

1 without the state in the manner provided for service of summons in Rule 7, [7, but if] **if** such
2 service cannot with due diligence be made [upon] **on** any expected adverse party named in the
3 petition, the court may make such order as is just for service by publication or [otherwise, and
4 shall] **otherwise. The court must** appoint, for persons not served with summons in the manner
5 provided in Rule 7, an attorney [who shall] **to** represent [them and] **them**, whose services
6 [shall] **must** be paid for by petitioner in an amount fixed by the court, [and, in case they are not
7 otherwise represented, shall] **to** cross examine the deponent. Testimony and evidence
8 perpetuated under this rule [shall] **will** be admissible against expected adverse parties not
9 served with notice only in accordance with the applicable rules of evidence. If any expected
10 adverse party is a minor or incompetent, the provisions of Rule 27 apply.

11 **A(3) Order and examination.** If the court is satisfied that the perpetuation of the
12 testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice,
13 [it shall make an order designating or describing] **discovery may be had in accordance with**
14 **these rules on the court's order, which must:**

15 **A(3)(a) designate or describe** the persons whose depositions may be taken and
16 [specifying] **specify** the subject matter of the examination and whether the depositions [shall]
17 **will** be taken [upon] **on** oral examination or written questions; or [shall make an order
18 designating or describing]

19 **A(3)(b) designate or describe** the persons from whom discovery may be sought under
20 Rule [43] **43**, specifying the objects of such discovery; or [shall make an order]

21 **A(3)(c) set** [for] a physical or mental examination as provided in Rule 44.

22 **A(4) Applicable discovery rules.** For the purpose of applying these rules to discovery
23 before action, each reference therein to the court in which the action is pending [shall] **will** be
24 deemed to refer to the court in which the petition for such discovery was filed.

25 **B Pending appeal.** If an appeal has been taken from a judgment of a court to which these
26 rules apply or before the taking of an appeal if the time therefor has not expired, the court in

1 without the state in the manner provided for service of summons in Rule 7, [7, but if] **if** such
2 service cannot with due diligence be made [upon] **on** any expected adverse party named in the
3 petition, the court may make such order as is just for service by **publication or otherwise. The**
4 **court must appoint an attorney to represent persons not served in the manner provided in**
5 **Rule 7 and, if the unserved person is not otherwise represented, to cross examine the**
6 **deponent. The services of any appointed attorney must be paid for by the petitioner in an**
7 **amount fixed by the court.** [publication or otherwise, and shall appoint, for persons not served
8 with summons in the manner provided in Rule 7, an attorney who shall represent them and
9 whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they
10 are not otherwise represented, shall cross examine the deponent.] Testimony and evidence
11 perpetuated under this rule [shall] **will** be admissible against expected adverse parties not
12 served with notice only in accordance with the applicable rules of evidence. If any expected
13 adverse party is a minor or incompetent, the provisions of Rule 27 apply.

14 **A(3) Order and examination.** If the court is satisfied that the perpetuation of the
15 testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice,
16 [it shall make an order designating or describing] **discovery may be had in accordance with**
17 **these rules on the court's order, which must:**

18 **A(3)(a) designate or describe** the persons whose depositions may be taken and
19 [specifying] **specify** the subject matter of the examination and whether the depositions [shall]
20 **will** be taken [upon] **on** oral examination or written questions; or [shall make an order
21 designating or describing]

22 **A(3)(b) designate or describe** the persons from whom discovery may be sought under
23 Rule [43] **43**, specifying the objects of such discovery; or [shall make an order]

24 **A(3)(c) set** [for] a physical or mental examination as provided in Rule 44.

25 **A(4) Applicable discovery rules.** For the purpose of applying these rules to discovery
26 before action, each reference therein to the court in which the action is pending [shall] **will** be

1 **PERPETUATION OF TESTIMONY OR EVIDENCE**

2 **BEFORE ACTION OR PENDING APPEAL**

3 **RULE 37**

4 **[A Before action.**

5 **A(1) Petition.] A Before action.** A person who desires to perpetuate testimony or to
6 obtain discovery to perpetuate evidence under Rule 43 or Rule 44 regarding any matter that
7 may be cognizable in any court of this state may file a petition in the circuit court in the county
8 of such person's residence or the residence of any expected adverse party. *[The petition shall*
9 *be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the*
10 *petitioner's personal representatives, heirs, beneficiaries, successors, or assigns are likely to be a*
11 *party to an action cognizable in a court of this state and are presently unable to bring such an*
12 *action or defend it, or that the petitioner has an interest in real property or some easement or*
13 *franchise therein, about which a controversy may arise, which would be the subject of such*
14 *action; (b) the subject matter of the expected action and petitioner's interest therein and a copy,*
15 *attached to the petition, of any written instrument the validity or construction of which may be*
16 *called into question or which is connected with the subject matter of the expected action; (c) the*
17 *facts which petitioner desires to establish by the proposed testimony or other discovery and*
18 *petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons*
19 *petitioner expects will be adverse parties and their addresses so far as one is known; and, (e) the*
20 *names and addresses of the parties to be examined or from whom discovery is sought and the*
21 *substance of the testimony or other discovery which petitioner expects to elicit and obtain from*
22 *each. The petition shall name persons to be examined and ask for an order authorizing the*
23 *petitioner to take their depositions for the purpose of perpetuating their testimony, or shall*
24 *name persons in the petition from whom discovery is sought and shall ask for an order allowing*
25 *discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence.]*

26 **A(1) Contents of petition. The petition must be entitled in the name of the petitioner**

