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State of New Jersey Law Revision Commission Final Report Relating to the Uniform Interstate Depositions and Discovery Act

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**STATE OF NEW JERSEY
LAW REVISION COMMISSION
FINAL REPORT* RELATING TO THE
UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT**

*Marna L. Brown, Esq.***

INTRODUCTION	242
I. Overview of the UIDDA	242
A. <i>History of the UIDDA</i>	242
B. <i>Reasons for and status of the UIDDA</i>	243
C. <i>Key provisions of the UIDDA</i>	247
II. Current New Jersey Law	249
A. <i>Taking depositions in New Jersey for use out-of-state</i> .	250
B. <i>Taking depositions out-of-state for use in New Jersey</i> .	250
III. Commission Recommendations and Suggestions for Court Rule Changes	253
SUGGESTED RULE CHANGES	257

* While the substantive information contained in this published version of the New Jersey Law Revision Commission's Final Report relating to the Uniform Interstate Depositions and Discovery Act remains the same as the Commission's original Final Report, published on December 20, 2012, in order to conform to the publication standards of the *Seton Hall Legislative Journal*, footnotes were implemented to provide direct citations to authority for substantive points.

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INTRODUCTION

In 2007, the National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission (“ULC”), approved and recommended for enactment in all states the Uniform Interstate Depositions and Discovery Act (“UIDDA”). Due to increases in the amount of litigation involving individuals and documents outside of the trial state, uniform procedures for interstate discovery have become necessary.¹ This Act sets forth a uniform procedure for subpoenaing the depositions of out-of-state individuals and the production of discoverable materials located outside of the trial state whereby a subpoena issued by a court in the trial state (or forum state) is then enforced by the clerk of a court in the discovery state (or foreign jurisdiction).² The history, status and key components of the UIDDA are discussed below as are New Jersey’s current court rules for out-of-state discovery.

I. Overview of the UIDDA

A. History of the UIDDA

Two uniform laws concerning interstate discovery procedures pre-date the UIDDA.³ The first, promulgated in 1920, is the Uniform Foreign Depositions Act (“UFDA”).⁴ Originally adopted in thirteen states, the UFDA provides that a witness in the discovery state (foreign jurisdiction) may be compelled to appear and testify in the same manner and by the same mechanism employed for taking testimony in matters pending in the courts of the trial state (forum or home state).⁵ The UFDA applies whenever a mandate, writ or commission is issued from the court in the foreign jurisdiction or whenever, upon notice or agreement, the foreign court is required to take the testimony of a witness in the home state.⁶

¹ *Interstate Depositions and Discovery Act Summary*, UNIF. LAW COMM’N, <http://uniformlaws.org/ActSummary.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act> (last visited Apr. 7, 2013).

² *Id.*

³ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 243

The Uniform Interstate and International Procedure Act (“UIIPA”), promulgated in 1962, was designed to supersede the UFDA.⁷ More extensive than its predecessor, the UIIPA covers personal jurisdiction and provides methods of taking depositions and serving notices.⁸ However, in 1977, having only been adopted in six jurisdictions, the UIIPA was withdrawn from recommendation “due to its being obsolete.” Nonetheless, several states — including New Jersey (as will be discussed below) — model their own statutes or rules on the UIIPA.⁹

B. Reasons for and status of the UIDDA

The UIDDA’s Prefatory Note explains that although every state has a rule governing foreign depositions, these rules differ in significant ways.¹⁰ For example, many states restrict the use of foreign depositions to judicial proceedings of the other state while some states permit their use for any proceeding.¹¹ A few states limit out-of-state discovery to the actual parties, but in some cases the term “party” may be interpreted broadly to include any interested person.¹² Other states allow any person with the power to take a deposition in the trial state to also take a deposition in the discovery state.¹³ Several states permit a subpoena to cover testimony or documents and other physical things while some states limit production to documents.¹⁴

⁷ *Id.*

⁸ *Id.* See UNIF. INTERSTATE AND INT’L PROCEDURE ACT § 3.02 (1962). This Section provides that a court of the home state may order a person who is domiciled or is found within this state to give his or her 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.”

⁹ SYLVIA B. PRESSLER & PETER G. VERNIERO, CURRENT N.J. COURT RULES, comment 1 on R. 4:11-5 (2013).

