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FOR DISCUSSION ONLY

**INTERSTATE DEPOSITIONS AND DISCOVERY OF
DOCUMENTS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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**INTERSTATE DEPOSITIONS AND DISCOVERY OF
DOCUMENTS ACT**

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
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INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS 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 court and then serve the witness with a subpoena under the law of the trial court. If a motion to compel is necessary, it must be filed in the witness’s home court. Other states require that a notice of deposition be shown to a clerk or judge in the deponent’s home court, after which

a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial court to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the witness's jurisdiction 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 home state power to issue, refuse to issue, or quash a subpoena.

g. Where can the witness be deposed?

Some states limit the place where a deposition can be taken to the witness's jurisdiction, and some limit it to the witness'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 witness's home jurisdiction 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 (the deponent's home court) can either use the procedure of 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 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 court 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.

1 **INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT**

2
3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Interstate Depositions and
4 Discovery of Documents Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Foreign jurisdiction” means the District of Columbia, Puerto Rico, the United States
7 Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States,
8 or any of the United States other than this state.

9 (2) “Person” means an individual, corporation, business trust, estate, trust, partnership,
10 limited liability company, association, joint venture, public corporation, government or
11 governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

12 (3) “Subpoena” means a court order regardless of title requiring a person to:

13 (A) attend and give testimony at a deposition;

14 (B) produce and permit inspection and copying of designated books, documents,
15 or tangible things in the possession, custody, or control of the person; or

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

17 **Comment**

18
19 This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the
20 Virgin Islands, and the territories of the United States. The committee decided not to extend this
21 Act to include foreign countries including the Canadian provinces. The committee felt that
22 international litigation is sufficiently different and is governed by different principles, so that
23 discovery issues in that arena should be governed by a separate act.

24
25 The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena
26 in the Act is based on the language of Rule 45 of the FRCP.
27

1 **SECTION 3. ISSUING A SUBPOENA.** When a party presents a subpoena issued
2 from a court of record of a foreign jurisdiction to a clerk of court in the [county or district] in
3 which discovery sought under the subpoena may be conducted under the laws of this state, the
4 clerk shall immediately issue a subpoena to the person to whom the subpoena is directed and
5 incorporate the terms used in the foreign jurisdiction subpoena.

6 **Comment**
7

8 The term “Court of Record” was chosen to exclude non-court of record proceedings from
9 the ambit of the Act. The committee felt that extending the Act to such proceedings as
10 arbitrations would be a significant expansion that might generate resistance to the Act. A “Court
11 of Record” includes anyone who is authorized to issue a subpoena under the laws of that state,
12 which usually includes an attorney of record for a party in the proceeding.
13

14 The term “Presented” to a clerk of court includes delivering to or filing. Presenting a
15 subpoena to the clerk of court in the foreign jurisdiction, so that a subpoena is then issued in the
16 name of the foreign jurisdiction, is the necessary act that invokes the jurisdiction of the foreign
17 jurisdiction, which in turn makes the newly issued subpoena both enforceable and challengeable
18 in the foreign jurisdiction.
19

20 The committee envisions the standard procedure under this section will become as
21 follows, using as an example a case filed in Kansas where the witness to be deposed lives in
22 Ohio: A lawyer of record for a party in the action pending in Kansas will issue a subpoena in
23 Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That
24 lawyer will then check with the clerk’s office, in the Ohio county or district in which the witness
25 to be deposed lives, to obtain a copy of its subpoena form (the clerk’s office will usually have a
26 Web page explaining its forms and procedures). The lawyer will then prepare an Ohio subpoena
27 so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server
28 (or local counsel) in Ohio, who will take the completed and executed Kansas subpoena and the
29 completed but not yet executed Ohio subpoena to the clerk’s office in Ohio. The clerk of court,
30 upon being given the Kansas subpoena, will then issue the identical Ohio subpoena (“issue”
31 includes signing, stamping, and assigning a docket number). The process server will pay any
32 necessary filing fees, and then serve the Ohio subpoena (with a list of all parties and counsel of
33 record) on the deponent in accordance with Ohio law.
34

