

Compelling an Out-Of-State Witness to Give Testimony or Produce Records at a Deposition for Use in a Foreign Jurisdiction

INTRODUCTION

This material is intended to provide the legal practitioner, legal assistant or professional process server with an overview of the work required when called upon to have a subpoena issued and served upon a non-party witness to attend a deposition in a foreign state for use in a civil action pending in another state. This is also intended to introduce you to the unique and valuable services provided by ***Interstate Deposition Subpoena Service***.

Uniform Interstate Deposition Statutes

Unlike the Federal Rules of Civil Procedure, which provide for a simplified procedure for conducting discovery throughout the country in the federal courts, there is no similar uniform procedure among the several states. This lack of uniformity exists despite the enactment of so called "uniform acts", such as the Uniform Foreign Depositions Act (UFDA) and the Uniform Interstate and International Procedure Act (UIIPA), that were intended to provide uniformity in this area. Although these two acts dominate the area of interstate deposition statutes, they have not been enacted by all states, and vary among the states that have.

Briefly, the UFDA, enacted in 1920, and adopted by several states, reads at Section 1 as follows:

"Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses 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."

Because this act was overly simplistic, and failed to meet some of the complex problems arising when depositions are taken in one state to be used in another, the National Conference of Commissioners on Uniform State Laws recommended in 1962 the enactment of the UIIPA. This latter act was intended, in some parts, to supercede the UFDA and reads at Section 3.02 (a) as follows:

" (A 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 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 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."

Since 1962, the UIIPA has been adopted by several states. Of those, some have adopted both the UFDA and the UIIPA leading to even further confusion and inconsistencies. Still further, while some jurisdictions have adopted major provisions of the UIIPA Act, they have departed from the official text in such a manner that the various instances of substituted, omitted, and added matter makes it difficult to classify those states as having adopted the Uniform Act, at least not in its verbatim form. The end result has been a varied collection of rules, codes and statutes among the several states which do not read the same and are not always found under the same topical headings, or within similar rules of sister states.

Proposed Uniform Interstate Deposition & Discovery of Documents Act

The National Council of Commissioners on Uniform State Laws (NCCUSL), through one of its drafting committees, is currently considering another uniform act that, if adopted, will simplify the process and significantly reduce the cost of obtaining local deposition subpoenas in aid of out-of-state litigation. The proposed "Uniform Interstate Deposition & Discovery of Documents Act" (UIDDDA), can be viewed at

www.law.upenn.edu/bll/ulc/idda/2006novembermeeting_draft.htm

The proposed (UIDDDA) is scheduled for a second reading before the NCCUSL at its next annual conference in July 27 through August 3, 2007 in Pasadena, CA, and may likely be adopted by that body at that time. If the act is adopted, it must then be presented to the legislatures of all states for their consideration and adoption. This will take some time. In the interim, the complexity of obtaining local deposition subpoenas persists. ***Interstate Deposition Subpoena***

Service is available to assist litigants today in any jurisdiction throughout the United States.

Trial State/Deposition State

The terms "trial state" or "forum state" refer to the state where a civil action is first instituted and where a final determination of the issues in that action will be rendered. The terms "deposition state" or "foreign jurisdiction" refer to the state where a deposition or production of records will take place pursuant to a properly issued and served subpoena.

Process of Obtaining Local Deposition Subpoenas

The process of obtaining local deposition subpoenas in aid of out-of-state litigation is referred to by a variety of terms. Some of these terms include words or phrases such as "domestication of", "localization of", "local", "out-of-state" or "interstate" deposition subpoenas. They all refer to the process of obtaining validly issued subpoenas from a court in a deposition state having jurisdiction over a non-party witness thereby compelling that witness to appear at a deposition within that state to give testimony and/or produce records for an action pending in a trial state.

Two Prong Inquiry

When seeking to obtain an out-of-state subpoena to compel a non-party witness to appear at a deposition in a foreign jurisdiction the legal practitioner, legal assistant or professional process server must be cognizant of several factors. The first is to comply with the forum state deposition rules and, if necessary, obtain the permission of the trial court to take an out-of-state deposition. The second is to apply to that foreign court for the issuance of subpoena to compel the witness within its jurisdiction to attend that deposition. In both areas, the court rules of each state will dictate how this is done.

