

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
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WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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The **National Conference of Commissioners on Uniform State Laws (NCCUSL)**, also known as **Uniform Law Commission (ULC)**, now in its 116th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

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- ULC keeps state law up-to-date by addressing important and timely legal issues.
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- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the

discovery state, after which a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness “may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.” The UIIPA provides that methods of service includes service “in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.” State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent’s home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction’s discovery procedure applies?

A significant issue is whether the trial state’s or discovery state’s discovery procedure controls, and on what issues. The general Restatement rule is that the forum state’s (the discovery state’s) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state’s or discovery state’s courts can issue protective orders. Both states have interests: the trial state’s courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state’s courts have an obvious

interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

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

(2) “Foreign subpoena” means a subpoena issued 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 requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

Comment

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

SECTION 3. ISSUANCE OF SUBPOENA.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

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

(c) A subpoena under subsection (b) must:

(A) incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

SECTION 4. SERVICE OF SUBPOENA. A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state 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 court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

SECTION 8. APPLICATION TO PENDING ACTIONS. This [act] applies to requests for discovery in cases pending on [the effective date of this [act]].

SECTION 9. EFFECTIVE DATE. This [act] takes effect ____.

A Look at the Law

Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?

by Rebecca Phalen

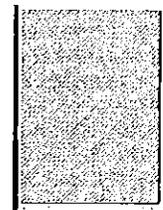
You are working on the discovery plan for your case, brainstorming the evidence that you need to prosecute or defend your case.

Even though your case is pending in a Georgia state court, your discovery plan is likely to list witnesses or evidence outside Georgia.

You know that a subpoena issued from a Georgia state court has no power outside the state lines.¹ But you also know that you can use deposition testimony when the deponent is out of reach of a subpoena,² and you can use documents that are otherwise admissible and have the proper foundation. You can reach witnesses and documents outside Georgia through an enforceable subpoena. Each state has a procedure in place to allow you to compel testimony or the production of documents located in that state. This guide will start you on the right path to getting the evidence you need wherever it is located.

What procedure does each state follow to issue a subpoena for cases pending elsewhere?

In federal courts you start with one rule, Rule 45, and the attorney in the underlying litigation can sign



a subpoena that is to be served in another district.³ But for litigation in state courts, each state has its own procedure for issuing and enforcing a subpoena for cases pending outside that state. Sometimes the state's procedure varies by county.⁴ Before you can compel a witness to provide testimony or produce documents in another state, you must find and follow that state's procedure.

The trend among the states is towards adopting the Uniform Interstate Depositions and Discovery Act (UIDDA), but not all states have adopted it yet. Some states, like Georgia, may require the attorney in the out-of-state action to present a commission to the clerk in the state where the witnesses or documents are located before the clerk will issue the subpoena. Other states require an application to be filed as a civil action, while still other states have procedures everywhere in between. These procedures are outlined below with cites to each state's statutes or rules.

Uniform Interstate Depositions and Discovery Act

The UIDDA permits a party to submit the "foreign subpoena" (the subpoena from the underlying litigation) to the clerk of court where the discovery is sought.⁵ The clerk must then issue a subpoena for service, and that subpoena must incorporate the terms used in the foreign subpoena and list the contact information for all counsel of record in the underlying litigation.⁶ The UIDDA eases concern about the unauthorized practice of law by clarifying that requesting the issuance of the subpoena does not constitute an appearance before the court.⁷ Under the UIDDA, the subpoena is to be served in accordance with the discovery state's law.⁸ It also provides the procedure to challenge or enforce the subpoena: an application is to be filed in the discovery state with the clerk of court that issued the subpoena.⁹

Even if a state has adopted the UIDDA, you must review that state's version. A couple of states have added different reciprocity requirements.¹⁰ For example, Utah's UIDDA only applies if the other state has adopted "provisions substantially similar to this uniform act."¹¹ Because Georgia has not (yet) adopted the UIDDA, Georgia attorneys must look to the alternative process in Utah.¹² Virginia's reciprocity requirement, however, allows a "predecessor uniform act" to suffice.¹³ Since Georgia has adopted the Uniform Foreign Depositions Act, then Georgia attorneys should be able to use Virginia's UIDDA procedure.

The states that have adopted the UIDDA, or a substantially similar statute, are: California,¹⁴ Colorado,¹⁵ District of Columbia,¹⁶ Delaware,¹⁷ Idaho,¹⁸ Indiana,¹⁹ Kansas,²⁰ Kentucky,²¹ Maryland,²² Mississippi,²³ Montana,²⁴ Nevada,²⁵ New Mexico,²⁶ New York,²⁷ North Carolina,²⁸ South Carolina,²⁹ Tennessee,³⁰ Utah,³¹ Virgin Islands³² and Virginia.³³ Earlier this year, bills to enact the UIDDA were introduced in Georgia³⁴ and Pennsylvania,³⁵ but those bills did not pass.

In Georgia, the bill to adopt the UIDDA passed the House, but the Senate passed an amendment to the bill to bifurcate it so that Part I of the bill would be in effect until the effective date of the revised evidence code, and Part II—with updated code citations—would be effective upon the effective date of the revised evidence code.³⁶ This bifurcation would permit the UIDDA to remain in effect seamlessly without any needed house-keeping measures. But when the bill as amended went back to the House, the House proposed an amendment to introduce a reciprocity provision so that the UIDDA process could only be used if the state where the underlying case is pending has adopted a similar procedure.³⁷ Interestingly, Georgia's proposed version of the UIDDA would keep a modified version of the current statute as

an alternative procedure so that there would still be a mechanism available to out-of-state attorneys should a state have not adopted a law governing the underlying action similar to the UIDDA.³⁸ The House passed the amendment with the reciprocity provision, so the Senate will likely address this amendment next year.