¹⁰ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The procedures for both obtaining a deposition subpoena and determining the place for the deposition differ among states.¹⁵ In some states, a party must file the 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.¹⁶ Other states require that a notice of deposition be shown to the clerk or judge in the discovery state, after which a subpoena will automatically issue.¹⁷ Still other states require a letter rogatory requesting the trial state to issue the subpoena, while about twenty states, according to the ULC, require that an attorney in the discovery state file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.¹⁸ Some states limit the place where a deposition may be taken to the discovery state while others limit the place to the deponent's home county.¹⁹

Also important is whether the procedure of the trial state or the discovery state controls and on what matters or issues.²⁰ The general Restatement rule is that the procedure of the forum (in this case, forum means discovery) state applies.²¹ Many states provide that the discovery state may use the procedure of either the trial or discovery state, with a presumption in favor of the discovery state procedure.²² Some states reverse this presumption, while others are unclear, and still others are silent on this issue.²³ Most states expressly or implicitly allow courts in the discovery state to issue protective orders.²⁴

Perhaps the most difficult issues are whether the trial state or discovery state should determine which privileges, such as the attorney-client privilege, should apply and also *which* state's privilege law should apply.²⁵ The privilege issue is further compounded by the general rule that once the privilege is waived, it is waived generally.²⁶ Other disputes regarding the relevance of evidence are handled in differing

¹⁵ *Id.*

¹⁶ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 245

ways among the states.²⁷

In order to bring uniformity to these inconsistencies, the UIDDA is patterned after Rule 45 of the Federal Rules of Civil Procedure (“FRCP”), establishing a simple clerical procedure under which a trial state subpoena may be used to ultimately enforce a discovery state subpoena.²⁸ Under the Act, litigants may submit to the clerk of the county in the state where the discoverable materials or individuals are sought, a subpoena issued under the authority of a court in the trial state.²⁹ Upon receiving the out-of-state subpoena, the clerk in the discovery state issues a subpoena for service on the person or entity to which the original subpoena is directed.³⁰ The terms of the subpoena issued in the discovery state must incorporate the terms of the original subpoena.³¹ The discovery state subpoena must also contain contact information for all counsel of record and any party not represented by counsel.³² The Act calls for minimal judicial oversight in that it eliminates the need for obtaining a commission or letters rogatory, or for filing a miscellaneous action before obtaining a subpoena in the discovery state.³³ It also eliminates the need to obtain local counsel in the discovery state in order to obtain an enforceable subpoena.³⁴

Discovery authorized by the subpoena must comply with the rules of the state in which it occurs.³⁵ Motions brought to enforce, quash, or modify a subpoena, or for protective orders, must be brought in and governed by the laws of the discovery state.³⁶ The county clerk in the discovery state acts in a ministerial role, but in a manner “sufficient to invoke the jurisdiction of the discovery state over the deponent.”³⁷ The Act recognizes that “the discovery state has a significant interest in protecting its residents who become non-party witnesses in” other jurisdictions from unreasonable or burdensome discovery requests.³⁸

²⁷ *Id.*

²⁸ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

²⁹ *Id.*

³⁰ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 3(b) (2007).

³¹ *Id.* § 3(c)(A).

³² *Id.* § 3(c)(B).

³³ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

³⁴ *Id.*

³⁵ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 5, cmt. (2007).

³⁶ *Id.* § 6, cmt.

³⁷ *Id.* § 3 cmt.

³⁸ *Id.* § 6 cmt.

To better understand the process, the ULC uses an example in its commentary, which is repeated here:

A witness in Florida needs to be deposed in preparation for a Kansas trial.³⁹ Under the UIDDA, a lawyer of record for the plaintiff in the Kansas action issues a subpoena in Kansas as the lawyer routinely would in pending actions.⁴⁰ That lawyer then obtains a subpoena form from the clerk's office in the Florida county where the witness to be deposed lives.⁴¹ Using the Florida subpoena form, the lawyer prepares a Florida subpoena that incorporates the terms and conditions of the Kansas subpoena.⁴² The lawyer then arranges for the executed Kansas subpoena, along with the completed but not yet executed Florida subpoena, to be delivered to the clerk's office in Florida.⁴³ The transmittal letter advises the clerk that the Florida subpoena is being sought pursuant to the Florida statute (citing the appropriate statute or rule and quoting the UIDDA).⁴⁴ The clerk of the court issues a Florida subpoena incorporating the terms and conditions of the Kansas subpoena and a process server, in accordance with Florida law, then serves the Florida subpoena on the deponent.⁴⁵ Appropriate filing and service fees are paid as required by Florida law.⁴⁶

As of the date of this report, the UIDDA has been adopted by thirty-two jurisdictions, including Delaware, New York and Pennsylvania.⁴⁷ Additionally, Connecticut's adoption of the Act is currently pending.⁴⁸ Notably, many of these jurisdictions have adopted

³⁹ *Id.* § 3 cmt.

