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Deposing Nonparties in States Other Than Where Your Case Is Pending

By Adam Reich – November 17, 2014

Chances are, if your law practice involves litigation in state courts, you will eventually have to depose a nonparty in a state other than where your case is pending. Because state-court subpoena power is limited to the forum state's geographic boundaries, and because state-court rules are not uniform, obtaining this deposition may be a daunting task. Many lawyers' reflexive action is to seek a court order or a commission or letters rogatory from the jurisdiction where the case is pending. This is not always necessary.

To secure a subpoena for the deposition of an extraterritorial nonparty you must first look to the rules of the jurisdiction where your case is pending, then turn to the procedural rules of the state where the nonparty is based, and then confirm that there are no additional requirements imposed by local rules in the nonparty's county of residence. While it is usually advisable to consult local counsel before subpoenaing a nonparty in a state where you are not licensed, engagement may not be necessary. This article provides a checklist that may be universally applied when you need to depose a nonparty in a state other than where your case is pending, and identifies each state's relevant statutes.

Checklist

Step 1. Confirm that your case-management order permits you to depose the nonparty, nonresident. States have different requirements for response times based on whether the deposition subpoena seeks documents, testimony, or both. In addition, some states require service of a deposition notice on all parties regarding the subpoenaed deposition. If the timing rules take you beyond the discovery cutoff, you may need to seek leave of court to take the deposition on shortened time or at a date after the discovery cutoff.

Step 2. Determine whether the nonparty, nonresident will consent to a deposition. If the witness is friendly, you may not even need to serve a subpoena. Make sure, however, that you confirm that the witness is not represented by counsel before contacting him or her.

Step 3. Determine the nonparty, nonresident's county of residence so that you know which state court has jurisdiction over him or her.

Step 4. Telephone the clerk of the relevant court and inquire as to any local requirements regarding subpoenas for an out-of-state action. While a state law may require a commission from another state, courts in different counties in that state may have different requirements as to who signs that commission (i.e., a judge or a clerk).

Step 5. Review this article and the rules of the state where the nonparty is located.

Step 6. To the extent you determine that the witness's state requires filing a new case to

obtain your desired discovery, research and engage local counsel.

Step 7. To the extent you determine that the witness's state requires a commission or something similar from the state where the action is pending, follow local procedures in the forum state to obtain the commission or other such requirement. Some states, such as California, have simplified procedures for obtaining a commission, in that you need only fill out a judicial council form, go to the court filing window, and pay the requisite fee. Still other states require filing a motion to obtain a commission or letter rogatory.

Step 8. Determine the requirements of the state where your case is pending regarding deposition notices. Many states require that you serve a notice of deposition and attach a copy of the subpoena served on the nonresident, nonparty, on all parties to the action. As discussed in step 1, pay special attention to the timing requirements of any rules relating to service of deposition notices.

Step 9. Confirm whether the witness's state has service rules or requirements different from those of the state where your action is pending, which apply in addition to or instead of the forum state's rules.

Step 10. If you ever have a doubt about another state's requirements, seek guidance from an attorney who is licensed in that state and who has experience in the county where you believe the nonparty witness is located.

State Rules for Subpoenaing Witnesses Within Their Boundaries for Discovery Relating to Cases Pending in Other States

Uniform Interstate Depositions and Discovery Act (UIDDA) States

The UIDDA permits a party to an action pending in one state to obtain a deposition in a UIDDA state by preparing and presenting a subpoena compliant with the law of the forum state to the clerk of the relevant court or to an attorney licensed in the UIDDA state. The clerk or attorney must then issue a subpoena compliant with the laws of the UIDDA state, which incorporates the terms used in the foreign subpoena to the extent consistent with the UIDDA state's laws. The District of Columbia and numerous states have adopted some version of the UIDDA. Not all of the UIDDA states have the same rules.

