

D R A F T

FOR APPROVAL

**UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA
JULY 27 - AUGUST 3, 2007

**UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT**

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2007

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

**DRAFTING COMMITTEE ON UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

RICHARD B. LONG, P.O. Box 2039, 20 Hawley St., East Tower, Binghamton, NY 13902,
Chair

FRANCISCO L. ACEVEDO, P.O. Box 9023905, San Juan, PR 00902-3905

GEORGE H. BUXTON, III, 31 E. Tennessee Ave., Oak Ridge, TN 37830

M. MICHAEL CRAMER, 4 Whisperwood Ct., Rockville, MD 20852

PATRICK DEBLASE, 8648 Wilshire Blvd., Beverly Hills, CA 90211-2910

TIMOTHY D. DEGIUSTI, 204 N. Robinson, Suite 1550, Oklahoma City, OK 73102

HARRY D. LEINENWEBER, U.S. District Court, 219 S. Dearborn St., Suite 1946, Chicago, IL
60604

HAROLD E. MEIER, Box 491, Dayton, WY 82836

FREDERICK D. NELSON, Hamilton County Courthouse, 1000 Main St., Rm. 320, Cincinnati,
OH 45202

DAVID T. PROSSER, JR., P.O. Box 1688, Madison, WI 53701

KAREN ROBERTS WASHINGTON, 2929 Carlisle, Suite 250, Dallas, TX 75204

THOMAS A. MAUET, University of Arizona, James E. Rogers College of Law, P.O. Box
210176, Tucson, AZ 85721-0176, *Reporter*

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*

DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LIN HUGHES, 1300 Capitol Center, 919 Congress Ave., Austin, TX 78701, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

TABLE OF CONTENTS

Prefatory Note 1
SECTION 1. SHORT TITLE 5
SECTION 2. DEFINITIONS 5
SECTION 3. ISSUANCE OF SUBPOENA 6
SECTION 4. SERVICE OF SUBPOENA 8
SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION 8
SECTION 6. APPLICATION TO COURT 8
SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION 9
SECTION 8. EFFECTIVE DATE 10

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.

1 United States Virgin Islands, and the territories of the United States. The committee decided not
2 to extend this Act to include foreign countries including the Canadian provinces. The committee
3 felt that international litigation is sufficiently different and is governed by different principles, so
4 that discovery issues in that arena should be governed by a separate act.
5

6 The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena
7 in the Act is based on the language of Rule 45 of the FRCP.
8

9 The term “Subpoena” does not include a subpoena for the inspection of a person
10 (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal
11 injury case, for example, are separately controlled by state discovery rules (the corresponding
12 federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of
13 the trial state, a subpoena is never necessary.
14

15 SECTION 3. ISSUANCE OF SUBPOENA.

16 (a) A party may present a foreign subpoena to a clerk of court in the [county, district,
17 circuit, or vicinage] in which discovery is sought to be conducted in this state.

18 (b) When a party presents a foreign subpoena to a clerk of court in this state, the clerk
19 shall immediately issue to that party a subpoena for service upon the person to which the foreign
20 subpoena is directed. The subpoena must incorporate the terms used in the foreign subpoena and
21 contain or be accompanied by the names, addresses, and telephone numbers of all counsel of
22 record in the proceeding to which the subpoena relates and of any party not represented by
23 counsel.

24 Comment

25
26 The term “Court of Record” was chosen to exclude non-court of record proceedings from
27 the ambit of the Act. The committee concluded that extending the Act to such proceedings as
28 arbitrations would be a significant expansion that might generate resistance to the Act. A “Court
29 of Record” includes anyone who is authorized to issue a subpoena under the laws of that state,
30 which usually includes an attorney of record for a party in the proceeding.
31

32 The term “Presented” to a clerk of court includes delivering to or filing. Presenting a
33 subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name

1 of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state,
2 which in turn makes the newly issued subpoena both enforceable and challengeable in the
3 discovery state.
4

5 The committee envisions the standard procedure under this section will become as
6 follows, using as an example a case filed in Kansas (the trial state) where the witness to be
7 deposed lives in Florida (the discovery state): A lawyer of record for a party in the action
8 pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely
9 issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the
10 Florida county or district in which the witness to be deposed lives, to obtain a copy of its
11 subpoena form (the clerk's office will usually have a Web page explaining its forms and
12 procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the
13 Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who
14 will take the completed and executed Kansas subpoena and the completed but not yet executed
15 Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short
16 transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena
17 is being sought pursuant to Florida statute ____ (citing the appropriate statute or rule and quoting
18 Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical
19 Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number).
20 The process server (or other agent of the party) will pay any necessary filing fees, and then serve
21 the Florida subpoena on the deponent in accordance with Florida law (which includes any
22 applicable local rules).
23

