 (S.D. Cal. 1942) ("No such suit shall begin before the expiration of 6 months from the date of filing such claim unless the commissioner reorders a decision thereon within that time").

petition must show why the petitioner is not presently able to bring an action. Rule 27(a) is not satisfied if the petitioner is able to sue presently, but it would be difficult or inconvenient for the petitioner to do so.[101]

This requirement of Rule 27(a) may be satisfied when the moving party is the potential defendant and thus unable to commence the action.[102] "The allegation that the petitioner expects to be a party to an action must be unequivocal and there must be [a] factual showing sufficient to support the expectation of an action."[103]

In the *Martin* case, as discussed above, "landowners near an aluminum reduction plant were claiming that fluorides emanating from the plant were causing serious injury to their cattle."[104] "The owner of the plant, as a prospective tort defendant, could not itself bring the suit or cause it to be brought."[105]

In another case, "an executrix [of a decedent's estate] expected that the Commissioner of Internal Revenue would assess a deficiency federal estate tax."[106] The executrix sought "to perpetuate testimony concerning the intent of the testator in making certain gifts."[107] The court found that the executrix was unable "to bring, or cause to be brought, an action concerning the matter," since no action could be begun until after the Commissioner's deficiency assessment was made.[108] Even then, the executrix "might have to wait until six months after filing a claim for a refund" before commencing suit.[109]

"It is plainly insufficient merely to show in the petition that the witness is seriously ill."[110] The petition must also show "some adequate reason

---

[101] *Shore*, 644 F.2d at 388-89.

[102] *See* Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967) (allowing a potential defendant to take the pre-action deposition of an aged or gravely ill witness who may not be available to testify later).

[103] WRIGHT ET AL., *supra* note 37, § 2072.

[104] *Id.* § 2072, at 659 (discussing *Martin*, 297 F.2d 49).

[105] *Martin*, 297 F.2d at 52.

[106] *Id.* (discussing *In re* Ernst, 2 F.R.D. 447, 451 (S.D. Cal. 1942)).

[107] *Ernst*, 2 F.R.D. at 451.

[108] *Id.*

[109] *Id.*

[110] *Id.* (discussing *Martin*, 297 F.2d 49).

why the suit in which the testimony is to be used cannot then be brought."[111]

D. Materiality and Competency of Evidence

The petitioner must seek to perpetuate only legally relevant testimony. "Perpetuation of testimony that is not legally relevant to the [petitioner's] claims is unnecessary to 'prevent a failure or delay of justice.'"[112] "The proposed testimony should be material and competent evidence in the matter in controversy."[113]

E. Perpetuation of Evidence

The purpose of Rule 27 is to provide a system for perpetuating evidence that might otherwise be lost. Ordinarily, the fact that the petitioner is presently unable to bring the action should be considered as evidence

---

[111] *Id.* (citing *In re* Checkosky, 142 F.R.D. 4, 7-8 (D.D.C. 1992) (holding speculation that materials might be lost was insufficient), *remanded on other grounds sub nom.* Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994)); *In re* Carson, 22 F.R.D. 64, 65 (E.D. Ill. 1957) (denying a Rule 27 petition because, although petitioner alleged serious condition of witness, petitioner did not show any reason why suit could not be brought at that time).

[112] Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995).

[113] WRIGHT ET AL., *supra* note 37, § 2072 (citing Ariz. v. Cal., 292 U.S. 341, 54 S. Ct. 735, 78 L. Ed. 1298 (1934)). *But see Martin*, 297 F.2d at 55 (dicta). The *Martin* court stated:

> Nor do we think that Rule 27 requires that the inquiry at the deposition be limited to evidence that would be material and admissible in evidence at the trial. We need not and do not decide whether the inquiry can be as wide in scope as is contemplated by Rule 26(b), dealing with depositions in a pending action, as that question is not before us. The inquiry here proposed is narrowly limited, its purpose being to enable Reynolds to discover when relevant physical evidence is likely to be disposed of and lost, and the location of other physical evidence that has been transferred away from appellees' property and thus made less readily available. These inquiries are thus directly related to the discovery of evidence that would otherwise be made unavailable because of action of the adverse party.

Martin, 297 F.2d at 55. The Ninth Circuit limited the application of *Martin* in *Nevada v. O'Leary*. 63 F.3d 932, 936 (9th Cir. 1995). The *O'Leary* court noted that "the depositions approved of in *Martin* involved limited inquiries for the purpose of gaining information regarding physical evidence [(cattle alleged to have been poisoned by toxins from the defendant's plant)] entirely within the control of the adverse party and which was otherwise unavailable to the Rule 27 petitioner." 63 F.3d at 936.

of the danger of loss of testimony, since "[i]t is common knowledge that the lapse of time is replete with hazards and unexpected events. This is so regardless of the age, health, or general status of an individual."[114]

"[G]eneralized concerns about the passage of time, the fading of memories, and the destruction of documents" are ordinarily not sufficient to support a showing that the testimony needs to be perpetuated.[115] Where a large number of witnesses could provide testimony concerning the same events, the "risk that the demise of any one witness [would] harm the petitioner's case" may be drastically reduced."[116] In determining whether an order for a deposition perpetuating discovery should be granted, the court may consider such matters as (1) the age of the potential deponent, (2) the medical condition of the potential deponent, and (3) a potential deponent's plans to leave the country.[117]

A deposition under Rule 27(a)(1) is appropriate where a party who expects to sue or be sued wishes to take a pre-action deposition of an aged witness or party who may not be available to testify later.[118] "The age of a proposed deponent may be relevant in determining whether there is sufficient reason to perpetuate testimony."[119] Mere conclusory statements that the deponent is aged are insufficient.[120] The petitioner must establish

---

[114] *Ernst*, 2 F.R.D. at 451. This is so regardless of age, health, or general status of individual.