The District of Columbia and 15 UIDDA states have incorporated the standard UIDDA procedure described above, subject to certain exceptions as provided in the governing statutes or rules, including: **Delaware** (Del. Code tit. 10, § 4311); **Georgia** (Ga. Code § 24-13-112); **Idaho** (Idaho R. Civ. P. 45(i)); **Indiana** (Ind. Code § 34-44.5-1-6); **Kansas** (Kan. Stat. § 60-228a); **Maryland** (Md. Code, Cts. & Jud. Proc. § 9-402); **Michigan** (Mich. Ct. R. 2.305(F); Mich. Comp. Laws § 600.2203); **Mississippi** (Miss. Code § 11-59-5; M.R.C.P. 45(a)(3)); **Montana** (Mont. R. Civ. P. 28(c)); **Nevada** (Nev. Rev. Stat. §§ 53.100 et seq.); **New York** (N.Y. C.P.L.R. § 3119(b)); **North Carolina** (N.C. Gen. Stat. § 1F-3); **North Dakota** (N.D.R.Ct. 5.1(b)); **Pennsylvania** (42 Pa. Cons. Stat. §§ 5332 et seq.); **Tennessee** (Tenn. Code § 24-9-203); and **Washington, D.C.** (D.C. Code § 13-443). In addition, two UIDDA states require that the foreign court have a reciprocal or substantially similar statute: **Utah** (Utah Code §§ 78b-17-101 et seq.) and **Virginia** (VA Code §§ 8.01-412.8 et seq.).

Six UIDDA states offer both a UIDDA procedure and an alternative method for obtaining the deposition of a nonparty witness for an action pending in another state:

- 1. Kentucky** (Ky. Rev. Stat. § 421.360(3) (UIDDA procedure); Ky. CR. 28.03 (judge of the district court of the district where the witness resides will issue a subpoena if you produce a commission authorizing the deposition or proof of notice duly served));
- 2. Louisiana** (La. Rev. Stat. § 13:3825(C) (UIDDA procedure); La. Rev. Stat. § 13:3821 (you can apply to the court in the parish where discovery is sought for an order compelling the deposition provided that you have from the forum court either a mandate, a writ, or a commission, or if you have proof of notice or agreement relating to the Louisiana witness));
- 3. New Mexico** (NMRA, Rule 1-045(B) (UIDDA procedure, which requires filing a miscellaneous proceeding in the judicial district in which the subpoena is to be served as a prerequisite to issuance of the New Mexico subpoena); N.M. Stat. § 38-8-1 (you can file a motion for an order from a New Mexico judge compelling the witness to testify and produce documents before the judge or a notary or a commissioner at any place within the judicial district where the witness resides or sojourns, at least 10 days after the order is served, but you must show the judge (1) an order from the court or judge in the state where the action is pending; (2) a stipulation from the parties authorizing the deposition; or (3) notice given pursuant to the practice in the foreign state));
- 4. South Carolina** (S.C. Code § 15-47-120 (UIDDA procedure); Rule 28(d)(1), SCRCP (you can obtain a subpoena for deposition or records for an out-of-state proceeding by providing the clerk a certified copy of a mandate, writ, or commission issued by the forum court, or a certified copy of a notice or written agreement filed in the out-of-state court directing the deposition occur));
- 5. Vermont** (V.R.C.P. 45(f)(3)(B)–(C) (UIDDA procedure that imposes additional requirements regarding the Vermont subpoena, including (1) it must conform to Rule 45, including the terms of the foreign subpoena incorporated therein; and (2) it must advise the witness of the right to move in a Vermont court to quash or modify the subpoena); V.R.C.P. 28(d) (you can have local counsel petition the civil division of the superior court in the unit where the deponent resides, is employed, or transacts business, for an order directing issuance of a subpoena for deposition)); and
- 6. Washington** (Wash. Rev. Code §§ 5.51.010 et seq. (UIDDA procedure); Wash. CR 45(e)(4) (Washington courts may issue deposition subpoenas for attendance at any place within their jurisdiction whenever the other state’s laws authorize someone to take depositions in Washington, with or without commission)).