24 The advantages of this process are readily apparent. The act of the clerk of court is
25 ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent.
26 The only documents that need to be presented to the clerk of court in the discovery state are the
27 subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need
28 to hire local counsel to have the subpoena issued in the discovery state, and there is no need to
29 present the matter to a judge in the discovery state before the subpoena can be issued. In effect,
30 the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the
31 new subpoena is then served on the deponent in accordance with the laws of the discovery state.
32 The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial
33 participation are unnecessary to have the subpoena issued and served in the discovery state.
34

35 This Act will not change or repeal the law in those states that still require a commission
36 or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal
37 the law in those discovery states that still require a commission or letter rogatory from a trial
38 state before a deposition can be taken in those states. It is the hope of the Conference that this
39 Act will encourage states that still require the use of commissions or letters rogatory to repeal
40 those laws.
41

42 The Act requires that, when the subpoena is served, it contain or be accompanied by the
43 names, addresses, and telephone numbers of all counsel of record and of any party not

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

10
11 **SECTION 4. SERVICE OF SUBPOENA.** A party seeking to serve a subpoena issued
12 by a clerk of court under Section 3 shall serve the subpoena in compliance with [cite applicable
13 rules or statutes of this state for service of subpoena].

14 **SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION.** When a
15 subpoena issued under Section 3 commands a person to attend and give testimony at a
16 deposition, produce designated books, documents, records, or tangible things, or permit
17 inspection of premises, the time and place and the manner of the taking of the deposition, the
18 production, or the inspection must comply with [cite applicable rules or statutes of this state].

19 **Comment**

20
21 The Act requires that the discovery permitted by this section must comply with the laws
22 of the discovery state. The discovery state has a significant interest in these cases in protecting
23 its residents who become non-party witnesses in an action pending in a foreign jurisdiction from
24 any unreasonable or unduly burdensome discovery request. Therefore, the committee believes
25 that the discovery procedure must be the same as it would be if the case had originally been filed
26 in the discovery state.

27
28 The committee believes that the fee, if any, for issuing a subpoena should be sufficient to
29 cover only the actual transaction costs, or should be the same as the fee for local deposition
30 subpoenas.

31
32 **SECTION 6. APPLICATION TO COURT.** An application to the court for a

1 protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under
2 Section 3 must comply with the applicable rules or statutes of this state and be presented in the
3 court in the [county, district, circuit, or vicinage] in which discovery is to be conducted.

4 **Comment**

5
6 The act requires that any application to the court for a protective order, or to enforce,
7 quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must
8 comply with the law of the discovery state. Those laws include the discovery state’s procedural,
9 evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in
10 protecting its residents who become non-party witnesses in an action pending in a foreign
11 jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily
12 accomplished by requiring that any discovery motions must be decided under the laws of the
13 discovery state. This protects the deponent by requiring that all applications to the court that
14 directly affect the deponent must be made in the discovery state.

15
16 The term “modify” a subpoena means to alter the terms of a subpoena, such as the date,
17 time, or location of a deposition.

18
19 Evidentiary issues that may arise, such as objections based on grounds such as relevance
20 or privilege, are best decided in the discovery state under the laws of the discovery state
21 (including its conflict of laws principles).

22
23 Nothing in this act limits any party from applying for appropriate relief in the trial state.
24 Applications to the court that affect only the parties to the action can be made in the trial state.
25 For example, any party can apply for an order in the trial state to bar the deposition of the out-of-
26 state deponent on grounds of relevance, and that motion would be made and ruled on before the
27 deposition subpoena is ever presented to the clerk of court in the discovery state.

28
29 If a party makes or responds to an application to enforce, quash, or modify a subpoena in
30 the discovery state, the lawyer making or responding to the application must comply with the
31 discovery state’s rules governing lawyers appearing in its courts. This act does not change
32 existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5
33 and state rules governing the unauthorized practice of law.)
34

35 **SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

36 applying and construing this uniform act, consideration must be given to the need to promote
37 uniformity of the law with respect to its subject matter among states that enact it.

1

SECTION 8. EFFECTIVE DATE. This [act] takes effect ____.