UFDA and Subpoenas Issued with a Commission

The Uniform Foreign Depositions Act (UFDA) remains in place in several states. It is a predecessor act of the UIDDA, adopted by the National Conference of Commissions on Uniform State Laws in 1920. It states:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.³⁹

The states that still have the UFDA, or a similar statute, are: Florida,⁴⁰ Georgia,⁴¹ Louisiana,⁴² Nebraska,⁴³ New Hampshire,⁴⁴ Ohio,⁴⁵ Oregon,⁴⁶ Rhode Island,⁴⁷ South Dakota,⁴⁸ Texas⁴⁹ and Wyoming.⁵⁰

If your witness is located in one of these states, then your first step should be to call the clerk of court in the county or parish where the witness is located. The clerk may require a notice of deposition, a commission or even a miscellaneous action to issue the subpoena. It is unlikely that local counsel is required for these states (with the exception of Oregon)—at least until the subpoena needs to be enforced.

Issued Without Court Intervention

A few states allow either the clerk of court or another person to issue the subpoena without filing a separate action. In these states, because you are not entering an appearance before the court—requesting the subpoena is more of an administrative task—you should not be required to hire local counsel.⁵¹ Only when you need the court to enforce the subpoena will you need local counsel.

These states are: Arkansas,⁵² Connecticut,⁵³ Iowa,⁵⁴ Massachusetts,⁵⁵ Minnesota⁵⁶ and North Dakota.⁵⁷ Some of these states only require a notice of deposition from the foreign state. Other states only need evidence that the deposition is permitted under the foreign state's law, and a commission may be the way to meet that requirement. Because the judge in the discovery state is not familiar with the facts of the underlying litigation, the judge in the discovery state may be more likely to enforce a subpoena that was accompanied by a commission signed by the judge familiar with the litigation. A call to the clerk is recommended, but you should first review the applicable statute or rule so that you are an informed caller.

Issued with Court Involvement

Other states, however, require greater court action before they will issue the subpoena. Some will require you to file an application or motion in the discovery state's court before the subpoena can issue, and an application or motion will require local counsel. Those states are: Alaska,⁵⁸ Arizona,⁵⁹ Hawaii,⁶⁰ Illinois,⁶¹ Maine,⁶² Massachusetts,⁶³ Michigan,⁶⁴ Missouri,⁶⁵ New Jersey,⁶⁶ Pennsylvania,⁶⁷ Vermont⁶⁸ and West Virginia.⁶⁹ The statutes in some other states, however, seem to require court action, but not necessarily that you file an application or petition. Those states are: Alabama,⁷⁰ Oklahoma,⁷¹ Washington⁷² and

Wisconsin.⁷³ Given the unclear procedure in those states, you should call the clerk of court to determine their procedure. If that call is not enlightening, then local counsel should be engaged.

Should You Hire Local Counsel?

Even if local counsel is not required, if you anticipate any resistance to the subpoena, then you may gain a strategic advantage by hiring local counsel before you seek the subpoena. Hiring local counsel, and including that name on the subpoena, will alert the deponent and your opposing counsel that you have counsel ready to enforce the subpoena.

Not only can hiring local counsel give you a strategic advantage, but also local counsel can answer several questions related to the mechanics and logistics of issuing and serving a subpoena out of state:

- What methods of service are permitted?
- What are the witness and mileage fees?
- How long will it take to have the subpoena issued?
- Does the state require a specific notice period for the subpoena?
- Are there any concerns about the type of information sought, especially in cases in which protected health information is requested?⁷⁴
- Is the commission that you intend on requesting from the Georgia court sufficient?
- Who are reputable process servers and court reporters?

Local counsel can also advise you of any requirements that you be admitted *pro hac vice* to take the deposition⁷⁵ and any other unauthorized practice of law concerns. Typically, because you are licensed to practice law in Georgia and you are taking the deposition for a matter pending in Georgia, there should not be unauthorized practice of law issues, but you should

check the rule of the state from which you are seeking discovery.⁷⁶

The additional up-front cost for hiring local counsel ensures that the subpoena is issued and served properly—meeting your ultimate goal of having an enforceable subpoena. To provide certainty to your client on costs, local counsel should offer this assistance for a flat rate.

If you are pursuing evidence in a state that does not require local counsel, then review that state's statutes, which will answer most of these questions. After you are familiar with those statutes, then you can make an informed call to the clerk of court.

What Documents Do You Need From the Georgia Court to Get Started?

The state's statute or rule, as identified above, will determine the documents you need from the Georgia court. Conversations with local counsel may also alert you to other requirements.

