Memorandum

To: NCCUSL Drafting Committee,
Uniform Interstate Depositions and Discovery of Documents Act

From: Thomas A. Mauet, Reporter

Date: February 7, 2006

Re: Changes to draft of uniform act for discussion during the March 17-19, 2006 meeting in Portland, OR

In our December, 2005 meeting we discussed a number of issues and considered a number of changes to the first draft of the uniform act. These include the following:

1. We agreed that the objectives of the uniform act are to set forth a clear, simple, and efficient procedure, that minimizes judicial involvement, that is inexpensive to the litigants, so that the uniform act is adoptable by the substantial majority of states.

2. We agreed that the terms "trial state" and "discovery / deposition state" best describe the jurisdictions involved in these situations. While these terms are not in the draft, they may be used in any later commentary.

3. It was suggested that I check the procedural language of the uniform child support act and the uniform enforcement of foreign judgments act as to service of process language. I have done that, but these acts are quite general and shed little light on these issues.

4. We agreed to keep the phrase "court of record" in the act, and perhaps have a later

commentary explain what it means and why it was chosen. The committee rejected the proposal that the phrase "in accordance with the law of any foreign jurisdiction" be substituted for the "court of record" language.

5. We discussed whether the term "subpoena" should also include "subpoena duces tecum." We agreed that it should, but did not resolve whether it should be part of the act, or whether it should be in a separate definitions section. Accordingly, I have put the term "subpoena duces tecum" in brackets in my draft. If the committee prefers to have a definitions section, that section can state: "The word 'subpoena' as used in this act shall include ..."

6. We discussed whether the term "person" should also include other artificial entities. We agreed that it should, but did not resolve whether it should be part of the act, or whether it should be in a definitions section. Accordingly, I have put the phrase "or entity" in brackets in my draft. If the committee prefers to have a definitions section, that section can state: "The term 'person' as used in this act shall include ..."

7. We discussed whether the deponent should also be served with a notice of deposition as well as the subpoena. Since a subpoena will ordinarily contain only the name, address, and telephone of the lawyer issuing the subpoena, some committee members felt that it would be helpful for a lawyer representing the deponent to know who the other lawyers in the case are. Since a notice of deposition must be served on all lawyers (and any unrepresented parties) of record anyway, requiring that the notice of deposition be served on the deponent would not be a burdensome requirement. Another possibility mentioned: requiring that the parties to the lawsuit and their counsel of record be shown on the subpoena issued in the discovery state. Accordingly, I have put the phrase "and notice of deposition with proof of service" in brackets in my draft. The draft also requires that the notice of deposition and proof of service be filed with the clerk of court and be served on the deponent along with the subpoena. However, in our December meeting the committee did not decide whether to include this language (or similar language) in the draft, did not decide whether to include proof of service, and did not decide on whether the notice must be presented to the clerk of court. I believe the better approach is to require service

of the notice of deposition on the deponent, but not require that the notice of deposition be filed with the clerk of court.

8. We discussed whether the phrase "in the county or district in which that person to whom the subpoena is directed resides or is located" should be replaced with the phrase "where discovery is to be conducted." However, in our December meeting the committee did not decide which version (or other version) is preferable. Accordingly, I have put the phrase "where discovery is to be conducted" in brackets in my draft.

9. We agreed that the draft should not include any language dealing with relevance or privilege issues, because such issues will be determined by the forum jurisdiction's conflicts rules.

10. We agreed that Par. 4 of the draft should include the phrase "time, place, and manner of the" depositions and the phrase "or production made." Accordingly, I have added that language in brackets to that paragraph. In addition, I added the term "or inspection" as well, to better reflect the full breadth of the subpoena power.

11. We discussed whether the draft should be in the form of my first draft, or whether it should be reorganized to more explicitly set forth the duties and rights of the lawyer issuing the subpoena, the clerk of court, and the deponent. Accordingly, I have attached two versions of the draft to this memo. The first version retains the style of my original; the second version is more explicit. (The first paragraph of both versions is patterned on Rule 45 of the Federal Rules of Civil Procedure.) Both versions put the new material in brackets. In our December meeting no decision was made on which approach was preferable, since we did not yet have alternative drafts to consider.