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An Introduction to Obtaining Out-of-State Discovery in State and Federal Court Litigation

by Brenda M. Johnson

If it hasn't happened already, at some point in your practice you will be faced with the prospect of obtaining discovery from a third party in another state who is outside your court's subpoena power. Perhaps a former employee or officer of the defendant in your Ohio trucking case has retired to Florida or Arizona. The nurse whose charting notes are crucial to your medical malpractice case against a Cleveland hospital has relocated to Minneapolis. Documents critical to the product liability case you brought in the Northern District of Ohio are in the hands of a third-party materials analysis service located in California.

In each of these situations, unless the third party wants to cooperate, you will need an enforceable subpoena to obtain the discovery you need. If you're in federal court, this is a relatively simple process; however, despite nearly one hundred years' of efforts on the part of the Uniform Law Commission (ULC) to promote a consistent approach, the procedure for issuing out-of-state subpoenas for discovery still varies, both in terms of procedure and clarity. In those states that have adopted some version of the ULC's most recent model legislation, it is sufficient to present the clerk of court in the county where your deponent is located with a subpoena from your state court, whereupon the clerk of court is required to issue a similar subpoena for service.¹ In states that, like Ohio, still follow a version of the ULC's first model legislation on the issue, you will need to obtain a commission from your trial judge and have it presented to the court of the state in which you seek discovery in order to get a subpoena issued.² Some states allow the issuance of a subpoena by

a local attorney, without court intervention, and some will issue a subpoena upon proof that an appropriate notice of deposition has been served in the original action.³

In any case where it becomes apparent that you will need to obtain discovery from an out-of-state witness in conjunction with a state court case, your first step should be to locate your witness and determine the specific state court that has jurisdiction over that person or entity. Once you've done that, after reviewing the state's statutes and procedural rules regarding discovery in support of out-of-state litigation, contact the local clerk of court for guidance. If you are informed as to the general nature of the process, the local clerk is usually very helpful – so, in order to get you started, this article includes a list of current state statutes and rules relating to issuance of subpoenas for use in out-of-state litigation. Before getting to the list, however, here is a summary of the various approaches governing the issue.

Out-Of-State Discovery in Federal Court

Under the current federal rule, you can issue a subpoena from the district court in which your action is pending and serve it anywhere in the United States; however, there are geographic limitations on where you can require the discovery to take place, and you will have to go to the district court with jurisdiction over your witness if you need to enforce the subpoena, or if the recipient seeks to quash it.

Rule 45 of the Federal Rules of Civil Procedure, as amended effective December 1, 2013, permits nationwide service of a subpoena issued from the district court where your action is pending.⁴ This is a welcome simplification from prior practice, which required the subpoena to issue from the district court in which compliance with the requested discovery was to occur, and imposed a range of geographic limitations on such service.⁵

At the same time, the new rule places specific restraints upon the place of compliance. An individual subpoena recipient may only be compelled to attend a deposition or produce documents within 100 miles of where the recipient resides, is employed, or regularly transacts business in person, and a corporate officer can only be compelled to attend within the state where the person resides, is employed, or does business in person.⁶ Moreover, motions to quash or enforce a subpoena must be made in the first instance to the district court in which compliance is required, as opposed to the issuing court, although they can subsequently be transferred to the issuing court with the consent of the subpoena recipient or under exceptional circumstances.⁷ If the matter is transferred, Rule 45 specifically provides that the attorney for the subpoena recipient will be permitted to appear before the issuing court; however, Rule 45 does not automatically allow the attorney who issued the subpoena to appear in the district court where compliance is required. This means, both formally and practically, that any dispute over compliance with an out of state subpoena is likely to require the involvement of counsel local to the district where compliance is to occur.

