

A NY Practitioner's Guide To Interstate Discovery

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At some point, every New York state court practitioner will need to conduct discovery beyond the state's borders. Unfortunately, the Civil Practice Law and Rules has no equivalent to Federal Rule of Civil Procedure 45, the mechanism by which officers of the court use nationwide subpoena power to obtain documents and/or depose witnesses in federal cases.



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There have been two prior attempts to create a uniform system of interstate discovery procedures: (a) the Uniform Foreign Depositions Act (UFDA), adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1920; and then (b) the Uniform Interstate and International Procedure Act (UIIPA), adopted by the NCCUSL in 1962.[1] Thirteen states adopted the UFDA, and six states adopted the UIIPA.[2] New York adopted neither.

As a result, until quite recently, New York attorneys needing foreign state discovery would first have to obtain a commission from the New York trial court, and then proceed to the foreign jurisdiction in which the documents or witness is located and obtain a second order from the foreign court to enforce that commission. The second step of this step process would often entail retaining local counsel in the foreign jurisdiction.[3] Obviously, obtaining two court orders merely to obtain a document or a deposition can be unduly cumbersome and costly.

The NCCUSL has recently taken a third stab at standardizing interstate discovery procedures. On Aug. 3, 2007, it enacted the Uniform Interstate Depositions and Discovery Act (UIDDA), which was expressly modeled on Fed. R. Civ. Proc. 45.[4] Unlike the prior two efforts, the UIDDA has gained traction — and this time, New York has adopted it.

How Does It Work?

In UIDDA signatory states, the interstate discovery process is now integrated into a single step. The subpoenaing party submits the subpoena to a clerk of court in the jurisdiction that holds the evidence, and then the clerk issues a subpoena for service.[5] Thus, New York practitioners can obtain out-of-state discovery with zero court orders instead of two, so long as the foreign state has also enacted the UIDDA. If it has, then the New York practitioner can skip the steps of obtaining a commission or letters rogatory, engaging local counsel, and commencing a second proceeding before foreign court.[6]

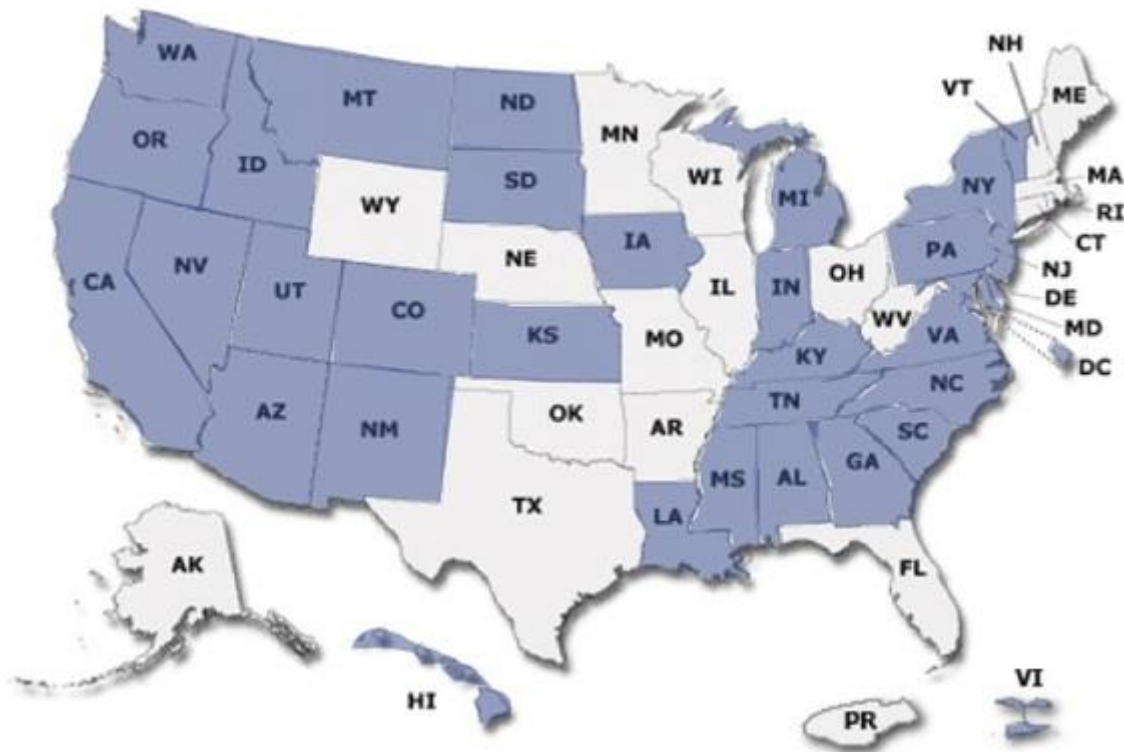
The UIDDA provides the subpoena to be used in the discovery state must comply with the laws of that state[7], as must an application to the court to modify, enforce or quash the subpoena.[8] Such protections guaranty that foreign witnesses will receive the same protections that their own state laws provide[9]. On the other hand, the UIDDA seeks to provide practitioners with the benefit of a more uniform interstate discovery process, including efficiency, minimal judicial oversight, and a reduction in discovery costs.[10]

Although many states including New York have enacted the UIDDA, the persistence of different interstate discovery methods compels an examination of different state procedures. New York practitioners, for instance, may need to conduct discovery in states that have not enacted the UIDDA, states that have enacted the UIDDA but with certain limitations, or states that have enacted the UFDA or another distinct form of foreign discovery procedures.