1 and must show:

2 A(1)(a) that the petitioner, or the petitioner's personal representatives, heirs,
3 beneficiaries, successors, or assigns are likely to be a party to an action cognizable in a court
4 of this state and are presently unable to bring such an action or defend it, or that the
5 petitioner has an interest in real property or some easement or franchise therein, about
6 which a controversy may arise, that would be the subject of such action;

7 A(1)(b) the subject matter of the expected action and petitioner's interest therein and
8 a copy, attached to the petition, of any written instrument the validity or construction of
9 which may be called into question or that is connected with the subject matter of the
10 expected action;

11 A(1)(c) the facts that petitioner desires to establish by the proposed testimony or other
12 discovery and petitioner's reasons for desiring to perpetuate;

13 A(1)(d) the names or a description of the persons petitioner expects will be adverse
14 parties and their addresses so far as one is known;

15 A(1)(e) the names and addresses of the parties to be examined or from whom
16 discovery is sought and the substance of the testimony or other discovery that petitioner
17 expects to elicit and obtain from each; and,

18 A(1)(f) a request for an order:

19 A(1)(f)(i) authorizing the petitioner to take the depositions of the parties to be
20 examined for the purpose of perpetuating their testimony; or

21 A(1)(f)(ii) allowing discovery under Rule 43 or Rule 44 from the persons from whom
22 discovery is sought for the purpose of preserving evidence.

23 A(2) **Notice and service.** The petitioner [shall] **must** thereafter serve a notice [upon] **on**
24 each person named in the petition as an expected adverse party, together with a copy of the
25 petition, stating that the petitioner will apply to the court at a time and place named therein,
26 for the order described in the petition. The notice [shall] **must** be served either within or

1 without the state in the manner provided for service of summons in Rule 7. [7, but if] **if** such
2 service cannot with due diligence be made [upon] **on** any expected adverse party named in the
3 petition, the court may make such order as is just for service by **publication or otherwise. The**
4 **court must appoint an attorney to represent persons not served in the manner provided in**
5 **Rule 7 and, if the unserved person is not otherwise represented, to cross examine the**
6 **deponent. The services of any appointed attorney must be paid for by the petitioner in an**
7 **amount fixed by the court.** [publication or otherwise, and shall appoint, for persons not served
8 with summons in the manner provided in Rule 7, an attorney who shall represent them and
9 whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they
10 are not otherwise represented, shall cross examine the deponent.] Testimony and evidence
11 perpetuated under this rule [shall] **will** be admissible against expected adverse parties not
12 served with notice only in accordance with the applicable rules of evidence. If any expected
13 adverse party is a minor or incompetent, the provisions of Rule 27 apply.

14 **A(3) Order and examination.** If the court is satisfied that the perpetuation of the
15 testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice,
16 [it shall make an order designating or describing] **discovery may be had in accordance with**
17 **these rules on the court's order, which must:**

18 **A(3)(a) designate or describe** the persons whose depositions may be taken and
19 [specifying] **specify** the subject matter of the examination and whether the depositions [shall]
20 **will** be taken [upon] **on** oral examination or written questions; or [shall make an order
21 designating or describing]

22 **A(3)(b) designate or describe** the persons from whom discovery may be sought under
23 Rule [43] **43**, specifying the objects of such discovery; or [shall make an order]

24 **A(3)(c) set** [for] a physical or mental examination as provided in Rule 44.

25 **A(4) Applicable discovery rules.** For the purpose of applying these rules to discovery
26 before action, each reference therein to the court in which the action is pending [shall] **will** be

1 deemed to refer to the court in which the petition for such discovery was filed.

2 **B Pending appeal.** If an appeal has been taken from a judgment of a court to which these
3 rules apply or before the taking of an appeal if the time therefor has not expired, the court in
4 which the judgment was rendered may allow the taking of the depositions of witnesses to
5 perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the
6 event of further proceedings in such court. In such case the party who desires to perpetuate
7 the testimony or obtain the discovery may make a motion in the court therefor [*upon*] **on** the
8 same notice and service thereof as if the action was pending in the circuit court. [*The motion*
9 *shall show: (1) the names and addresses of the persons to be examined or from whom other*
10 *discovery is sought and the substance of the testimony or other discovery which the party*
11 *expects to elicit from each; and (2) the reasons for perpetuating their testimony or seeking such*
12 *other discovery. If the court finds that the perpetuation of the testimony or other discovery is*
13 *proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3)*
14 *of section A of this rule and thereupon discovery may be had and used in the same manner and*
15 *under the same conditions as are prescribed in these rules for discovery in actions pending in the*
16 *circuit court.*]

17 **B(1) Contents of motion. The motion must show:**

18 **B(1)(a) the names and addresses of the persons to be examined or from whom other**
19 **discovery is sought and the substance of the testimony or other discovery which the party**
20 **expects to elicit from each; and**

21 **B(1)(b) the reasons for perpetuating their testimony or seeking such other discovery.**

22 **B(2) Order of the court. If the court finds that the perpetuation of the testimony or**
23 **other discovery is proper to avoid a failure or delay of justice, it may make an order as**
24 **provided in subsection A(3) of this rule. Thereupon, discovery may be had and used in the**
25 **same manner and under the same conditions as are prescribed in these rules for discovery in**
26 **actions pending in the circuit court.**

1 **C Perpetuation by action.** This rule does not limit the power of a court to entertain an
2 action to perpetuate testimony.

3 **D Filing of depositions.** Depositions taken under this rule [*shall*] **must** be filed with the
4 court in which the petition is filed or the motion is made.