⁴⁰ *Id.*

⁴¹ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 3, cmt. (2007).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Legislative Fact Sheet – Interstate Depositions and Discovery Act*, UNIF. LAW COMM'N,

<http://uniformlaws.org/LegislativeFactSheet.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act> (last visited Apr. 7, 2013). These are Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington and the U.S. Virgin Islands.

⁴⁸ *Id.*

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 247

the Act by court rule rather than by statute, or a combination of the two.⁴⁹

C. Key provisions of the UIDDA

The Uniform Act defines only five terms.⁵⁰ The first, “foreign jurisdiction,” is defined simply as “a state other than this state.”⁵¹ “Foreign subpoena” is defined as “a subpoena issued under authority of a court of record of a foreign jurisdiction.”⁵² The Act is purposefully drafted to not extend its application to foreign countries.⁵³ As a result, however, the name “foreign jurisdiction” may be misleading or misunderstood.

“Subpoena” is defined to cover a court-compelled deposition or production and inspection of documents and other tangible things or the inspection of premises.⁵⁴ The term “subpoena” includes a subpoena *duces tecum* but does not include a subpoena for the inspection of a person.⁵⁵ Thus medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (comparable to the application of Rule 35 of the FRCP).⁵⁶ The last two defined terms, “person” and “state,” have meanings consistent with other uniform laws.⁵⁷

Sections 3 and 4 cover issuance and service of the subpoena.⁵⁸ A party must submit a foreign subpoena to the clerk of the court in the county in which discovery is sought to be conducted.⁵⁹ The request itself

⁴⁹ These include (but may not be limited to) Arizona, Idaho, Iowa, New York, North Carolina, North Dakota, Pennsylvania, South Dakota and Vermont; both New York and Pennsylvania require legislative enactment of the rule. North Carolina adopted the uniform act and also revised its court rules consistent with the statute. See Chad D. Hansen & Bradley A. Roehrenbeck, *New Rules for Interstate Discovery in North Carolina*, THE LITIGATOR (N.C. Bar Ass’n), Feb. 2012, at 8, for an overview of the changes made to North Carolina law on interstate discovery.

⁵⁰ See UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 2 (2007).

⁵¹ *Id.* § 2(1).

⁵² *Id.* § 2(2).

⁵³ *Id.* § 2 cmt.

⁵⁴ *Id.* § 2(5)(A)-(C).

⁵⁵ *Id.* § 2, cmt.

⁵⁶ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 2, cmt. (2007).

⁵⁷ *Id.* § 2(3), (4).

⁵⁸ See *id.* §§ 3, 4.

⁵⁹ *Id.* § 3(a).

does not constitute an appearance in the courts of that state.⁶⁰ Upon receipt of the foreign subpoena, the clerk, in accordance with that court's procedure, must issue a subpoena for service upon the person to which the foreign subpoena is directed.⁶¹ The subpoena must be issued promptly, incorporate the terms used in the foreign subpoena, and contain or be accompanied by the names, addresses and telephone numbers of all counsel of record and any party not represented by counsel in the proceeding to which the subpoena relates.⁶²

The Comment to Section 3 clarifies that the "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."⁶³ However, the Act does "repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states."⁶⁴ Of course, it is the ULC's expressed hope that the Act "will encourage states that still require the use of commissions or letters rogatory to repeal those laws."⁶⁵

Section 5 clarifies that the laws "of *this state* [i.e., the state adopting the Uniform Act] applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises, also apply to subpoenas issued under Section 3" of the UIDDA.⁶⁶ As noted in the commentary, the Act "requires that the discovery permitted by this section must comply with the laws of the discovery state" and "[t]herefore, . . . the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state."⁶⁷ "The fee, if any, for issuing . . . [the] subpoena . . . [must] be sufficient to cover only the actual transaction costs or . . . the same as the fee for local deposition subpoenas."⁶⁸

⁶⁰ *Id.*

⁶¹ *Id.* § 3(b).

⁶² UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 3(b), (c)(A)-(B) (2007).

⁶³ *Id.* § 3, cmt.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* § 5 (emphasis added).

⁶⁷ *Id.* § 5 cmt.

⁶⁸ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT § 5 cmt. (2007).

