

DRAFT

FOR DISCUSSION ONLY

# UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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*WITH PREFATORY NOTE AND COMMENTS*

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NATIONAL CONFERENCE OF COMMISSIONERS  
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January 31, 2007

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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.

1                                **UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT**

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

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

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

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

10                               (3) “State” means a state of the United States, the District of Columbia, Puerto Rico, the  
11 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the  
12 United States.

13                               (4) “Subpoena” means a document, however denominated, issued under authority of a  
14 court of record requiring a person to:

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

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

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

19     **Comment**

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

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

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

9  
10 **SECTION 3. ISSUING A SUBPOENA.**

11 (a) A party may present a subpoena issued under authority of a court of record of a foreign  
12 jurisdiction to a clerk of court in the [county, district, circuit, or vicinage] in which discovery is  
13 sought to be conducted in this state.

14 (b) When a party presents a subpoena issued under authority of a court of record of a  
15 foreign jurisdiction to a clerk of court in this state, the clerk shall immediately issue a subpoena to  
16 the party that requested it for service upon the person to which the foreign subpoena is directed.  
17 The subpoena must incorporate the terms used in the foreign subpoena and contain or be  
18 accompanied by the names, addresses, and telephone numbers of all counsel of record in the  
19 proceeding to which the subpoena relates and of any party not represented by counsel.

20 **Comment**

21  
22 The term “Court of Record” was chosen to exclude non-court of record proceedings from  
23 the ambit of the Act. The committee concluded that extending the Act to such proceedings as  
24 arbitrations would be a significant expansion that might generate resistance to the Act. A “Court  
25 of Record” includes anyone who is authorized to issue a subpoena under the laws of that state,  
26 which usually includes an attorney of record for a party in the proceeding.

27  
28 The term “Presented” to a clerk of court includes delivering to or filing. Presenting a  
29 subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name  
30 of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state,  
31 which in turn makes the newly issued subpoena both enforceable and challengeable in the  
32 discovery state.



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

16  
17           The advantages of this process are readily apparent. The act of the clerk of court is  
18 ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent.  
19 The only documents that need to be presented to the clerk of court in the discovery state are the  
20 subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need  
21 to hire local counsel to have the subpoena issued in the discovery state, and there is no need to  
22 present the matter to a judge in the discovery state before the subpoena can be issued. In effect,  
23 the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new  
24 subpoena is then served on the deponent in accordance with the laws of the discovery state. The  
25 process is simple and efficient, costs are kept to a minimum, and local counsel and judicial  
26 participation are unnecessary to have the subpoena issued and served in the discovery state.

27  
28           This Act will not change or repeal the law in those states that still require a commission or  
29 letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the  
30 law in those discovery states that still require a commission or letter rogatory from a trial state  
31 before a deposition can be taken in those states. It is the hope of the Conference that this Act will  
32 encourage states that still require the use of commissions or letters rogatory to repeal those laws.

33  
34           The Act requires that, when the subpoena is served, it contain or be accompanied by the  
35 names, addresses, and telephone numbers of all counsel of record and of any party not represented  
36 by counsel. The committee believes that this requirement imposes no significant burden on the  
37 lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of  
38 deposition to every counsel of record and any unrepresented parties. The benefits in the discovery  
39 state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will  
40 frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers  
41 in the case. This requirement can easily be met, since the subpoena will contain or be  
42 accompanied by the names, addresses, and telephone numbers of all counsel of record and of any  
43 party not represented by counsel (which is the same information that will ordinarily be contained

1 on a notice of deposition and proof of service). The committee is of the opinion that failure to  
2 comply with this provision is not a jurisdictional defect, so that failure to comply would not  
3 render the service of the subpoena defective.  
4

5 **SECTION 4. SERVING A SUBPOENA.** A party seeking to serve a subpoena issued by  
6 a clerk of court under Section 3 must serve the subpoena in compliance with [cite applicable rules  
7 or statutes of this state for service of subpoena].

8 **SECTION 5. DEPOSITIONS, PRODUCTION, AND INSPECTIONS.** When a  
9 subpoena issued under Section 3 commands a person to attend and give testimony at a deposition,  
10 produce designated books, documents, records, or tangible things, or permit inspection of  
11 premises, the time and place and the manner of the taking of the deposition, the production, or the  
12 inspection must comply with [cite applicable rules or statutes of this state].

13 **Comment**

14  
15 The Act requires that the discovery permitted by this section must comply with the laws of  
16 the discovery state. The discovery state has a significant interest in these cases in protecting its  
17 residents who become non-party witnesses in an action pending in a foreign jurisdiction from any  
18 unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the  
19 discovery procedure must be the same as it would be if the case had originally been filed in the  
20 discovery state.  
21

22 The committee believes that the fee, if any, for issuing a subpoena should be sufficient to  
23 cover only the actual transaction costs, or should be the same as the fee for local deposition  
24 subpoenas.  
25

26 **SECTION 6. APPLICATIONS TO COURT.** An application to the court for a  
27 protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under  
28 Section 3 must comply with the laws of this state and be presented in the court in the [county,  
29 district, circuit, or vicinage] in which discovery is to be conducted.

30 **Comment**

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

10  
11 The term “modify” a subpoena means to alter the terms of a subpoena, such as the date,  
12 time, or location of a deposition.

13  
14 Evidentiary issues that may arise, such as objections based on grounds such as relevance  
15 or privilege, are best decided in the discovery state under the laws of the discovery state (including  
16 its conflict of laws principles).

17  
18 Nothing in this act limits any party from applying for appropriate relief in the trial state.  
19 Applications to the court that affect only the parties to the action can be made in the trial state.  
20 For example, any party can apply for an order in the trial state to bar the deposition of the out-of-  
21 state deponent on grounds of relevance, and that motion would be made and ruled on before the  
22 deposition subpoena is ever presented to the clerk of court in the discovery state.

23  
24 **SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

27 **SECTION 8. EFFECTIVE DATE.** This [act] takes effect \_\_\_\_.