Which States Have Adopted the UIDDA?

As of today, 32 states, as well as Washington, D.C., and the Virgin Islands, have signed on to the UIDDA.[11] Here is the Uniform Law Commission's official map[12] of the current status of legislative enactment:

Legislative Enactment Status Interstate Depositions and Discovery Act



For New York-based practitioners, the significant states to have not yet adopt the UIDDA are Connecticut[13], Massachusetts[14], Illinois[15] and Texas.[16] In Connecticut, Conn. Gen. Stat. §§ 52-148e(f), 52-155 (2011) and Conn. R. Super. Ct. Civ. § 13-28(g) require a commission from the out-of-state court. In Massachusetts, Illinois and Texas, an order from a court in those states is also needed to

obtain evidence or depose a witness.[17]

Even within UIDDA states, there are distinctions worth noting. For example, in California, Cal. Civ. Proc. Code §§ 2029.100-.900 provides that while the clerk in the county in which discovery is sought may issue the subpoena, a California practitioner may also issue the subpoena upon receipt of the proper documentation.[18] In general, before proceeding under the UIDDA, one should become familiar with that state's implementing statute.[19]

How is UIDDA Discovery Conducted in New York?

For non-New York practitioners from UIDDA states, seeking to conduct discovery in New York, CPLR 3102(e), traditionally required the out-of-state party to obtain a mandate, writ, or commission from the foreign court before commencing a proceeding in the New York court.[20] To avoid this process, such out-of-state practitioners can instead use CPLR 3119, New York's adoption of the UIDDA.[21] Under CPLR 3119(b)(1), a foreign party may submit the foreign subpoena to the county clerk in the county in which discovery is sought, which clerk will then issue the subpoena. Alternatively, under CPLR 3119(b)(4), a New York attorney is authorized to issue a subpoena after receipt of the out-of-state subpoena.[22] Thus, New York-based practitioners can be retained by foreign counsel to issue a subpoena under this statute.

Going Forward

With the rapid implementation of the UIDDA by 32 states and the District of Columbia, one can expect the remaining 18 hold-outs to adopt the UIDDA within the next few years. When that happens, one of the principal challenges to state, versus federal, court litigation will have been removed. Even now, New York state court practitioners are finding themselves newly empowered to better represent their clients, as they are now able to efficiently pursue pretrial discovery almost anywhere the evidence finds itself.

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[1] In 1977, the NCCUSL removed its endorsement of the UIIPA, referencing its obsolete provisions. See Prefatory Note, Uniform Interstate Depositions & Discovery Act (2007).

[2] *Id.* The states and territories that have adopted the UFDA include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands. Arkansas, D.C., Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands currently have the UIIPA.

[3] *Id.*

[4] *Id.*

[5] UIDDA § 3.

[6] Id. cmt. at 7.

[7] UIDDA §§ 4-5.

[8] UIDDA § 6.

[9] UIDDA § 6 cmt. at 9.

[10] Prefatory Note, UIDDA (2007).

[11] Legislative Fact Sheet — Interstate Depositions and Discovery Act, Uniform Law Commission, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Interstate Depositions and Discovery Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act).

[12]

<http://www.uniformlaws.org/Act.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act>.

[13] Conn. Gen. Stat. §§ 52-148e(f), 52-155 (2011), Conn. R. Super. Ct. Civ. § 13-28(g).

[14] Mass. Gen. Laws Ann. ch. 223A, § 11 (2011); Mass. Gen. Laws ch. 233, § 45 (2011).

[15] I.L.C.S. Ct. Rule 204(b).

[16] Tex. Civ. Prac. & Rem. Code Ann. § 20.002 (Vernon 2011).

[17] N.J. R. of Ct. 4:11-4; Mass. Gen. Laws Ann. Ch. 223A, § 11(2011); I.L.C.S. Ct. Rule 204(b); Tex. Civ. Prac. & Rem. Code Ann. § 20.002 (Vernon 2011).

[18] § 2029.350.

[19] Rebecca Phalen, Esq. provides an updated online list of state statutes enacting UIDDA, accompanying her article *Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?*, Georgia Bar Journal (June 2007), <http://www.rebeccaphalen.com/wp-content/uploads/2014/12/UPDATED-all-states-cites-for-out-of-state-subpoenas-Dec-2014.pdf>.

[20] CPLR 3102(e).

[21] CPLR 3119(b)(1-3).

[22] CPLR 3119(b)(4).