Notice of Deposition

You may only need a notice of deposition for the other state to issue the subpoena. If you need documents from the deponent, then add the document request to the notice.⁷⁷ Even if the other state does not require a notice of deposition, a Georgia ethics opinion may. In Advisory Opinion 40, the State Disciplinary Board cautioned against the misuse of subpoenas when serving subpoenas on nonparty witnesses.⁷⁸ A subpoena should only be issued for depositions that have been scheduled by agreement or "where a notice of deposition has been filed and served on all parties, and should not be issued when no deposition has been scheduled."⁷⁹ This notice requirement is to allow parties to the litigation to contest the relevancy, confidentiality or privileged nature of the material requested.⁸⁰

Georgia Subpoena

For the states that require the submission of the Georgia subpoena,

including those that have adopted the UICDA, the Georgia Civil Practice Act allows only for subpoenas for deposition, although a document request can be included.⁸¹ Therefore, even if the discovery state, unlike Georgia, permits a subpoena for documents alone and you only want documents, in states that require the subpoena to incorporate the terms of the subpoena in the underlying action,⁸² the subpoena issued from the discovery state must include the request for deposition. You can then outline in the cover letter that you will accept the documents (with any necessary certification to lay the evidentiary foundation) in lieu of the deposition.

Commission

For those states that require a commission, Georgia courts have the authority to issue commissions

under the Georgia Civil Practice Act. The courts can issue a commission for the taking of depositions when it is "necessary or convenient" and upon "application and notice."⁸³ The commission may designate an officer to take the deposition by name or descriptive title.⁸¹ You may be able to obtain consent from opposing counsel for a commission or you may have to file a motion for issuance of the commission showing why the commission is necessary or convenient for your case.

And You've Made It Through the Maze.

So continue brainstorming about the evidence that you need for your case—without feeling trapped by state lines. There is a way to reach the evidence. This guide provides

the procedure so that you can focus on the substantive issues facing your client. ●

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**APPENDIX I
 Out-of-State Subpoena Citations**

State where you need discovery	Method	Statute or Rule
Alabama	Issued with court involvement	ALA. R. CIV. P. 28(c)
Alaska	Issued with court involvement	ALASKA R. CIV. P. 28(c)
Arizona	Issued with court involvement	ARIZ. R. CIV. P. 30(h)
Arkansas	Issued without court involvement	ARK. R. CIV. P. 45(f)
California	Similar to UICDA	CAL. CIV. PROC. CODE §§ 2029.100-.900 (West 2011)
Colorado	UICDA	COL. REV. STAT. ANN. §§ 13-90.5-101 to -107 (West 2011)
Connecticut	Issued without court involvement	CONN. GEN. STAT. §§ 52-148a(f), 52-155 (2011); CONN. R. SUPER. CT. CIV. § 13-28(g)
District of Columbia	UICDA	D.C. CODE §§ 13-441 to -448 (2011); D.C. R. CIV. PROC. 28-1; D.C. CODE § 14-103 (2011)
Delaware	UICDA	DEL. CODE ANN. tit. 10, § 4311 (2011)
Florida	UFDA	FLA. STAT. ANN. § 92.251 (West 2011)
Georgia	UFDA	O.C.G.A. §§ 24-10-110 to -112 (West 2011)
Hawaii	Issued with court involvement	HAW. REV. STAT. § 624-27 (2011)
Idaho	UICDA	Id. R. CIV. P. 45(f)
Illinois	Issued with court involvement	I.L.C.S. S. CT. RULE 204(b)
Indiana	UICDA	IND. CODE §§ 34-44.5-1-1 to -44.5-1-11 (2011); IND. R. TRIAL PROC. 28(E)
Iowa	Issued without court involvement	IOWA CODE ANN. § 622.84 (West 2011)
Kansas	UICDA	KAN. STAT. ANN. § 60-228a (2010)
Kentucky	UICDA	KY. REV. STAT. ANN. § 421.360 (2011)