Six UIDDA states have statutes that are unique with respect to the other UIDDA states:

- 1. Arizona** (Ariz. R. Civ. P. 45.1(b)). In addition to the standard UIDDA procedure, Arizona requires that (1) the out-of-state subpoena include, below the case number, the phrase “For the Issuance of an Arizona Subpoena Under Ariz. R. Civ. P. 45.1”; (2) the clerk issue a signed but blank subpoena to the requestor, so the requestor completes the subpoena; and (3) the Arizona subpoena identify the Arizona court issuing it, the caption

and case number of the foreign action, the foreign forum court, and all discovery requested in the foreign subpoena to the extent it conforms to Rule 45 of the Arizona Rules of Civil Procedure. Ariz. R. Civ. P. 45.1(b)(1)–(3).

2. California (Cal. Civ. Proc. Code §§ 2020.100 et seq.). Like New York, California permits litigants to depose California witnesses for foreign actions by submitting foreign subpoenas to either a California-licensed attorney or the clerk of the court in the county where discovery is sought. *See* N.Y. C.P.L.R. § 3119(b). California lawyers must prepare the desired subpoena using the appropriate judicial council form, and need to include in the California subpoena the caption and case number of the foreign case and the name of the California superior court where the deposition is to be conducted. Cal. Civ. Proc. Code §§ 2029.350(a), (b); 2029.390. If you opt to pursue the deposition through a clerk of court, you also need to pay a filing fee and submit an application for issuance of a discovery subpoena in an action pending outside California on the [appropriate judicial council form](#). Cal. Civ. Proc. Code §§ 2029.390; 2029.300.

3. Colorado (Colo. Rev. Stat. §§ 13-90.5-101 et seq.). In addition to submitting the foreign subpoena to the district court in Colorado where discovery is sought, you need to complete a formal request using [Colorado Form JDF 87](#). *See* [JDF 86, R7-13, Instructions for Issuing a Subpoena in Support of an Action Outside the State of Colorado](#) (JDF 86). In addition to the foreign subpoena and the formal request, you should also submit a Colorado subpoena for the clerk to sign, using Colorado Form JDF 90. The Colorado subpoena must be personally served no later than 48 hours prior to the appearance date identified on the subpoena.

4. Iowa (I.C.A. Rule 1.1702(2)). Parties have two options for obtaining discovery in Iowa for actions pending in other states: (1) submit a foreign subpoena to a court clerk in the Iowa county where discovery is sought and request that the clerk provide a signed, blank subpoena for you to complete; or (2) arrange for an Iowa-licensed attorney to issue and sign an Iowa subpoena as an officer of the court, which incorporates the terms of the foreign subpoena. I.C.A. Rule 1.1702(2)(a)–(b). The Iowa subpoena must identify the court in the county where discovery is sought as the issuing court, and include the title of the action and docket number from the foreign jurisdiction. I.C.A. Rule 1.1702(2)(c)–(d). Form subpoenas are available at Rule 1.1901 of the Iowa Rules of Civil Procedure, and either Form 13 or Form 15 may be used. Iowa Code R. 1.1702(2)(d). There is no need to open an Iowa court file to issue the subpoena for a deposition for a foreign action, and you must pay \$50 to do so. Iowa Code R. 1.1702(5).

5. Oregon (ORCP 38(C)(2)(a); UTRC 5.140(1)(a)). In addition to standard UIDDA requirements, Oregon Rule of Civil Procedure 38(C) requires the Oregon subpoena to substantially conform to the format requirements of Oregon Rule of Civil Procedure Rule 55, and permits any Oregon-licensed attorney to assist the clerk in drafting the subpoena. ORCP 38(C)(2)(b)–(c). Meanwhile, Uniform Trial Court Rule 5.140 provides clarification on what you should submit to the court, including an original and two copies of a fully completed Oregon subpoena, and a declaration and request for issuance of subpoena that substantially adheres to Form 5.140.1c in the Uniform Trial Court Rules Appendix of Forms, which affirms that (1) the foreign subpoena was issued by a court of record of a state, as “state” is defined in Oregon Rule of Civil Procedure 38(C)(1)(b); (2) that the Oregon subpoena complies with the Oregon Rules of Civil Procedure; and (3)

that the fully completed Oregon subpoena contains the contact information of all attorneys of record and self-represented parties. Or. Unif. Trial Ct. R. 5.140(1)(c).

