

RULE 27. DISCOVERY BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) *Petition.* A person who desires to perpetuate testimony or to obtain discovery under Rule 34 or 35 regarding any matter that may be cognizable in any court of the state may file a verified petition in the Superior Court in the county, or in the District Court in the division, of the residence of any expected adverse party; and if there be more than one expected adverse party, some of whom may live in different counties or divisions, then the petition may be filed in any county or division in which an expected adverse party may reside.

The petition shall be entitled in the name of the petitioner and shall show: (i) that the petitioner expects to be a party to an action cognizable in a court of the state but is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and the petitioner's interest therein, (iii) the facts which the petitioner desires to establish by the proposed testimony or other discovery and the petitioner's reasons for desiring to perpetuate or obtain it, (iv) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the petitioner expects to elicit or obtain from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 34 or 35 from the persons named in the petition.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 4(d), (e), or (j) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), (e), or (j), an attorney who shall represent them and whose services shall be paid for by the petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross-examine the deponent. If any

expected adverse party is a minor or incompetent the provisions of Rule 17(b) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony or other discovery may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 34 and specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 35. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the court by the authority of which it is taken, it may be used in any action involving the same subject matter subsequently brought in any court of this state having cognizance thereof in accordance with the provisions of Rule 32(a) and (b).

(b) Pending Appeal. If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 34 or 35 for use in the event of further proceedings in that court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion therefor upon the same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit or obtain from each; (2) the reasons for perpetuating the testimony. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in paragraph (3) of subdivision (a) of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in civil actions generally.

(c) Recording in Registry of Deeds. Any deposition to perpetuate testimony taken before action or pending appeal together with the verified petition therefor

and certificate of the officer before whom it was taken may, within 90 days after the taking, be recorded in the registry of deeds in the county where the land or any part of it lies, if the deposition relates to real estate; if not, in the county where the parties or any of them reside.

(d) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Advisory Committee's Note
September 23, 1971

The principal amendments made to Rule 27 have the purpose of expressly permitting production and inspection under Rule 34 and physical or mental examination under Rule 35, whether or not a deposition is taken. The changes which are made in subdivisions (a) (1) and (a) (3) and in subdivision (b) clarify an ambiguity that exists in Federal Rule 27 and in the existing Maine rule modeled thereon. See 8 Wright & Miller, *Federal Practice and Procedure* § 2074 (1970). The rule as amended conforms to Rule 27 of the Vermont Rules of Civil Procedure. Rule 27 has always provided, both in connection with depositions before action and depositions pending appeal, that the court “may make orders of the character provided for by Rules 34 and 35.” See Rule 27(a) (3) and 27(b). Of course the express provision that the court may permit independent discovery under Rule 34 or Rule 35 in no way implies that the court may not combine such a Rule 34 or 35 order with one for depositions.

The other two changes in Rule 27 are necessitated by prior amendments of other rules. Rule 27(a) (2) is amended to make specific reference to the possibility of service under Rule 4(j), which through a 1966 amendment made available alternative provisions for service in a foreign country. Correction of the cross-reference in Rule 27(a) (4) became necessary with the rearrangement of certain rules in connection with the substantial revision of the discovery rules effective July 1, 1970.

Reporter's Notes
December 1, 1959

This rule, which is substantially the same as Federal Rule 27, is intended only for the perpetuation of testimony and not as a discovery device. It is not significantly different from R.S.1954, Chap. 117, Sec. 21ff. (repealed in 1959).

Rule 27(c) is not in the federal rule. It continues the requirement of R.S.1954, Chap. 117, Sec. 24 (amended in 1959) [now 16 M.R.S.A. § 552], that a deposition to perpetuate testimony be recorded in the appropriate registry of deeds within 90 days after the taking.