State where you need discovery	Method	Statute or Rule
Louisiana	UFDA	LA. REV. STAT. ANN. § 13:3821 (2011)
Maine	Issued with court involvement	ME. R. CIV. P. 30(h)
Maryland	UIDDA	MD. CODE ANN., CTS. & JUD. PROC. §§ 9-401 to -407 (2011)
Massachusetts	Issued without court involvement; alternative procedure requires court involvement	MASS. GEN. LAWS ANN. ch. 223A, § 11 (2011); MASS. GEN. LAWS ch. 233, § 45 (2011)
Michigan	Issued with court involvement	MICH. RULES M.C.R. 2.305(E); MICH. COMP. LAWS § 600.1852(2) (2011)
Minnesota	Issued without court involvement	MINN. R. CIV. P. 45.01(d)
Mississippi	UIDDA	2011 Miss. Laws 347 (S.B. No. 2264); MISS. R. CIV. P. 45(a)(3)
Missouri	Issued with court involvement	MO. SUPREME COURT R. 57.08; MO. ANN. STAT. § 492.100 (West 2011)
Montana	UIDDA	MONT. R. CIV. P. 28(d) (Effective Oct. 1, 2011)
Nebraska	Similar to UFDA	NEB. CT. R. DISC. § 6-328(e)
Nevada	UIDDA	2011 Nev. Legis. Serv. 10 (A.B. 87)
New Hampshire	Similar to UFDA	N.H. REV. STAT. ANN. § 517-A:1 (2011); N.H. REV. STAT. ANN. § 517:18 (2011)
New Jersey	Issued with court involvement	N.J. R. OF CT. 4:11-4
New Mexico	UIDDA; alternative procedure with court involvement	N.M. DIST. CT. CIV. PROC. R. 1-045.1; N.M. STAT. § 38-8-1 (2011)
New York	UIDDA	N.Y. C.P.L.R. 3119 (McKENNEY 2011)
North Carolina	UIDDA (eff. Dec. 1, 2011)	N.C. Sess. Laws 2011-247 (H.B. 379) (To Be Codified In N.C. GEN. STAT. §§ 1F-1 to 1F-7) (Effective Dec. 1, 2011)
North Dakota	Issued without court involvement	N.D. R. CIV. P. 45(a)(3)
Ohio	UFDA	OHIO REV. CODE ANN. §§ 2319.08 - .09 (West 2011)
Oklahoma	Issued with court involvement	OKLA. STAT. ANN. tit. 12, § 2004.1 (2011)
Oregon	UFDA, but local counsel requirement	OR. R. CIV. P. 38(C); UNIF. TRIAL CT. R. 5.140
Pennsylvania	Issued with court involvement	42 PA. CONS. STAT. ANN. § 5326 (WEST 2011)
Rhode Island	similar to UFDA	R.I. GEN. LAWS § 9-18-11 (2011).
South Carolina	UIDDA	S.C. CODE ANN. §§ 15-47-100 to -160 (2010); S.C. R. CIV. PROC. 28(d)
South Dakota	UFDA	S.D. CODIFIED LAWS § 19-5-4 (2011)
Tennessee	UIDDA	TENN. CODE ANN. §§ 24-9-201 to -207 (West 2011).
Texas	similar to UFDA	TEX. CIV. PRAC. & REM. CODE ANN. § 20.002 (VERNON 2011)
Utah	UIDDA	UTAH CODE ANN. §§ 78B-17-101 to -302 (WEST 2011); UTAH R. CIV. PROC. 26(h)
Vermont	Issued with court involvement	VT. R. CIV. P. 28(d)
Virgin Islands	UIDDA	V.I. CODE ANN. tit. 5, §§ 4922-4925B (2011)
Virginia	UIDDA	VA. CODE ANN. § 8.01-412.8 to 412.15 (West 2011)
Washington	Issued with court involvement	WASH. SUPER. CT. CIV. R. 45(e)(4)
West Virginia	Issued with court involvement	W. VA. R. CIV. P. 28(d)
Wisconsin	Issued with court involvement	WIS. STAT. ANN. § 887.24 (West 2011)
Wyoming	UFDA	WYO. STAT. ANN. § 1-12-115 (2011)