6. South Dakota (S.D. Codified Laws § 15-6-28.3). In addition to the standard UIDDA requirements, South Dakota requires the subpoena to advise the witness of the right to petition the South Dakota court to quash or modify the subpoena. S.D. Codified Laws § 15-6-28.3(C). Uniquely, South Dakota's UIDDA statute grants attorneys not licensed in South Dakota the right to petition South Dakota courts to enforce or resolve disputes relating to these subpoenas, and to respond to any petition or motion relating to these subpoenas without first having to obtain *pro hac vice* admission. S.D. Codified Laws § 15-6-28.3(A).

For those states that have not incorporated the UIDDA into their laws, there is a great variety of requirements for deposing witnesses for use in foreign actions. Consultation with local counsel is advisable to ensure compliance.

Alabama

Alabama requires a commission from the foreign court "or proof of notice duly served." Ala. R. Civ. P. 28(c). This must be presented to a judge of the circuit where the witness resides. Local counsel is not needed to initiate an action to obtain this discovery. *See* Robin H. Jones, "Can I Get a Witness: Obtaining Out-of-State Deposition Subpoenas," 72 *Ala. Law.* 470, 473 (2011).

Alaska

Alaska requires a court order from an Alaskan court to take a deposition for use in foreign jurisdictions, so you need to retain local counsel to file a miscellaneous action in Alaska. Alaska R. Civ. P. 17(f)(1); 28(c). The clerk will issue the subpoena upon receiving proof of service of a notice to take a deposition, served within a "reasonable" time in advance of the deposition, which is consistent with Alaska Rules of Civil Procedure 30(b) and 31(a). Alaska R. Civ. P. 45(d).

Arkansas

Arkansas requires (1) filing a deposition notice that complies with Rule 30(b) of the Arkansas Rules of Civil Procedure in the forum state court; and then (2) filing a certified copy of that deposition notice with the circuit clerk of the Arkansas county where the deposition is to occur. ARCP 45(f). In the case of subpoenas *duces tecum*, the subpoenaed person has 10 days from service to object. ARCP 45(e). Timely objections block the subpoenaing party from obtaining responsive documents without a court order.

Connecticut

Connecticut requires you to apply to the forum court for permission, presumably a commission or letters rogatory, to take the deposition in Connecticut. Conn. Gen. Stat. § 52-148e(f). The instructions for an out of state commission to depose a Connecticut resident (rev. Sept. 5, 2013), [posted at the state of Connecticut Judicial Branch's website](#), identify two three-step procedures for deposing a Connecticut witness for a foreign action. In both instances, the first step is to formally request a commission to take a deposition in Connecticut from the forum court. The next step is also the same in both procedures: confirm that the time and notice requirements of

sections 52-148a and 52-148b of the Connecticut General Statutes are satisfied. The third step is where the two procedures differ. First, you may send a certified copy of an order for commission signed by a foreign court to a Connecticut attorney or notary public, who can then schedule the deposition and issue the subpoena. Alternatively, you may apply for a court-ordered subpoena pursuant to section 52-155 of the Connecticut General Statutes, by filing with the superior court clerk in the county where the deponent resides (1) an application for issuance of subpoena; (2) appearance by Connecticut counsel or a self-represented party; (3) a certified copy of the foreign order; and (4) a proposed order, along with the filing fee.

Florida

Florida requires you to provide a writ, commission, or some other order from the court where the action is pending, or a notice or agreement that requires a deposition take place in Florida. Fla. Stat. § 92.251(2). (Florida’s law is based on a predecessor to the UIDDA known as the Uniform Foreign Depositions Act (UFDA)).

Hawaii

Hawaii requires filing a verified petition with the relevant circuit court, which includes a commission from the foreign court or a notice or order from that court, to the relevant circuit court in Hawaii. Haw. Rev. Stat. § 624-27; *Rahofy v. Steadman*, 245 P.3d 201, 205 n.11 (Utah 2010). Consequently, local counsel should be engaged.