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 249

Section 6 states that “[a]n application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under [this Act] must comply with the rules or statutes of this [the discovery] state and be submitted to the court in the county . . . in which discovery is to be conducted.”⁶⁹ The procedural, evidentiary and conflict of laws rules of the discovery state must all be followed.⁷⁰ Sections 7, 8 and 9 are consistent with similar provisions in other uniform laws.⁷¹

II. *Current New Jersey Law*

New Jersey’s procedures for issuing and serving subpoenas are governed by state court rules and not by statute.⁷² Rule 4:14-7 of the Rules Governing the Courts of the State of New Jersey covers deposition subpoenas generally.⁷³ Subsection (a) provides that attendance of a witness at the taking of depositions in New Jersey may be compelled by subpoena issued and served in accordance with Rule 1:9.⁷⁴ Subsection (b) addresses the time and place of examination and the reimbursement of out-of-pocket expenses and loss of pay of both resident and non-resident witnesses.⁷⁵ Rule 1:9-1 prescribes the method for issuance of the subpoena and its contents.⁷⁶ Rule 1:9-2 governs production of documentary evidence.⁷⁷

⁶⁹ *Id.* § 6.

⁷⁰ *Id.* § 6 cmt.

⁷¹ *Compare* UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT §§ 7-9 (discussing the Act’s uniformity of application and construction, application to pending actions, and effective date) *with* UNIF. COLLABORATIVE LAW ACT §§ 21, 24 (2010), UNIF. ADULT GUARDIANSHIP PROTECTIVE PROCEEDINGS AND JURISDICTION ACT §§ 501, 4-5 (2007), *and* UNIF. REAL PROPERTY TRANSFER ON DEATH ACT §§ 18, 21 (2009).

⁷² *See generally* N.J. Ct. R. 4:14-7 (discussing the form, contents, scope, time, place, notice and limitations of subpoenas).

⁷³ *Id.*

⁷⁴ N.J. Ct. R. 4:14-7(a).

⁷⁵ N.J. Ct. R. 4:14-7(b).

⁷⁶ N.J. Ct. R. 1:9-1.

⁷⁷ N.J. Ct. R. 1:9-2.

A. *Taking depositions in New Jersey for use out-of-state*

New Jersey court rules specifically address taking testimony in New Jersey for use in foreign jurisdictions.⁷⁸ In order to compel the deposition of a New Jersey resident for use in another state, the out-of-state attorney must make an *ex parte* petition to the Superior Court, pursuant to Rule 4:11-4, for an order issuing a subpoena to the person to be deposed.⁷⁹ The petition shall be captioned in the Superior Court, Law Division, and designated a “petition pursuant to Rule 4:11-4.”⁸⁰ Any subpoena issued must comply with Rule 4:14-7 and be filed in accordance with Rule 1:5-6(b).⁸¹

For practical purposes, a foreign litigant must retain a New Jersey licensed attorney in order to submit the Rule 4:11-4 petition.⁸² The New Jersey attorney will file the petition, a proposed form of order and the appropriate filing fee with the Superior Court clerk in the county where the witness resides or works.⁸³ A commission, letter rogatory or other similar judicial certificate issued in the forum state must support the petition.⁸⁴

B. *Taking depositions out-of-state for use in New Jersey*

The court rules also cover taking testimony of out-of-state witnesses for use in New Jersey actions.⁸⁵ Rule 4:11-5 provides that a deposition for use in an action in this state (whether pending, not yet commenced or pending appeal) may be taken *outside this state* either:

⁷⁸ N.J. Ct. R. 4:11-4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See N.J. SUPERIOR COURT CLERK’S OFFICE & THE ADMIN. OFFICE OF THE COURTS, INFORMATION FOR OUT-OF-STATE ATTORNEYS ON THE PROCEDURE TO PURSUE DISCOVERY OF A NEW JERSEY RESIDENT FOR USE IN OUT-OF-STATE LITIGATION (2007), available at <http://www.judiciary.state.nj.us/civil/forms/10518.pdf>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ N.J. Ct. R. 4:11-5.