Endnotes

1. O.C.G.A. § 24-10-21 (2011) (limiting place of service of subpoena to places within the state); see also *Parrott v. Edwards*, 113 Ga. App. 422, 427, 148 S.E.2d 175, 180 (1966) (nonparty who was resident of another state was beyond the subpoena power of Georgia courts).
2. O.C.G.A. § 9-11-32(a)(3)(D) (2011).
3. FED. R. CIV. P. 45(a)(3). Different districts, even within the same judicial circuit, have interpreted the service requirement under Rule 45 differently, so one must undertake additional research. See, e.g., *Hall v. Sullivan*, 229 F.R.D. 501 (D. Md. 2005) (denying nonparty's motion to quash subpoena because Federal Express delivery was sufficient delivery; in-hand personal service of subpoena is not required for subpoenas that only require a document production). Compare *Klockner Namisco Holdings Corp v. Daily Access com, Inc.*, 211 F.R.D. 685 (N.D. Ga. 2002) (denying motion for sanctions for failure to appear at deposition because personal service of subpoena was required), with *In re Falcon Air Express, Inc.*, No. 06-11877-BKC-AJC, 2008 WL 2038799 (S.D. Fla. May 8, 2008) (rejecting "as antiquated the so-called majority position interpreting Rule 45 as requiring personal service, and instead [adopting] the better-reasoned, modern, emerging minority position, which holds that substitute service of a subpoena is effective on a nonparty witness under Rule 45," rejecting *Klockner*).
4. The United States Postal Service website has a tool to locate the county by address. See ZIP Code Lookup, UNITED STATES POSTAL SERVICE, <http://zip1.usps.com/zip4/welcome.jsp> (enter address, then click on "Mailing Industry Information") (last visited Aug. 11, 2011).
5. UNIF. INTERSTATE DEPOSITIONS & DISCOVERY ACT § 3 (2007). The full text of the UIDDA and comments from the National Conference of Commissioners on Uniform State Laws is located at http://www.law.upenn.edu/bl/archives/ule/uidda/2007act_final.htm (last visited Aug. 11, 2011).
6. UIDDA § 3(c) (2007).
7. *Id.* § 3(a).
8. *Id.* § 4 and Comment.
9. *Id.* § 6.
10. UTAH CODE ANN. § 78B-17-103 (West 2011); VA. CODE ANN. § 8.01-414 (West 2011).
11. UTAH CODE ANN. § 78B-17-103 (West 2011).
12. UTAH R. CIV. P. 26(h); see also *How to Take a Deposition in Utah for a Case from Another State*, UTAH STATE COURTS, <http://www.utcourts.gov/resources/attorney/outofstateattorney/> (last visited Aug. 11, 2011).
13. VA. CODE ANN. § 8.01-412.14 (West 2011).
14. CAL. CIV. P. CODE §§ 2029.100-.900 (West 2011); see also *Judicial Council Forms, CALIFORNIA COURTS*, <http://www.courts.ca.gov/forms.htm> (last visited Aug. 11, 2011). Forms SUBP-030, SUBP-035, SUBP-040, SUBP-045, and SUBP-050 pertain to subpoenas for actions pending outside California.
15. COLO. REV. STAT. ANN. §§ 13-90.5-101 to -107 (West 2011); see also *Issuing Out of State Subpoena Forms, COLORADO STATE JUDICIAL BRANCH*, http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=117 (last visited Aug. 7, 2011).
16. D.C. CODE §§ 13-441 to -448 (2011). The District of Columbia also still has the Uniform Foreign Depositions Act on the books. D.C. CODE § 14-103 (2011). Rule of Civil Procedure 28-1(b) provides an alternative procedure, requiring a certified copy of the commission or notice to be filed and a judge's approval before the clerk can issue the subpoena. D.C. R. CIV. P. 28-1; see also *Clarification of Uniform Interstate Depositions and Discovery Act (UIDDA) in the District of Columbia*, INSURANCE DEFENSE BLOG, (Jan. 5, 2011, 2:40 PM), <http://www.insurancedefenseblog.us/2011/01/clarification-of-uniform-interstate-depositions-and-discovery-act-uidda-in-the-district-of-columbia.html> (noting, also, the exception for medical records request, in which an appearance before the court must be made under D.C. Code § 14-307).
17. DEL. CODE ANN. tit. 10, § 4311 (2011).
18. IDAHO R. CIV. P. 45(i).
19. IND. CODE §§ 34-44.5-1-1 to -44.5-1-11 (2011) (UIDDA). The previous method also remains on the books. IND. R. TRIAL P. 28(E) (court may order person to provide testimony, documents, inspections, or mental examination upon application or in response to a letter rogatory). In fact, the Marion County Clerk's office has information only on how to have a subpoena issued under Indiana Trial Rule 28(E), available at <http://www.indy.gov/eGov/County/Clerk/Court/Filings/Pages/OutOfStateLitigants.aspx> (last visited Aug. 11, 2011).
20. KAN. STAT. ANN. § 60-228a (2010).
21. KY. REV. STAT. ANN. § 421.360 (West 2011).
22. MD. CODE ANN., CTS. & JUD. PROC. §§ 9-401 to -407 (West 2011).
23. 2011 Miss. Laws 347 (S.B. No. 2264). The passage of this section did not affect the prior method of obtaining out-of-state subpoenas, thus providing an alternate method. Miss. R. CIV. P. 45(a)(3) (clerk can issue a subpoena upon submission of the foreign subpoena).
24. MONT. R. CIV. P. 28(c) (effective Oct. 1, 2011). Before October 1, 2011, the previous rule remains in effect. MONT. R. CIV. P. 28(d) (district court may issue the subpoena upon proof that notice has been duly served).
25. 2011 Nev. Legis. Serv. 10 (A.B. 87) (effective Oct. 1, 2011). This bill repeals the UFDA.
26. N.M. DIST. CT. CIV. P. R. 1-045.1. An alternative procedure permits the New Mexico judge to issue an order directing a witness to provide testimony or documents. N.M. STAT. ANN. § 38-8-1 (2011).
27. N.Y. C.P.L.R. 3119 (McKINNEY 2011).
28. The North Carolina Uniform Interstate Depositions and Discovery Act becomes effective on December 1, 2011. 2011 N.C. Sess. Laws 247 (H.B. 379) (to be codified in N.C. GEN. STAT. §§ 1E-1 to 1E-7). Before December 1, 2011, N.C. Gen. Stat. Ann. § 1A-1, Rule 28(d) (2010) remains in effect (present a commission, order, notice, or consent to the judge and it "shall be the duty of the judge" to issue the subpoena). Beginning on December 1, 2011, under H.B. 379, Rule 28(d) will be amended

- to apply only to depositions to be used in foreign countries. For local rule requirements regarding the taking of the deposition once the subpoena is issued, see Posting of Mack Sperling to North Carolina Business Litigation Report, <http://www.ncbusinesslitigationreport.com/2009/10/articles/professional-responsibility-1/out-of-state-counsel-depositions-and-pro-hac-vice-admissions-in-north-carolina/> (Oct. 26, 2009).
29. S.C. CODE ANN. §§ 15-47-100 to -160 (2010). The previous rule was not repealed, allowing an attorney or the clerk of court to issue a subpoena after filing a commission with the South Carolina court. S.C. R. Civ. P. 28(d). The South Carolina Supreme Court has noted that Rule 28(d) is consistent with South Carolina's UIFDA. Order re South Carolina Rules of Civil Procedure, 2011 Note (April 28, 2011), <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=28.0&subRuleID=&ruleType=CIV> (amending note to Rule 28 in a Court Rule Maintenance Order).
 30. TENN. CODE ANN. §§ 24-9-201 to -207 (West 2011).
 31. UTAH CODE ANN. §§ 78B-17-101 to -302 (West 2011); see also UTAH R. CIV. P. 26(h) (providing that subpoena can issue upon filing of notice of deposition with the clerk). The website for Utah State Courts has provided information on how to take a deposition in Utah for a case from another state at <http://www.utcourts.gov/resources/attorney/outofstateattorney/> (last visited Aug. 11, 2011).
 32. V.I. CODE ANN. tit. 5, §§ 4922-4925B (2011).
 33. VA. CODE ANN. §§ 8.01-412.8 to -412.15 (West 2011).
 34. See H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), available at http://www1.legis.ga.gov/legis/2011_12/sum/hb46.htm (last visited Aug. 11, 2011).
 35. See S.B. 79, Gen. Assemb., Reg. Sess. (Pa. 2011).
 36. See H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), available at http://www1.legis.ga.gov/legis/2011_12/sum/hb46.htm (last visited Aug. 11, 2011) (Senate amendment at Version 2).
 37. Comments of Rep. Mike Jacobs, Afternoon House Session 3 at