Illinois

Illinois permits any person authorized by the laws of another state to take a deposition in Illinois, “with or without commission,” for an act pending in the foreign court, but that person must petition the circuit court in the Illinois county where the deponent resides, is employed, transacts business, or is found, for a subpoena. Ill. Sup. Ct. R. 204(b). The circuit court can hear and act on that petition, with or without notice, as the court directs. Any order granting or denying a petition for a deposition for an out-of-state action is immediately appealable. *Eskandani v. Phillips*, 61 Ill.2d 183, 194–95 (1975). “While Rule 204(b) deals specifically with deposition testimony in aid of an action pending in another State . . . it is the intent of the rule to empower the circuit court to grant the same discovery in Illinois in aid of an action pending in another State as it could order in an action pending in Illinois.” Rule 204(b)’s “as the court directs” language makes review of local rules particularly important. (For example, in Winnebago County, General Order 3.07 of the Circuit Court, Seventeenth Judicial Circuit, provides that any petition filed pursuant to Rule 204(b) shall be treated as initiating a new civil action and be assigned a miscellaneous case number, and related proceedings must be conducted in accordance with Illinois Supreme Court Rules governing discovery. Ill. 17 Cir. Gen. Order 3.07.)

Maine

Maine requires filing an application with the clerk in the county where the witness resides, is employed, or transacts business. Me. R. Civ. P. 30(h)(2). The application must be signed by a Maine-licensed attorney and state (1) the title of the action in the court where it is pending; (2) the name and location of the out-of-state court; (3) the title and docket/identification number of the foreign action; (4) the nature of the out-of-state action and the provisions of that state’s laws that authorize the deposition; (5) the time and place for the deposition; (6) the name and address

of each deponent or a general description sufficient to identify the deponent; (7) confirmation that timely and adequate notice of the deposition has been given to opposing parties in the manner required by the laws of the foreign state or the laws of Maine (specified at Me. R. Civ. P. 30(b)(1) (10 days' notice requirement)); and (8) if a subpoena *duces tecum* is to be served, the materials to be produced. Me. R. Civ. P. 30(h)(3).

Massachusetts

Massachusetts requires letters rogatory from the foreign court or application of any interested person. Mass. Gen. Laws ch. 223A, § 11. The Massachusetts court's order may set forth unique practice and procedural rules for the discovery, applying Massachusetts law, the law of the foreign state, or some combination.

Minnesota

Minnesota permits the court administrator or a Minnesota-licensed attorney to issue a subpoena for an action pending in a foreign jurisdiction in the name of the court for the county where the deposition will occur, as long as the law of the state where the action is pending is complied with—i.e., it permits out-of-state depositions at the time they are sought, and any deposition notice rules have been satisfied. Minn. R. Civ. P. 45.01(d). That subpoena may command production of documents and materials to the extent permitted by the law of the foreign state, but subpoenas seeking records are subject to Minnesota Rules of Civil Procedure 26.03 (protective orders) and 45.03(b)(2) (subpoenaed party may object within 14 days of service, and objection blocks the subpoena absent a court order). Minn. R. Civ. P. 45.01(d).

Missouri

Missouri offers two ways to obtain the desired deposition. First, you may move *ex parte* in the circuit court in the county where the deponent is found, for an order directing issuance of a subpoena. Mo. Sup. Ct. R. 57.08. Second, you may obtain a commission from the foreign state, as Missouri law requires that any person authorized by the commission be treated as having the same power as if authorized by a Missouri court. Mo. Rev. Stat. §§ 492.100; 492.270.

Nebraska

Nebraska appears to require association of local counsel. Nebraska Court Rule of Discovery 6-328 requires an order from the district court for the county where the witness resides to obtain a deposition pursuant to the laws of the foreign state. Neb. R. Disc. § 6-328(e).

New Hampshire

New Hampshire requires a commission: "A commissioner or other person appointed by any court of record of any other state . . . for the purpose of taking depositions in this state for use in causes pending in such court of record, shall have the same powers of procuring the attendance of witnesses to give depositions before him, and of requiring the production of papers and the giving of such depositions, as justices of the peace within this state with reference to depositions for use in civil causes pending within the courts of this state." N.H. Rev. Stat. § 517:18. Section 516:1 provides the form for writs of summons to witnesses, and section 516:3 indicates that any justice may issue these writs for witnesses in cases pending before any justice or judge, in any

case in any court. N.H. Rev. Stat. §§ 516:1; 516:3; *but see* N.H. Rev. Stat. § 516:4 (permitting notaries to issue writs for witnesses to appear before them for depositions in any matter).