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 251

- (a) on notice pursuant to R. 4:14-2,⁸⁶ or, in the case of a foreign country, pursuant to R.4:12-3;⁸⁷
- (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice; or
- (c) in any manner stipulated by the parties.⁸⁸

A party may be compelled to appear in an out-of-state deposition if the party is noticed as provided in Rule 4:14-12.⁸⁹ However, in order for the New Jersey attorney to be in a position to compel the deposition of an *out-of-state non-party* witness, the other state must have a procedure, by rule or statute (similar to Rule 4:11-4), which authorizes the foreign court to issue a deposition subpoena on petition in aid of foreign litigation.⁹⁰ If the other state has no such procedure, a New Jersey attorney must first obtain a letter rogatory or commission issued by the New Jersey court in order to be able to compel the non-party witness's

⁸⁶ R. 4:14-2, which governs depositions generally, provides that a party desiring to take the deposition of any person upon oral examination shall give not less than 10 days written notice to every other party to the action of the time and place for taking the deposition and the name of each person to be examined. The time and place shall be reasonably convenient for all parties and if the name of the person to be examined is unknown to the party seeking the deposition, the notice must contain a general description sufficient to identify the person or the particular class or group to which the person belongs. N.J. Ct. R. 4:14-2(a). The remainder of R. 4:14-2 sets forth the parameters for conducting the deposition. *Id.*

⁸⁷ R. 4:12-3, which governs depositions in foreign countries, provides that such depositions shall be taken on notice before a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States; or before such person or officer as may be appointed by commission or under letters rogatory. N.J. Ct. R. 4:12-3. The rule further provides, among other things, that a commission or letters rogatory shall be issued on application and notice, and on such terms and with such directions "as are appropriate" without any further explanation of what is meant by the term "appropriate." *Id.* R. 4:12-2, which governs depositions outside of New Jersey but within the United States or its territories, provides that such depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States, or of the place where the examination is held. N.J. Ct. R. 4:12-2.

⁸⁸ R. 4:11-5 further provides that commissions and letters rogatory shall be issued in accordance with R.4:12-3 and if the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath. N.J. Ct. R. 4:11-5, 3.

⁸⁹ N.J. Ct. R. 4:11-5, 4:14-2.

⁹⁰ SYLVIA B. PRESSLER & PETER G. VERNIERO, CURRENT N.J. COURT RULES, comment 1 on R. 4:11-5 (2013).

attendance at the out-of-state deposition.⁹¹ In short, a New Jersey attorney cannot effectively initiate a discovery request on an out-of-state non-party witness without first obtaining a New Jersey court order.⁹²

Even if the foreign jurisdiction were to have adopted the UIDDA and the foreign jurisdiction were to simply issue a subpoena for a deposition by the out-of-state court (rather than issuing a letter rogatory or a commission), it appears that New Jersey court rules nonetheless would require that a New Jersey licensed attorney petition the New Jersey court to effectuate the issuance of a subpoena for the deposition in New Jersey.

A unique aspect of New Jersey practice is that an attorney cannot issue a subpoena solely for production of documents.⁹³ Instead, regardless of whether the deposition will actually ever take place, the subpoena must be issued for the deposition of the custodian of records with instructions to produce the relevant documents at the time of the deposition and no sooner.⁹⁴ Although the end result remains production of documents only, the full process and timeline for giving notice of the oral deposition must be followed. This further complicates the process of compelling New Jersey witness document production by an out-of-state court.

New Jersey also differs from other states because of *Winberry v. Salsbury*,⁹⁵ where the New Jersey Supreme Court interpreted article VI, section 2, paragraph 3 of the New Jersey Constitution to mean that the rule-making power of the Supreme Court is confined to practice, procedure and administration.⁹⁶ The Court held that when its rule-making authority is exercised in those areas, the Court's authority is not subject to conflicting legislation.⁹⁷ Thus, under a *Winberry* analysis, the UIDDA would be adopted by court rule rather than by statute.

⁹¹ *Id.*

⁹² *See id.* *See also* N.J. SUPERIOR COURT CLERK'S OFFICE & THE ADMIN. OFFICE OF THE COURTS, *supra* note 83; *Silverman v. Berkson*, 141 N.J. 412, 428 (1995); *Application of N.J. Bureau of Securities for an Open Commission under R. 4:11-5(b) to Examine Under Oath Berkson*, 280 N.J. Super. 180, 181-82 (App. Div. 1995).

⁹³ *See* N.J. Ct. R. 4:14-7.

⁹⁴ *See id.*

⁹⁵ *Winberry v. Salsbury*, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

⁹⁶ *Id.*; N.J. CONST. art. VI, § 2, para. 3.