Relevant State Rules, Codes and Statutes

The rules enacted or promulgated by the states addressing the issuance and service of subpoenas as well as taking of depositions, either within or outside their respective states, are contained in books titled "Court Rules", "Rules of Civil Procedure", "Code of Civil Procedure", "Statutes

or Codes Annotated", or like name. In this material, all such rules, codes or statutes will be referred to as " court rules" or " rules " .

The court rules relevant to this discussion are in five categories:

1. Rules pertaining to issuance and service of subpoenas.
2. Rules pertaining to taking depositions outside of state.
3. Rules pertaining to depositions to be taken within state for use in a foreign state.
4. Rules pertaining to advance notice to witness and distance or geographic restrictions.
5. Rules pertaining to fees and costs related to issuance of out-of state subpoenas.

The court rules of the various states are not uniformly categorized and may present the practitioner difficulty when endeavoring to ascertain which rules apply.

The Subpoena

A subpoena is a writ issued by or in the name of the court commanding a person within its jurisdiction to appear at a certain time and place to give evidence in a matter pending before a court. A Subpoena Ad Testificandum compels the witness to appear and give testimony. A Subpoena Duces Tecum compels the witness to appear, produce records or tangible items, and give testimony. Once issued and properly served, the witness must comply with the command of the subpoena or face possible penalty for contempt of court.

Jurisdictional Limitations of a State Subpoena

A subpoena issued by a state court is valid only within its geographic boundaries. Consequently, a subpoena issued in a state within which an action is pending cannot be used or served in another state to compel a non-party witness who resides or works in the foreign state to give testimony or produce records. There are, however, procedures established in all states that will aid the litigant in obtaining a local subpoena to compel such a witness to give evidence in that foreign jurisdiction for use in the trial state.

Necessity of a Deposition in Foreign Jurisdiction

A subpoena issued from any court must command action at a specific time and place. The subpoena can compel appearance at a trial, or at a deposition. When dealing with subpoenas to be issued in a foreign jurisdiction seeking evidence to be used in another jurisdiction, the subpoena must be issued in the context of a deposition. This is so even though a party seeking to obtain records may give the witness the option of forwarding those records directly to it in lieu of actual appearance.

Obtaining Trial Court's Permission to Take Out-Of-State Deposition

The court rules of all states provide for a procedure to obtain the permission of the trial court to take an out-of-state deposition. Those rules will also indicate who may be designated as the person to take the out-of-state deposition, and what documents will be made available to the applicant for forwarding to the foreign state in order to request the issuance of a local subpoena. It is suggested that the practitioner refer to the court rules of the foreign state to see what documents are required so that the proper ones may be obtained from the trial court.

Documents From Trial Courts

All state courts have rules pertaining to who may take depositions outside of their jurisdiction. Those court rules contain references to what types of documents are available from the court when application is made to take an out-of-state deposition, or when the parties agree to conduct such a deposition. These documents are as follows:

1. Order to Take Out-of-State Deposition

An Order to Take Out-of-State Deposition is an order entered by the trial court where the action is pending permitting the taking of deposition of a non-party witness in another State. The Order is obtained upon motion of the party seeking to depose the witness with notice to all opposing counsel or parties. Upon hearing, the trial court may issue the Order if deemed appropriate.

2. Commission to Take Out-of State Deposition

A Commission to Take Out-of-State Deposition is similar to an Order to Take Out-of-State Deposition with the added provision that it designates or commissions a person to take the out-of-state deposition. When so commissioned, the Commissioner shall have the power to administer oaths and take the deposition in the foreign state the same as if it were taken in the trial State.

3. Stipulation to Take Out-of-State Deposition

A Stipulation to Take Out-of-State Deposition is an agreement between the parties to take an out-of-state deposition having the same effect as a Commission.

4. Letter Rogatory

A Letter Rogatory, when used in this context, is a formal written request from the trial court where the matter is pending directed to the court having jurisdiction over the non-party witness requesting the latter court's assistance in having a subpoena issued, and a deposition taken.

Necessity of Subpoena

The necessity of using a subpoena to compel a reluctant non-party witness to appear at a deposition seems obvious. It is sometimes suggested, however, that when a non-party witness is willing to cooperate and give testimony or produce records, the issuance of a local subpoena is not necessary. We disagree for the following reasons:

(a). The testimony given at a deposition, or records obtained, may be precluded as evidence at trial if not obtained pursuant to subpoena and in compliance with court rule.