New Jersey

New Jersey requires local counsel to petition the Superior Court *ex parte* for an order commanding issuance of a New Jersey subpoena. N.J. Ct. R. 4:11-4(a). The petition shall be captioned “In the Superior Court, Law Division” and shall be designated “petition pursuant to R. 4:11-4.” It must be filed in accordance with New Jersey Court Rule 1:5-6(b), and will be treated as a miscellaneous matter. [Read more information here.](#)

Ohio

Ohio requires a mandate, writ, or commission from the foreign court, or a notice or agreement. Ohio Rev. Code § 2319.09.

Oklahoma

Oklahoma requires submission of proof of service of a deposition notice with an application to the district court for the county in Oklahoma where the deposition is to occur. Okla. Stat. tit. 12, § 2004.1(A)(2)(a). A witness served with a subpoena in Oklahoma can be compelled to attend a deposition in the witness’s county of residence, any county adjoining the witness’s county of residence, or the county where the witness is located when the subpoena is served. Okla. Stat. tit. 12, §3230(B)(1) (cited by Okla. Stat. tit. 12, § 2004.1(A)(3)).

Rhode Island

Rhode Island requires a commission or order from a foreign court. R.I. Gen. Laws Ann. § 9-18-11. Local counsel should file a miscellaneous action titled, “In re: petition of _____ for the Issuance of Subpoena(s).” Randall L. Souza et al., *A Practical Guide to Discovery and Depositions in Rhode Island* § 23.4 (Mass. Continuing Legal Education, Inc. 2010). That petition should attach the original commission, letter rogatory, or other order from the foreign court that authorizes the deposition in Rhode Island. In addition, local counsel should file a motion for an order to issue a subpoena for use in foreign litigation, which is noticed on the regular motion calendar, and include a [proposed] order therewith. After the order is issued, local counsel should issue the subpoena and a deposition notice to the Rhode Island witness.

Texas

Texas requires a mandate, writ, or commission from the foreign court. Tex. Civ. Prac. & Rem. Code § 20.002; Tex. R. Civ. P. 201.2.

West Virginia

West Virginia requires association of local counsel to petition the court with general civil jurisdiction in the county where the witness resides, is employed, or transacts business in person, for a deposition subpoena. W. Va. R. Civ. P. 28(d).

Wisconsin

Wisconsin requires a commission or order from the foreign state, and that the foreign state have similar laws requiring witnesses to provide deposition testimony for actions pending in

Wisconsin. Wis. Stat. § 887.24. Rule 1.22 of the Milwaukee County Circuit Court Rules identifies three steps to obtaining the subpoena: (1) secure a commission, order, or letter rogatory from the court where the action is pending that authorizes issuance of a subpoena by the Milwaukee County Circuit Court; (2) file an original plus two copies of a petition requesting issuance of a subpoena and pay the filing fee; and (3) after filing and payment, bring the court file to the office of the chief judge for review and signature. Milwaukee Cnty. Ct. R. 1.22(A)(1)–(3). The petition must be accompanied by (1) a copy of the reciprocal statute in the foreign jurisdiction; (2) a certified copy of the certificate, order, commission, or letter rogatory; (3) a proposed order authorizing the Milwaukee County Circuit Court to issue the subpoena; (4) a proposed Wisconsin subpoena using Form GF-126 or a substantial equivalent, signed by an active member of the Wisconsin state bar or presented to the clerk of the circuit court for signature; and (5) a self-addressed, stamped envelope for return of the signed copies, in the event they are submitted by mail and not in person. Milwaukee Cnty. Ct. R. 1.22(A)(2)(b).

Wyoming

Wyoming requires a mandate, writ, or commission from the foreign court, or a notice or agreement requiring the deposition in Wyoming. Wyo. Stat. § 1-12-115.

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