DRAFT

FOR DISCUSSION ONLY

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

UNIFORM LAW COMMISSION

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WITH PREFATORY NOTE AND COMMENTS

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 Uniform Law Commission or the Drafting Committee. They do not necessarily reflect the views of the Uniform Law Commission 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.

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DRAFTING COMMITTEE ON UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

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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 shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

(2) "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.

(3) "Subpoena" means a court order regardless of title requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, 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 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)(B) is limited to inspection of premises.) Inspection of a person is almost always a reference to the medical examination of the plaintiff in personal injury cases, and this examination is separately controlled by state discovery rules (the corresponding federal rule is FRCP 35). In those situations, the plaintiff is already subject to the jurisdiction of the trial state, so a subpoena is never necessary.

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

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee felt that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistence 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 Ohio (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 Ohio 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 an Ohio subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Ohio, who will take the completed and executed Kansas subpoena and the completed but not yet executed Ohio subpoena to the clerk's office in Ohio. The clerk of court, upon being given the Kansas subpoena, will then issue the identical Ohio subpoena ("issue" includes signing, stamping, and assigning a docket number).

The process server will pay any necessary filing fees, and then serve the Ohio subpoena (with a list of all parties and counsel of record) on the deponent in accordance with Ohio law.

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 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.

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

Comment

The Act requires that, when the subpoena is served, it be accompanied by a list of all parties and the names, addresses, and telephone numbers of all counsel of record. The committee felt that this requirement imposes no burden on the lawyer issuing the subpoena, since that lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of all the parties to the action and to contact the other lawyers in the case. In most states, this requirement can easily be met by giving the deponent, at the time the subpoena is served, a copy of the required notice of deposition and the accompanying proof of service, since the notice and proof of service will usually contain the information required. The committee is of the opinion that failure to comply with this provision is not a jurisdictional defect, so that failure to comply would not render the service of the subpoena defective.

SECTION 5. DEPOSITIONS, PRODUCTION, AND INSPECTIONS. When a subpoena issued under Section 3 commands a person to:

(1) attend and give testimony at a deposition,

(2) produce designated books, documents, records, or tangible objects, or

(3) permit inspection of premises,

the time and place and the manner of the taking of the deposition, the production, or the inspection must comply with [cite rule or statute of this state governing the time and place and the manner of taking the deposition, the production of designated books, records, documents, or tangible objects, or the inspection of premises].

Comment

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

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

Comment

The act requires that any motion to enforce, quash, or modify a subpoena 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's primary goal is to protect 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.

The committee chose not to address particular evidentiary issues that may arise, such as

objections based on grounds such as relevance or privilege. As the preface notes, such issues are particularly thorny, and are best decided under the laws of 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.

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. EFFECTIVE DATE. This [act] takes effect ___.