(b). Opposing parties may challenge the admissibility of such evidence. Reference to the trial state court rules is essential.

(c). The non-party witness, by cooperating without benefit of subpoena, may be releasing or divulging confidential information. This unauthorized release may be the subject of further litigation by the party whose rights are affected by such release or disclosure.

Obtaining an Out-Of-State Subpoena

Having obtained the trial court's permission to take the out-of-state deposition, and the proper documents, the practitioner must then comply with the rules of the foreign state in order to process its application for the issuance of a local subpoena. The court rules of the several states vary widely as to the procedure necessary to obtain a local subpoena, and who may issue the subpoena. Those procedures, however, can be generally characterized as follows:

1. Informal procedure.

Some states have very simplified procedures for obtaining a local deposition subpoena. Generally, these states require proof that an action is pending in the trial state and proof that a deposition has been scheduled for a non-party witness within its jurisdiction. In most cases, the presentation of such proofs to the court clerk or other person authorized to issue subpoenas in the foreign jurisdiction is all that is required. A subpoena will then be issued. Nominal fees may apply.

2. Formal procedure, local attorney not required.

Other states have more formal procedures for obtaining a local subpoena which may require the filing an application or petition with the court clerk or judge without the necessity of employing a local attorney. The application or petition must be supported by certain documents made available from the trial courts. The applicant may also be required to submit an Order to be signed by a Judge authorizing the issuance of the subpoena, as well as the proposed subpoena. Filing fees will apply.

3. Formal procedure, attorney required.

Still other states require an attorney who is admitted to practice law in that state to file a formal motion or petition. These motions or petitions are generally treated as miscellaneous matters with docket or index numbers assigned. The pleadings must be supported by relevant documents from the trial state as well one or more of the documents noted in the succeeding section. The filing fees in many instances are more costly than the less formal procedures. Legal fees to local counsel will apply.

Documents Required in Foreign Jurisdiction

The court rules of the state where the deposition is to take place, and where the non-party witness will be subpoenaed, will indicate what documents must be presented to the court as part of the litigant's request for the issuance of a local subpoena. Those documents may include:

1. Application
2. Motion or Petition
3. Certification or letter of need from local counsel
4. Proposed Order for Issuance of Subpoena
5. Supporting documents:
 - a. Original or certified copy of Order and/or
 - b. Original or certified copy of Commission, or
 - c. Original or certified copy of Stipulation, or
 - d. Original Letter Rogatory
 - e. Certified copy of Notice of Taking of Deposition with Proof of Service upon all parties.
 - f. Sample subpoena with exhibits, if any, as if issued in trial state.
6. Local subpoena with exhibits, if any, for signature by Judge, Clerk, or other authorized person.

Conducting the Deposition in the Foreign State

The court rules of the various states are not uniform as to who may be designated or commissioned to take the out-of-state deposition, nor who may conduct a deposition in the deposition state. It is therefore necessary to consult the court rules of both trial state and the deposition state to determine permissible persons. Some examples of those are: commissioner", "officer authorized to take depositions", " person authorized to take depositions", " person appointed", "judicial officer", "court reporter", "party", "notary public".

Unauthorized Practice of Law

The court rules vary as to whether the taking of a deposition within a state by an out-of-state attorney not admitted to practice in that state constitutes the unauthorized practice of law. Reference to deposition state court rules on this issue is essential.

Disqualification for Interest

As a general rule, the court rules and statutes of the various states do not permit depositions to be taken before or recorded by a person who is a relative, employee or attorney of a party, or a relative or employee of such attorney, or is financially interested in the action. Employing the services of a disinterested certified court reporter is therefore essential.

Determining What, Where and How To Obtain Local Subpoena

Interstate Deposition Subpoena Service is available to assist clients with the issuance of local deposition subpoenas in any jurisdiction throughout the United States. We offer our services through our online selection of relevant court rules, summary of procedures, estimated costs and sample forms.

To determine what is required in the trial state to obtain that court's permission to conduct an out-of-state deposition, or what is required in the deposition state to obtain a local subpoena for a non-party witness, visit www.InterstateDeposition.com, or call us at **(800) 981-0088** to speak to one of our representatives.