- 1:06:35, video available at <http://www.gpb.org/lawmakers/2011/day-40-sine-die> (last visited Aug. 11, 2011).
38. See H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (proposed sections 24-10-113 and 21-13-113).
 39. See Comments to Uniform Interstate Depositions & Discovery Act (2007), NATIONAL CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.law.upenn.edu/bll/archives/ulc/kldda/2007act_final.htm (last visited Aug. 11, 2011).
 40. FLA. STAT. ANN. § 92.251 (West 2011).
 41. O.C.G.A. §§ 24-10-110 to 112 (2011).
 42. LA. REV. STAT. ANN. § 13:3821 (2011).
 43. NEB. CT. R. DISC. § 6-328(e).
 44. N.H. REV. STAT. ANN. § 517-A:1 (2011); N.H. REV. STAT. ANN. § 517:18 (2011).
 45. OHIO REV. CODE ANN. §§ 2319.08-.09 (West 2011).
 46. OR. R. CIV. P. 38(c); UNIF. TRIAL CT. R. 5.140 (requiring either local counsel or the party to present the commission in person to register the document).
 47. R.I. GEN. LAWS § 9-18-11 (2011) (statute similar to UIFDA).
 48. S.D. CODIFIED LAWS § 19-5-4 (2011).
 49. TEX. CIV. PRAC. & REM. CODE ANN. § 20.002 (VERNON 2011) (statute similar to UIFDA).
 50. WYO. STAT. ANN. § 1-12-115 (2011).
 51. See, e.g., Ala. Rules Governing Admissions, R. 7 (must be admitted *pro hac vice* to appear as counsel before any court); Conn. Rules of Super. Ct. Regulating Admission to the Bar § 2-16 (*pro hac vice* admission required to participate in "the presentation of a cause or appeal in any court of this state").
 52. ARK. R. CIV. P. 45(f) (clerk shall issue a subpoena when a party files a certified copy of the notice of deposition).
 53. CONN. GEN. STAT. §§ 52-148e(f), 52-155 (2011); CONN. R. SUPER. CT. CIV. § 13-28(g). Depositions can be taken of Connecticut witnesses in the same manner as matters pending in Connecticut "on application" of any party to the underlying civil action. This language implies that a commission should be obtained from the court where the action is pending. Then the subpoena

- could be issued "in like manner" by a judge, clerk, notary public, or commissioner. CONN. R. SUPER. CT. CIV. § 13-28(h). The State of Connecticut Judicial Branch has provided instructions for deposing a Connecticut resident, stating that a Connecticut attorney or notary public may issue the subpoena or that the out-of-state attorney may apply for a court-ordered subpoena. Out of State Commission to Depose a Connecticut Resident, (Dec. 15, 2010), <http://www.jud.ct.gov/CivilProc/depose.pdf>.
54. IOWA CODE ANN. § 622.84 (West 2011). The statute permits the "person authorized to take the depositions" to issue the subpoena when another state's laws allow a deposition to be taken. Although not stated in the statute, a commission may be a way to show that the state in the underlying action has allowed the deposition to be taken. In Iowa, clerks or attorneys may issue subpoenas. IOWA R. CIV. P. 1.1701(2).
 55. MASS. GEN. LAWS ch. 233, § 45 (2011) (person can be summoned to give deposition in case pending in another state in same manner as summoning witnesses before court, likely need commission) (one of two alternative procedures in Massachusetts); see also MASS. GEN. LAWS ch. 233, § 1 (2011) (stating that a clerk, notary public, or justice of the peace may issue summonses).
 56. MINN. R. CIV. P. 45.01(d) (subpoena can be issued by court administrator or Minnesota attorney provided deposition "is allowed" and has been properly noticed where action is pending).
 57. N.D. R. CIV. P. 45(a)(3) (clerk can issue subpoena, but party must file proof of service of notice or file letter of request from court where action is pending).
 58. ALASKA R. CIV. P. 28(c) (upon motion, court may order issuance of subpoena when a deposition is to be taken pursuant to the laws of another jurisdiction).
 59. ARIZ. R. CIV. P. 30(h) (must file an application as a civil action under oath and with other requirements, including attaching a notice, order from foreign state, commission, or letter rogatory).
 60. HAW. REV. STAT. § 624-27 (2011) (present verified petition when a

commission has been issued or where notice has been given in underlying action).