35 The advantages of this process are readily apparent. The act of the clerk of court is
36 ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent.
37 The only documents that need to be presented to the clerk of court in the discovery state are the
38 subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need

1 to hire local counsel to have the subpoena issued in the discovery state, and there is no need to
2 present the matter to a judge in the discovery state before the subpoena can be issued. In effect,
3 the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the
4 new subpoena is then served on the deponent in accordance with the laws of the discovery state.
5 The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial
6 participation are unnecessary to have the subpoena issued and served in the discovery state.

7
8 This Act will not change or repeal the law in those states that still require a commission
9 or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal
10 the law in those states that still require a commission or letter rogatory from a trial state before a
11 deposition can be taken in those states. It is the hope of the Conference that this Act will
12 encourage states that still require the use of commissions or letters rogatory to repeal those laws.
13

14 **SECTION 4. SERVING A SUBPOENA.** A party seeking to serve a subpoena issued
15 by a clerk of court under Section 3 must serve the subpoena in compliance with [cite rule or
16 statute for service of subpoena]. The subpoena must be accompanied by a list of all parties and
17 the names, addresses, and telephone numbers of all counsel of record.

18 **Comment**

19
20 The Act requires that, when the subpoena is served, it be accompanied by a list of all
21 parties and the names, addresses, and telephone numbers of all counsel of record. The committee
22 felt that this requirement imposes no burden on the lawyer issuing the subpoena, since that
23 lawyer already has the obligation to send a notice of deposition to every counsel of record and
24 any unrepresented parties. This requirement makes it easy for the deponent (or, as will
25 frequently be the case, the deponent's lawyer) to learn the names of all the parties to the action
26 and to contact the other lawyers in the case.
27

28 **SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION.** If a subpoena
29 issued under Section 3 commands the person to:

30 (1) attend and give testimony at a deposition, the time and place for and the manner of
31 taking the deposition must comply with [cite rule or statute governing the time and place for and
32 the manner of taking depositions];

1 (2) produce designated books, documents, or tangible objects, the production must
2 comply with [cite rule or statute governing the production of designated books, documents, and
3 tangible objects]; or

4 (3) permit inspection of premises, the inspection must comply with [cite rule or statute
5 governing the inspection of premises].

6 **Comment**
7

8 The Act requires that a deposition, production of records, and inspection of premises
9 must comply with the laws of the discovery state. Since the discovery state’s primary interest in
10 these cases is to protect its residents who become non-party witnesses in an action pending in
11 another jurisdiction from any unreasonable or unduly burdensome discovery request, this is
12 easily accomplished by requiring that the discovery procedure be the same as it would be if the
13 case had originally been filed in the discovery state.
14

15 **SECTION 6. MOTIONS.** Any motion to enforce, quash, or modify a subpoena issued
16 by a clerk of court under Section 3 must comply with the laws of this state and be presented in
17 the court in the [county or district] in which discovery is to be conducted.

18 **Comment**
19

20 The act requires that any motion to enforce, quash, or modify a subpoena, or any motion
21 to compel testimony, must comply with the procedural and evidentiary law of the discovery state.
22 Again, the discovery state’s primary goal is to protect its residents who become non-party
23 witnesses in an action pending in another jurisdiction from any unreasonable or unduly
24 burdensome discovery requests, and this is easily accomplished by requiring that any discovery
25 motions must be decided under the laws of the discovery state.
26

27 The committee chose not to address particular evidentiary issues that may arise, such as
28 objections based on grounds such as relevance or privilege. As the preface notes, such issues are
29 particularly thorny, and are best decided under the laws of the discovery state.
30

31 The term “modify” a subpoena means to alter the terms of a subpoena, such as the date,
32 time, or location of a deposition.
33

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

4 **SECTION 8. EFFECTIVE DATE.** This [act] takes effect _____.