⁹⁷ *Id.*

According to the National Center for State Courts, there are thirty-eight states which have state constitutions that provide rulemaking authority, though only a handful of these states have constitutional provisions that are similar to New Jersey's.⁹⁸ Most of these state constitutions give their legislatures either the right to approve the court rules and thus the ability to override the judiciary, or an equal right, along with the judiciary, to promulgate the rules.⁹⁹ A December 30, 2008 report prepared by senior attorneys at the Connecticut Office of Legislative Research Center, states that courts in twenty-two states (with minor exceptions in three states) appear to have exclusive authority to adopt court rules, eleven of which do so by explicit constitutional provision.¹⁰⁰ The remaining eleven state courts do so by the courts' interpretations of inherent authority under their respective constitutions, under a statute, or under a combination of both.¹⁰¹

III. Commission Recommendations and Suggestions for Court Rule Changes

New Jersey court rules currently require the intervention of a court when compelling the deposition of out-of-state non-party witnesses for use in a New Jersey proceeding or when deposing New Jersey witnesses for use in another state proceeding.¹⁰² In either case, current practice is

⁹⁸ *States with Constitutional Rulemaking Authority*, NAT'L CENT. FOR STATE COURTS, <http://www.ncsc.org/topics/court-management/rulemaking-and-administrative-orders/state-links.aspx> (last visited Apr. 7, 2013). The 38 states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. *Id.* States with provisions similar to New Jersey include Arizona, Delaware, Georgia, Hawaii, Kentucky and Michigan. Christopher Reinhart & George Coppolo, STATE OF CONN. OFFICE OF LEGISLATIVE RESEARCH, COURT RULES IN OTHER STATES-LEGISLATIVE APPROVAL 1 (2008).

⁹⁹ Christopher Reinhart & George Coppolo, STATE OF CONN. OFFICE OF LEGISLATIVE RESEARCH, COURT RULES IN OTHER STATES-LEGISLATIVE APPROVAL 1 (2008).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See N.J. Ct. R. 4:11-4 (providing the procedure to compel deposition of out-of-state nonparty witness in state where witness resides); N.J. Ct. R. 4:11-5 (providing the procedure to compel depositions taken outside of New Jersey). See

cumbersome and expensive. In contrast, the UIDDA presents a simple and convenient process for issuing and enforcing deposition subpoenas.¹⁰³

There are advantages to adopting the UIDDA in New Jersey in particular. Litigation in New Jersey is increasingly complex, often involving parties with connections to other states, including the immediate neighboring states of New York and Pennsylvania.¹⁰⁴ In fact, the United States Government census indicates that in 2010, two of the top ten most common state-to-state moves were from New Jersey to Pennsylvania and New York to New Jersey.¹⁰⁵ Some of the country's largest companies are also headquartered in New Jersey.¹⁰⁶ Furthermore, in the past year alone, between fifty to fifty-five judicial vacancies were created.¹⁰⁷ Having a mechanism like the UIDDA in place in New Jersey would virtually eliminate court involvement in the initiation of interstate discovery. Additionally, its implementation could enhance pre-trial state court practice and help to ease our overburdened courts.

The Commission's recommends adoption of the UIDDA in New Jersey, with modifications to accommodate New Jersey practice. Although this Commission ordinarily recommends to the Legislature regarding the adoption of uniform laws, the Commission respectfully suggests here, that because of the *Winberry* considerations, the better course would be court rule revision. This suggestion is made in the spirit of cooperation and comity between the legislative and judicial

also SYLVIA B. PRESSLER & PETER G. VERNIERO, CURRENT N.J. COURT RULES, comment 1 on R. 4:11-5 (2013).

¹⁰³ UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT prefatory note (2007).

¹⁰⁴ Hon. Brian R. Martinottie, J.S.C., *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 572-73 (2012).

¹⁰⁵ See U.S. CENSUS BUREAU, 2010 STATE-TO-STATE MIGRATION FLOW 14-18 (2010), available at <http://www.census.gov/hhes/migration/data/acs/state-to-state.html>. According to the 2010 Survey, 45.3 million people lived in a different house within the United States one year earlier. *Id.* New York, and now Pennsylvania, have both adopted the UIDDA. UNIF. LAW COMM'N, *supra* note 48.

¹⁰⁶ See Fortune 500, CNN Money (May 21, 2012), <http://money.cnn.com/magazines/fortune/fortune500/2012/states/NJ.html> (stating that New Jersey is one of the top ten states with twenty or more Fortune 500 companies).

¹⁰⁷ See Judge Glenn A. Grant, Acting Administrative Director of the Courts, Speech before the Assembly Budget Committee (May 2, 2012).