Out-of-State Discovery in State Court

1. The Uniform Foreign Deposition Act

The Uniform Law Commission first tackled the issue of out-of-state discovery in 1920, when it promulgated the Uniform Foreign Deposition Act (UFDA).⁸ The UFDA, which was originally adopted by 13 states and remains the law in five states (Florida, Louisiana, New Hampshire, Wyoming and Ohio), provides in relevant part as follows:

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.⁹

If you need discovery from a state following the UFDA approach, you should first contact the court with jurisdiction over your witness to find out what you need to obtain from your trial court in order to obtain a subpoena, and also to determine whether you will need local counsel.

2. The Uniform Interstate and International Procedures Act

The Uniform Interstate and International Procedures Act (UIIPA), which was drafted by the UPA in 1962, was meant to provide a more comprehensive treatment of the issue, but failed to catch on with the states, and the UPA withdrew it from recommendation in 1977.¹⁰ It differs from the UFDA mostly in that it is more specific regarding the respective rights of the trial court and the discovery court to specify the discovery procedure; however, if it was not for the fact that it remains the law in Massachusetts, it would be of only historical significance.¹¹

3. The Uniform Interstate Depositions and Discovery Act

Drafted in 2007, the Uniform Interstate Depositions and Discovery Act (UIDDA) has been adopted in some form by 29 states, as well as by the U.S. Virgin Islands and the District of Columbia. The goal in drafting the UIDDA was 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 deponents.”¹²

The UIDDA allows a party seeking discovery to present the clerk of court in the jurisdiction where the discovery is sought with a subpoena issued under the authority of the trial court, and then the clerk is to issue a subpoena under the authority of the discovery court for service on the witness.¹³ There is no need to file a motion with the court or to open a miscellaneous proceeding, and requesting a subpoena in this manner is not considered an entrance of appearance in the courts of the discovery state, which eliminates the need to obtain local counsel simply in order to obtain a subpoena.¹⁴ The only local judicial involvement contemplated under the UIDDA occurs if there is a dispute over enforcement, in which case any application for a protective order or to enforce the subpoena must be made to the local court.¹⁵

This simplified procedure, however, is not necessarily available to all out-of-state litigants in all states that have adopted the UIDDA. Three states, namely Alabama, Georgia, and Utah, have reciprocity requirements that preclude litigants from states (such as Ohio) that have not adopted the UIDDA from using the simplified UIDDA procedures.¹⁶ Litigants from non-UIDDA states must still obtain

commissions from their trial court in order to obtain discovery in those states.¹⁷

4. Other States

Thirteen states have declined to adopt any of the uniform rules promulgated by the UPA, and their procedures vary both in kind and specificity. As noted above, at least two (Arkansas and Oklahoma) will permit issuance of a subpoena upon proof that a notice of deposition has been served, and one (Minnesota) permits

issuance by a local attorney, but the rest require some form of petition or motion practice in the discovery court, preceded by the procurement of a commission or letter rogatory from the trial court. At least two of these states (Connecticut and New Jersey) provide instructions on their state judicial website that are designed to aid out-of-state litigants in navigating the process. Nevertheless, in these states, and in any state in which you find you need to take discovery, the best practice is to check with the local

clerk of court after doing your best to educate yourself as to that particular state's practices. To help you with this process, this article is accompanied by a list of the state statutes and civil rules governing out-of-state discovery. We have done our best to make sure this list is current as of the date of publication; however, we can make no guarantees, so make sure you check the current status of the law before you go forward with any discovery plan.