61. I.L.C.S. S. Ct. R. 204(b) (petition the court for a subpoena to compel the testimony of the deponent). The Clerk of the Circuit Court of Cook County, Illinois, provides the procedures for obtaining a subpoena for deposition for a case pending in another state. Deposition for a Case Pending in Another State, CLERK OF THE CIRCUIT COURT, COOK COUNTY, ILLINOIS, <http://198.173.15.34/?section=DDPage&DDPage=3300> (click "Procedures") (last visited Aug. 11, 2011).
62. ME. R. CIV. P. 30(h) (must file an application before clerk may issue a subpoena; statute expressly requires local counsel).
63. MASS. GEN. LAWS ch. 223A, § 11 (2011) (court may order person to give testimony or documents upon application or in response to a letter rogatory); *see also* MASS. GEN. LAWS ch. 233, § 45 (2011) (providing an alternative process).
64. MICH. RULES M.C.R. 2.305(F) (person authorized to take deposition may petition the court for a subpoena to give testimony or produce documents); MICH. COMM. LAWS § 600.1852(2) (2011) (court may order person to give testimony or produce documents upon application or in response to a letter rogatory); *see also* *Ewin v. Burnham*, 728 N.W.2d 463, 465 (Mich. Ct. App. 2006) (discussing these two rules and finding that they do not conflict). The Clerk's Office in Wayne County (Detroit), Michigan has provided instructions to have out-of-state subpoena issued under Rule 2.305(F). Issuance of Subpoena Out of State Case, WAYNE COUNTY CLERK, <http://www.co.wayne.mi.us/2118.htm> (last visited Aug. 11, 2011).
65. MO. S. CT. R. 57.08 (court can direct that a subpoena issue upon *ex parte* application when a deposition is to be taken pursuant to laws of another state); MO. ANN. STAT. § 492.100 (West 2011) (commissioners appointed by another state can compel the attendance of witnesses).
66. N.J. R. OF CT. 4:11-4 (must file *ex parte* petition to order issuance of subpoena). The Superior Court of New Jersey has provided an information packet, including forms, to assist out-of-state attorneys. Out-of-State Discovery Procedure, NEW JERSEY JUDICIARY, (May 2007) <http://www.judiciary.state.nj.us/civil/forms/10518.pdf>.
67. 42 PA. CONST. STAT. ANN. § 5326 (West 2011) (court can order someone to provide testimony or produce documents upon an application or in response to a letter rogatory).
68. VT. R. CIV. P. 28(d) (judge may order issuance of a subpoena upon petition when the deposition is to be taken pursuant to the laws of another state).
69. W. VA. R. CIV. P. 28(d) (upon petition, court may order issuance of subpoena when the deposition of a person is to be taken pursuant to the laws of another state).
70. ALA. R. CIV. P. 28(c) (present a commission to the judge or proof of a duly served notice and it "shall be the duty of the judge" to issue the subpoena).
71. OKLA. STAT. ANN. tit. 12, § 2001.1 (West 2011) (district court can issue subpoena upon proof of service of notice and no requirement of petition to be filed prior to issuance).
72. WASH. SUPER. CT. CIV. R. 45(c) (4) (court may issue a subpoena when a person is authorized by the law of another state to take a deposition in Washington, with or without a commission).
73. WIS. STAT. ANN. § 887.24 (West 2011) (witness may be subpoenaed before any person authorized by the state where the action is pending, but includes reciprocity requirement). The procedure is unclear from the statute, but the code section to compel a Wisconsin resident to testify at a civil action in the foreign state requires a submission to the judge, so that may guide the court's action for deposition testimony as well. WIS. STAT. ANN. § 887.25 (West 2011).
74. *See, e.g.*, I.L.C.S. S. Ct. R. 204(c) (must have agreement of parties or order of the court to depose nonparty physicians).
75. Sr Mack Sperling, Out Of State Counsel, Depositions, And Pro Hac Vice Admissions In North Carolina, NORTH CAROLINA BUSINESS LITIGATION REPORT, (Oct. 26, 2009), <http://www.ncbusinesslitigationreport.com/2009/10/articles/professional-responsibility-1/out-of-state-counsel-depositions-and-pro-hac-vice-admissions-in-north-carolina/>.
76. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT R. 5.5(c)(2) (lawyer admitted in another jurisdiction can provide legal service on a temporary basis in Florida when the services are reasonably related to a pending proceeding in another jurisdiction, if that lawyer is authorized by law to appear in that proceeding); FL. R. PROF'L CONDUCT 4-5.5(c)(2) (same); GA. R. PROF'L CONDUCT 5.5(c)(2) (same).
77. O.C.G.A. § 9-11-30(b)(1) (2011).
78. Advisory Op. 40, STATE BAR OF GEORGIA DISCIPLINARY BOARD (Sept. 21, 1981), http://www.gabar.org/handbook/state_disciplinary_board_opinions/adv_op_40/ (last visited Aug. 11, 2011).
79. *Id.*
80. *Id.*
81. O.C.G.A. § 9-11-45(a)(1)(C) (2011).
82. *See, e.g.*, UIDDA § 3(c) (2007); MISS. R. CIV. P. 45(a)(3).
83. O.C.G.A. § 9-11-28(b) (2011).
84. *Id.*; *see also* O.C.G.A. § 9-11-28(a) (2011).

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November 4, 2009

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BY: _____

Mr. John A. Sebert
Executive Director
Uniform Law Commission
111 North Wabash Avenue
Chicago, IL 60602

Dear Mr. Sebert:

At the 2009 Annual Meeting of the Conference of Chief Justices (CCJ), the Conference adopted the attached resolution on August 5, 2009. The resolution, *In Support of the Uniform Interstate Depositions and Discovery Act (UIDDA)*, was recommended for adoption by the CCJ Civil Justice Committee.

We share a copy of this resolution as information for you and your membership. This resolution reflects the policy position of the Conference.