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 255

branches of state government. Revising the court rules to conform to the UIDDA also makes sense in light of the fact that, as discussed *supra*, Rule 4:11-5 currently follows the UIIPA, an earlier uniform act abandoned by the ULC and now superseded by the UIDDA.¹⁰⁸

This will not be the first time the Commission has urged the courts to consider rule amendments (although it will be the first time that this Commission has issued a report *solely* suggesting such changes). In its 1997 report on the service of process statutes, in the context of a larger project that primarily revised statutory language, the Commission concluded that the regulation of service of process should be left to court rules and recommended that the Supreme Court consider amending the rules to allow service of process by private parties.¹⁰⁹

New Jersey would not be the first state to adopt the UIDDA by court rule.¹¹⁰ States such as Arizona, Iowa, New York, North Carolina,¹¹¹ North Dakota, Pennsylvania, South Dakota and Vermont have all promulgated or are contemplating rule changes as a result of the UIDDA.¹¹² For example, effective January 1, 2011, New York amended its Civil Practice Law and Rules (“CPLR”) to incorporate UIDDA procedures.¹¹³ New York adopted, almost verbatim, the language of the UIDDA with the appropriate references to already existing New York rules that govern service and form of the deposition subpoena.¹¹⁴

Similarly, Rule 45(f) of the Vermont Rules of Civil Procedure was added by Order of the Vermont Supreme Court during its August 2011 term to incorporate the provisions of the UIDDA with modifications as

¹⁰⁸ N.J. Ct. R. 4:11-5. *See supra* text accompanying notes 73-94.

¹⁰⁹ N.J. LAW REVISION COMM’N, FINAL REPORT: RELATING TO SERVICE OF PROCESS (1997). This report considered revision of Title 2A provisions concerning the courts and the administration of civil justice (some of which overlapped or conflicted with the Supreme Court’s power over practice and procedure) and not, as here, adoption of a uniform law.

¹¹⁰ UNIF. LAW COMM’N, *supra* note 48.

¹¹¹ North Carolina adopted the UIDDA by statute with conforming amendments to Rule 28(d) of the North Carolina Rules of Civil Procedure.

¹¹² UNIF. LAW COMM’N, *supra* note 48.

¹¹³ N.Y. C.P.L.R. 3119 (MCKINNEY 2011). New York state court rules must be consistent with legislation and may be subsequently changed by statute. *See* In the Matter of A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). The CPLR are statutes enacted by the New York legislature, and not court rules established by judges.

¹¹⁴ N.Y. C.P.L.R. 3119 (MCKINNEY 2011).

appropriate to Vermont practice.¹¹⁵ The definitions of the UIDDA were adopted, but the rule requires that the subpoena conform to the requirements of the Vermont rules and advise the person to whom the subpoena is directed of that person's right to petition the Vermont court to quash or modify the subpoena.¹¹⁶

Furthermore, Pennsylvania recently adopted the UIDDA except the section providing the procedure for service of the subpoena.¹¹⁷ (Governor Corbett signed an act amending the Judicial Code to adopt the UIDDA on October 24, 2012, which will become effective on December 24, 2012.)¹¹⁸ And earlier this year, the Supreme Court of the State of South Dakota ordered the adoption of new Rule 15-6-28A, SDCL after a public hearing.¹¹⁹ Iowa and North Dakota are contemplating changes to rules of civil procedure that would adopt the substance of the UIDDA with modifications reflecting each state's practices.¹²⁰

If incorporated in our court rules, the UIDDA framework would not affect the procedures for *taking* depositions for use in actions pending in New Jersey, as set forth in Rules 4:14-1, 4:14-2, 4:14-3 and 4:14-7.¹²¹ However, Rules 4:11-4 and 4:11-5 would need to be modified

¹¹⁵ VT. R. CIV. P. 45(f).

¹¹⁶ *Id.*

¹¹⁷ Foreign Depositions and Subpoenas Act of Oct. 24, 2012, Pub. L. No. 1459, No. 183 (codified as amended at 42 PA.CON.S.TAT. §§ 5331-37).

¹¹⁸ *Id.*

¹¹⁹ *See* In the Matter of the Adoption of a New Rule Relating to Interstate Depositions and Discovery to be Designated at SDCL15-6-28A, S.D. (Mar. 6, 2012). South Dakota Supreme Court Hearing. Added to the proposed form of the rule is a provision which states that a request for issuance of a subpoena under this rule, although not constituting an appearance in the courts of South Dakota, does create the necessary jurisdiction in South Dakota to enforce the subpoena, quash or modify the subpoena, issue any protective order, or resolve any other dispute relating to the subpoena and impose sanctions on the attorney requesting the issuance of the subpoena for any violation of the South Dakota Rules of Civil Procedure. The proposed rule also requires that the subpoena must conform to the South Dakota Rules of Civil Procedure and must advise the person to whom the subpoena is directed that such a person has a right to petition the South Dakota court to quash or modify the subpoena.