Current State Statutes And Rules

A. States Following the UIDDA

State	Statute or Rule	Procedural Notes
Alabama	Ala. Code. § 12-21-400 <i>et seq.</i>	Reciprocity required (Ala. Code § 12-21-406). Otherwise, a commission must be obtained. Ala. R. Civ. P. 28(c).
Arizona	Ariz. R. Civ. P. 45.1	
California	Cal. Code of Civ. Pro § 2029.100 <i>et seq.</i>	Alternative method is to retain local counsel to issue subpoena without court involvement (Cal. Code of Civ. Pro. § 2029.350)
Colorado	Colo. Rev. Stat. § 13-90.5-101 <i>et seq.</i>	
Delaware	Del. Code Ann. tit. 10, § 4311	
District of Columbia	D.C. Code. Ann. § 13-441 <i>et seq.</i>	
Georgia	O.C.G.A. § 24-13-110 <i>et seq.</i>	Reciprocity required (O.C.G.A. § 24-13-112(d)). In the alternative, a commission must be obtained from the court in which the action is pending. O.C.G.A. § 24-13-113(b).
Hawai'i	HRS § 624D-1 <i>et seq.</i>	
Idaho	Idaho R. Civ. P. 45(i)(2)	
Indiana	IC § 34-44.5-1 <i>et seq.</i>	
Iowa	Iowa R. Civ. P. 1.1702	
Kansas	Kan. Stat. Ann. § 60-228a	
Kentucky	Ky. Rev. Stat. Ann. § 421.360	
Maryland	Md. Cts. and Jud. Proc. Code Ann. § 9-401 <i>et seq.</i>	
Michigan	MCL § 600.2201 <i>et seq.</i>	
Mississippi	Miss. Code Ann. § 11-59-1 <i>et seq.</i>	
Montana	Title 25, Ch. 20, Rule 28, MCA (Mont. R. Civ. P. 28)	

A.States Following the UIDDA continued...

State	Statute or Rule	Procedural Notes
Nevada	NRS 53.100 <i>et seq.</i>	
New Mexico	N.M. Dist.Ct. R.C.P. 1-045.1	
New York	N.Y.C.P.L.R. § 3119	
North Carolina	N.C. Gen. Stat. § 1F-1 <i>et seq.</i>	N.C. Gen Stat. § 1A-1, Rule 28(c), which predates adoption of the UIDDA, also provides for issuance of a subpoena upon presentation of a commission or other authority.
North Dakota	N.D. R. Ct. 5.1	
Oregon	Or. R. Civ. P. 38(c)	
Pennsylvania	42 Pa. C.S. § 5331 <i>et seq.</i>	
South Carolina	S.C. Code § 15-47-110 <i>et seq.</i>	S.C. R. Civ. P. 28(d), which predates adoption of the UIDDA, also provides for issuance of a subpoena upon presentation of a commission or other authority.
South Dakota	S.D. Codified Laws § 15-6-28.1 <i>et seq.</i>	The UFDA remains codified at S.D. Codified Laws § 19-5-4.
Tennessee	Tenn. Code Ann. § 24-9-201 <i>et seq.</i>	
Utah	Utah Code § 78B-17-101 <i>et seq.</i>	Reciprocity required (Utah Code § 78B-17-102). For nonreciprocal states such as Ohio, requirements are set forth on the Utah courts website at https://www.utcourts.gov/resources/attorney/outofstateattorney/ (last accessed March 21, 2014)
Vermont	V.R.C.P. Rule 45(f)	
Virgin Islands	V.I. Tit. 5, § 4922 <i>et seq.</i>	
Virginia	Va. Code Ann. § 8.01-412.8 <i>et seq.</i>	Applies only if “the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction’s enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties.” Va. Code Ann. § 8.01-412.14.
Washington	Wash. Rev. Code § 5.51.010 <i>et seq.</i>	

B. States Following The UFDA

State	Statute or Rule
Florida	Fla. Stat. Ann. § 92.251
Louisiana	La. R.S. 13:3821
New Hampshire	RSA 517-A:1
Ohio	O.R.C. § 2319.09
Wyoming	Wyo. Stat. § 1-12-115