If you need additional information or assistance, please feel free to contact us or Dick Van Duizend or Kay Farley at the National Center for State Courts. Mr. Van Duizend can be reached at (703) 841-5632 or rvanduizend@ncsc.org. Ms. Farley can be reached at (202) 684-2622 or kfarley@ncsc.org.

Sincerely,

Christine M. Durham

Christine M. Durham
President
Conference of Chief Justices

c: Dick Van Duizend
Kay Farley

Enclosure

CONFERENCE OF CHIEF JUSTICES

Resolution 15

In Support of the Uniform Interstate Depositions and Discovery Act (UIDDA)

WHEREAS, the Conference of Chief Justices recognizes the need for an efficient and inexpensive procedure for litigants to depose out-of-state individuals and seek production of discoverable materials that may be located out of state; and

WHEREAS, the Uniform Laws Commission, previously known as the National Conference of Commissioners on Uniform State Laws, convened a committee of experts to examine practices and problems in dealing with the issues inherent in interstate discovery; and

WHEREAS, the UIDDA (1) provides for an efficient process for invoking the jurisdiction of the discovery state over the deponent; (2) eliminates the need for out-of-state litigants to obtain a commission or local counsel in the discovery state and to file miscellaneous actions during discovery in order to subpoena individuals located outside the trial state; (3) minimizes the need for judicial oversight in the discovery state; but, (4) recognizes that the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in another state from unreasonable or burdensome discovery requests; and

WHEREAS, adoption and implementation of the UIDDA will effectively address current jurisdictional problems and result in uniformity in both state law and practice;

NOW, THEREFORE, BE IT RESOLVED that the Conference commends the work of the Uniform Laws Commission on this subject and recommends to the appropriate state bodies to consider adoption of the substance of the UIDDA.



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STATEMENT OF
 ERIC M. FISH
 LEGISLATIVE COUNSEL
 UNIFORM LAW COMMISSION

HB5331

THE "UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT"
 BEFORE THE COMMITTEE ON THE JUDICIARY
 CONNECTICUT GENERAL ASSEMBLY
 AT A PUBLIC HEARING

March 14, 2012

Mr. Chairman and members of the Committee:

I am Eric M. Fish, Legislative Counsel for the Uniform Law Commission, submitting written testimony in support of HB5331, the Uniform Interstate Deposition and Discovery Act, an act that would allow the subpoena of out-of-state witnesses with a minimum of judicial intervention and increased efficiency. The UIDDA parallels the procedures currently used in federal courts under Rule 45 of the Federal Rules of Civil Procedure and many courts, judges, and lawyers are familiar with the concepts contained in the bill.

The UIDDA was approved by the Uniform Law Commission in the summer of 2007. To date, 20 states have adopted the UIDDA either through statute or by court rule. This year, 11 states are considering the UIDDA and widespread enactment is expected, a testament to acceptance of the act as well as the desire to improve upon civil procedure across the country in a manner that lowers costs of litigation and removes burdens from already overburdened court dockets.

The Uniform Law Commission is not unfamiliar with drafting legislation to aid states deal with issues of interstate depositions and discovery. The first attempt at a uniform act occurred in 1920 with adoption of the Uniform Foreign Depositions Act. This act was adopted in 13 states. During the time between 1920 and 1962, many states drafted their own legislation to address the problems presented by interstate depositions, specifically how to depose an out-

of-state deponent. In 1962, the Uniform Law Commission drafted a new act to harmonize the laws that developed in the 40 years following the Uniform Foreign Depositions Act. The Uniform Interstate and International Procedure Act was adopted by 4 states, the U.S. Virgin Islands, and the District of Columbia.

The UIDDA is simple and efficient. It establishes a simple clerical procedure under which a trial state subpoena may be reissued as a discovery state subpoena. Under the act, the out-of-state subpoena will be presented to the Clerk of the Court in Connecticut. Upon presentation of the out-of-state subpoena, the Clerk will issue a Connecticut subpoena that incorporates the terms of the out-of-state subpoena. This action does not constitute an appearance in the court, but is sufficient to invoke jurisdiction over the deponent.

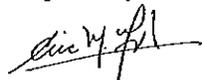
The UIDDA minimizes judicial oversight, eliminating the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. Removing judicial involvement with a ministerial process conserves judicial resources and keeps costs low for all parties involved. The act protects residents of the Connecticut from unreasonable and burdensome discovery requests. Under the act, motions brought to enforce, quash, or modify a subpoena, or for protective orders, must be brought in the Connecticut courts and are governed by the discovery rules of this state.

The drafting committee for the UIDDA benefited from the participation of observers from the American Association for Justice, the Association of Trial Lawyers of America, and the Federation of Defense and Insurance Counsel, all with significant experience with the issues related to interstate depositions. Many practitioners welcome the procedural changes contained within the UIDDA, as it will improve their practice. Because the UIDDA parallels Federal Rule of Civil Procedure 45, many lawyers familiar with the federal rules and will easily incorporate the UIDDA into their practice.

Adding to the many endorsements of the UIDDA, the Conference of Chief Justices issued a resolution in August 2009 recognizing that the UIDDA provides an efficient and cost-effective procedure for litigants to depose out-of-state individuals and seek production of discoverable materials that may be located out of state.

In sum, the UIDDA is efficient, simple, and minimizes the need for court involvement in the discovery process. I urge the Committee to act favorably on this Act.

Respectfully Submitted,



Legislative Counsel