¹²⁰ IOWA R. CIV. P. 1.1702; N.D. R. CIV. P. 45 (referring to N.D. R. Ct. 5.1).

¹²¹ *Compare* UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT (2007) with N.J. CT. R 4:14-1, 4:14-2, 4:14-3, and 4:14-7.

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 257

consistent with UIDDA principles.¹²² A fee schedule for filing and serving out-of-state subpoenas would also need to be established.

Suggested rule changes that could be used are set forth below and made part of this report. Modifications from current rules are noted by underscoring (additions) and strikethroughs (deletions). The Commission is advised that its conclusions and recommendations are now under consideration by the judiciary.

SUGGESTED RULE CHANGES***4:11-4. Testimony for Use in Foreign Jurisdictions.***

(a) Whenever the deposition of a person is to be taken in this State pursuant to the laws of the United States, or another country for use in connection with proceedings there, the Superior Court may, on ex parte petition, order the issuance of a subpoena to such person in accordance with R. 4:14-7. The petition shall be captioned in the Superior Court, Law Division, shall be designated “petition pursuant to R. 4:11-4” and shall be filed in accordance with R. 1:5-6(b). It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to N.J.S.A. 22A:2-7.

(b) Any deposition of a person to be taken in this State pursuant to the laws of another state for use in connection with proceedings there, shall not be taken in accordance with subsection (a) but shall be taken in accordance with the procedures set forth in R. 4:11-6.

4:11-5. Depositions Outside the State.

A deposition for use in an action in this State, whether pending, not yet commenced, or pending appeal, may be taken outside this State either (a) on notice pursuant to R.4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; or (b) in accordance with a commission or letter rogatory issued by a court of this State, which shall be applied for by motion on notice; or (c) pursuant to a subpoena issued to the person to be deposed in accordance with R. 4:14-7 and in accordance with the uniform interstate depositions and discovery act as adopted by the other state; or (d) in any manner stipulated by the parties. Depositions within the United States taken on notice shall be taken

¹²² See discussion *infra* Part IV.

before a person designated by R. 4:12-2. Commissions and letters rogatory shall be issued in accordance with R. 4:12-3. If the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath.

4:11-6. Depositions in accordance with the uniform interstate depositions and discovery act

(a) This rule shall govern depositions conducted in this State in connection with a civil lawsuit brought in another state.

(b) To request issuance of a subpoena under this rule, a party must submit a foreign subpoena to a clerk of the Superior Court in the county in which discovery is sought to be conducted in this State. A “foreign subpoena” under this rule is a subpoena issued under the authority of a court of record of the other state and must state the following below the docket number: “For the Issuance of a New Jersey Subpoena Under R. 4:11-6.” A request for the issuance of a subpoena under this rule does not constitute an appearance in the Superior Court of this State.

(c) When a party submits a foreign subpoena under this rule to a clerk, the clerk shall promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed.

(d) A subpoena under this rule shall:

(1) conform to the requirements of R. 4:14-7;

(2) incorporate the terms and conditions used in the foreign subpoena to the extent those terms and conditions do not conflict with R.4:14-7;

(3) advise the person to whom the subpoena is directed of that person’s right to move to quash or modify the subpoena or otherwise move under R.4:10-3 or R. 4:14-4 or 4:23-1 or any other Rules Governing the Courts of the State of New Jersey that are applicable to discovery; and

(4) contain or be accompanied by the names, addresses, telephone numbers and facsimile numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel; and

(5) bear the caption and case number of the out-of-state case to which it relates, identifying the out-of-state jurisdiction and court where the case is pending.

2013] *UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT* 259

(e) Depositions and other discovery taken pursuant to this rule shall be conducted consistent with, and subject to the limitations in, the Rules Governing the Courts of the State of New Jersey and all other applicable New Jersey law.

(f) An application to the Superior Court of this State for a protective order or to enforce, quash, or modify a subpoena issued by a clerk under this rule shall be submitted to the court in the county in which discovery is sought to be conducted and shall comply with the Rules Governing the Courts of the State of New Jersey and all other applicable New Jersey law.