C. Other States

State	Statute or Rule	Procedural Notes
Alaska	Alaska R. Civ. P. 28(c)	Subpoena acquired by motion
Arkansas	Ark. R. Civ. P. 45(f)	Allows issuance of subpoena by clerk of courts upon filing of a certified copy of a notice of deposition with the clerk's office.
Connecticut	Conn. Gen. Stat. § 52-148e	See Out of State Commission to Depose a Connecticut Resident – Revised 09/05/13 at http://www.jud.ct.gov/CivilProc/depose.pdf (last accessed March 20, 2014)
Illinois	Ill S. Ct. R. 204(b)	
Massachusetts	ALM GL Ch. 223A, § 11	Only state still following the UIIPA
Minnesota	Minn. R. Civ. P. 45.01(d)	May be issued by local attorney without judicial involvement
Missouri	Mo. S. Ct. R. 57.08	
Nebraska	Neb. Ct. R. Disc. § 6-328	
New Jersey	N.J. Court Rules, R. 4:11-4	Specifically requires retention of NJ attorney. See Information for Out of State Attorneys On the Procedure to Pursue Discovery of a New Jersey Resident for Use in Out-Of-State Litigation at https://www.judiciary.state.nj.us/civil/forms/10518_forgn_lit.pdf (last accessed March 21, 2014)
Oklahoma	12 Okl. St. § 2004.1	Court will issue subpoena on submission of proof of service of notice of deposition
Rhode Island	R.I. Gen. Laws § 9-18-11	Requires commission
Texas	Tex. Civ. Prac. & Rem. Code § 20.002	Requires commission
West Virginia	W. Va. R. Civ. P. 28(d)	
Wisconsin	Wis. Stat. § 88.24	

End Notes

1. See UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT (UIDDA) (2007) (at http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf (last accessed March 24, 2014)).
2. See UIDDA, *supra*, Prefatory Note at 1 (quoting the UNIFORM FOREIGN DEPOSITIONS ACT (UFDA) (1920)).
3. See Cal. Code of Civ. Pro. § 2029.350 (subpoena can be issued by California attorney); Minn. R. Civ. P. 45.01(d) (may be issued by Minnesota attorney); Ar. R. Civ. P. 45(f) (clerk of court may issue subpoena upon receipt of a certified copy of notice of deposition); 12 Okl. St. § 2004.1 (court will issue subpoena upon proof of service of notice of deposition).
4. See F.R.C.P. 45(a)(2) (eff. Dec. 1, 2013) (subpoena must issue from court where action is pending); F.R.C.P. 45(b)(2) (eff. Dec. 1, 2013) (subpoena may be served anywhere in the United States).
5. See F.R.C.P. 45(a)(2) (eff. until Dec. 1, 2013) (governing issuance of subpoenas); F.R.C.P. 45(b)(2) (eff. until Dec. 1, 2013) (governing service).
6. F.R.C.P. 45(c) (statewide compulsion is available for trial, but only if it would not impose substantial expense upon the recipient).
7. F.R.C.P. 45(d) (motions to compel production and to quash or modify a subpoena must be made to the district where compliance is required); F.R.C.P. 45(g) (power to hold in contempt is with the court for the district where compliance is required); F.R.C.P. 45(f) (transfer provision).
8. See UIDDA, *supra*, Prefatory Note at p. 1 (discussing history).
9. See *id.*; see also O.R.C. § 2319.09.
10. See UIDDA, *supra*, Prefatory Note at p. 1-2 (discussing history).
11. See ALM GL Ch. 223A, § 11.
12. UIDDA, *supra*, Prefatory Note at p. 4.
13. *Id.*, Section 3 at p. 6.
14. *Id.* At least one state (California) allows litigants the alternative of retaining local counsel to issue a subpoena without court involvement. See Cal. Code of Civ. Pro. § 2029.350.
15. *Id.*, *supra*, Section 6 at p. 9.
16. See Ala Code. § 12-21-406; O.C.G.A. § 24-13-112(d); Utah Code § 78B-17-102. Virginia has adopted a reciprocity requirement as well, but it includes states that have adopted "a predecessor uniform act," which presumably would include Ohio. See Va. Code Ann. § 8.01-412.14.
17. See Ala. R. Civ. P. 28(c) (commission procedure); O.C.G.A. § 24-13-113(b) (commission requirement).