[115] *Checkosky*, 142 F.R.D. at 7-8; Lombard's, Inc. v. Prince Mfg., 753 F.2d 974, 976 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) (denying a petition stating that the "witnesses were not 'immune from the uncertainties of life (and death)' and that [the petitioner] was 'genuinely' concerned that documents . . . could be destroyed"); *In re* Boland, 79 F.R.D. 665, 667 (D.D.C. 1978) (holding there was no allegation by the petitioner that "potential deponents were aged, gravely ill, or preparing to leave the country"). *But see* Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946) (holding that the right to relief "'does not depend upon the condition of the witness, but upon the situation of the party (petitioner), and his power to bring his rights to an immediate investigation'" (quoting Hall v. Stout, 4 Del. Ch. 269, 274 (1871)).

[116] *Checkosky*, 142 F.R.D. at 7-8.

[117] *Boland*, 79 F.R.D. at 667.

[118] *Mosseller*, 158 F.2d at 382; *In re* Rosario, 109 F.R.D. 368, 370-71 (D. Mass. 1986).

[119] *Penn Mut. Life Ins.*, 68 F.3d at 1374-75 (holding that advanced age carries an increased risk that a witness may be unavailable by time of trial); *see, e.g.*, Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967) (permitting deposition of seventy-one-year-old witness); De Wagenknecht v. Stinnes, 250 F.2d 414, 417 (D.C. Cir. 1957) (permitting the deposition of a seventy-four-year-old witness).

[120] Ash v. Cort, 512 F.2d 909, 913 (3d Cir. 1975).

danger that the testimony may be lost as a result of the deponent's age.[121] A deposition for the purpose of perpetuating a witness's testimony because of the deponent's serious physical condition is not permitted where the petitioner does not show any reason why the suit in which the testimony is to be used could not be brought before the deposition.[122] A petitioner may make a prima facie showing that "[a] witness's health justified a deposition to perpetuate testimony."[123] A potential deponent's plans to leave the country for a long period of time may be grounds for perpetuating testimony, presumably because the difficulties of serving process and conducting a deposition overseas create a risk of losing testimony.[124] However, a potential deponent's residence alone is an insufficient reason for granting a request to perpetuate testimony.[125]

VI. Taking and Using Depositions to Perpetuate Testimony

A deposition to perpetuate testimony is taken in accordance with the provisions of the Federal Rules of Civil Procedure.[126] The court may also make orders of the type provided for by Rule 34[127] and Rule 35.[128] In a deposition perpetuating testimony, each reference in the Federal Rules of Civil Procedure to the court in which the action is pending is deemed

---

[121] *See Penn Mut. Life Ins.*, 68 F.3d at 1374-75.

[122] *In re* Carson, 22 F.R.D. 64, 65 (E.D. Ill. 1957).

[123] Kurz-Kasch, Inc. v. United States, 115 F.R.D. 470, 471 (S.D. Ohio 1986) (holding that a pre-discovery deposition could be conducted where the witness had suffered two heart attacks and had five pacemakers within the previous fifteen years); *see also Mosseller*, 158 F.2d at 382 (holding that a deposition to perpetuate testimony of a witness was allowed where a medical opinion indicated that the witness might die before suit could be brought).

[124] *See, e.g., In re* Deiulemar Di Navigazione, S.p.A., 153 F.R.D. 592, 593 (E.D. La. 1994).

[125] *Penn Mut. Life Ins.*, 68 F.3d at 1375 n.3.

[126] *See* FED. R. CIV. P. 27(a)(3).

[127] FED. R. CIV. P. 34 (governing production of documents and things, and entry upon land for inspection and other purposes).

[128] FED. R. CIV. P. 27(a)(3) (concerning physical and mental examination of parties; inspection of medical documents).

to "refer to the court in which the petition for the deposition was filed."[129] If the deposition is read at trial, the trial court should make a finding that the witness was not able to attend trial because of illness and that reading the deposition was necessary in the interest of justice under exceptional circumstances.[130]

Rule 27(a)(4) allows a deposition to perpetuate testimony to be used in any action involving the same subject matter subsequently brought in a United States district court, even when the deposition is taken under another state's procedures, as long as the deposition is otherwise admissible in the courts of the state in which the deposition is taken.[131] Its use in the subsequent action is in accordance with the provisions of Rule 32.

VII. Conclusion

Although depositions before an action or pending appeal under Rule 27 are infrequently used, they provide an essential tool where there is a need to preserve testimony. In order to obtain court permission to conduct such discovery, it is essential that the petition or motion, together with supporting affidavits or declarations, contains specific information demonstrating that the discovery requested is necessary to prevent a failure or delay of justice.

---

[129] *Id.*

[130] FED. R. CIV. P. 32.

[131] FED. R. CIV. P. 27(a)(4).