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# Preparing for the UIDDA's New Rules for Foreign Depositions

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**CLIENTS IN OUT-OF-STATE COURT ACTIONS** frequently need to depose third-party witnesses residing in California, or, clients in California court actions frequently need to depose third-party witnesses residing out of state. What procedural steps must be followed to subpoena these witnesses for their depositions, and, if necessary, compel their attendance? In any interstate deposition, the primary question to consider is how to issue an enforceable subpoena to compel the witness to testify or produce documents. Currently, this process is riddled with inconsistency and complications.

In an effort to reduce these problems, the Uniform Interstate Depositions and Discovery Act (UIDDA) was signed into law in California this year.[1] On January 1, 2010, the process for deposing a nonparty California witness in an action pending in another state will change dramatically. California lawyers should be aware of the current and future statutes.

Currently, California's deposition statutes mirror the Uniform Foreign Depositions Act (UFDA), an earlier attempt at creating a uniform system of interstate deposition rules. Under the UFDA, a nonparty witness may be compelled to testify in the same manner and by the same process and proceeding as the state in which the action is based.[2] Unfortunately, the vagueness of this language has led to inconsistent interpretations.[3] Under this law, depositions in California for out-of-state actions are governed by Code of Civil Procedure Section 2029.010. California and other UFDA states are relatively liberal about issuing subpoenas in out-of-state actions. The court in the county in which the witness resides will issue a subpoena upon receipt of certain documents. However, the governing local rules or informal local practices create inconsistency regarding which documents are required. Most California courts will accept a commission, letter rogatory, or even a notice of deposition or party agreement as sufficient.[4] Some clerks will issue a subpoena upon receipt of an original or a copy of any of these documents; others may require a formal petition.[5] An attorney must always check with the court clerk for any additional local rules or practices. California is especially prone to variation from county to county, one of the reasons the legislature cited in adopting the UIDDA.[6]

California's current law is also ambiguous as to who may issue the subpoena to the nonparty witness—the California code does not specify whether a lawyer may do so instead of the court. The California Law Revision Commission, commenting on the current law, suggests that although an out-of-state lawyer cannot issue a subpoena in California, an active member of the California bar retained to represent a party in an out-of-state action may do so.[7] Thus, either a California court or a California attorney must be involved in the issuing process.[8] Further, a subpoena issued in an out-of-state action must be served in accordance with California rules of process.[9]

In determining where the deposition must take place and who may be deposed, some (but not all) requirements mirror those of an ordinary California deposition. For example, resident deponents in out-of-state litigation must still be deposed within 75 miles of their residence.[10] However, the California statute permitting depositions to be taken in the county in which the action is pending and within 150 miles of the deponents' residence is inapplicable because there is no action pending in California.[11] There is also ambiguity in Section 2029.010 as to who may be deposed in California in an out-of-state action.[12] Unlike the general guidelines for depositions that are found in Section 2025.010—which grant the power to depose all natural persons, corporations, and other organizations—Section 2029.010 only specifies "natural persons."[13] In light of the statute's context, however, the California Law Revision Commission determined that the current statute should probably be construed to include corporations and organizations as well.[14]

Additionally, Section 2029.010 does not indicate if one must retain local counsel to depose a California resident in a foreign

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action. Based on California Rules of Court, Rule 9.47, however, under certain conditions, attorneys licensed to practice in another state are permitted to perform litigation tasks in California on a temporary basis for an action proceeding in another state.[15] Thus, the deposition may be taken by an out-of-state lawyer, and the lawyer need not be admitted to any California court. With respect to deposition officers or court reporters, although California law imposes no additional requirements on their qualifications, look to the foreign state to make sure any California officer or reporter is qualified under that state's standards.

Finally, Section 2029.010 is unclear as to whether counsel must be admitted in California to participate in any proceedings if it becomes necessary to compel the nonparty witness to comply with the subpoena.[16] Thus, one should be prepared to react appropriately if it appears that the witness might disregard the subpoena.

Fortunately, in a little over a year the current system and many (though not all) of its complications and inconsistencies may be disregarded. In 2007, the National Conference of Commissioners on Uniform State Laws drafted and approved the UIDDA, setting forth a deposition procedure "that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents."[17] Beginning in 2010, California will be a UIDDA state.

Under the UIDDA, as adopted in California, there is no need for an attorney to obtain a commission or letter rogatory, file a miscellaneous action, or take any other preliminary steps before obtaining a subpoena for a foreign action.[18] Instead, an attorney from a foreign state only needs to submit a subpoena that comes from the foreign court to the clerk of the California court in the county in which the witness resides, along with an application for a new subpoena and the appropriate fee.[19]

The California court will then issue its own subpoena, incorporating the information on the face of the original subpoena, for service upon the witness.[20] The clerk's simple act of subpoena reissuance, though ministerial, sufficiently establishes jurisdiction over the deponent. The subpoena is then served in accordance with California law. Alternatively, if an out-of-state party retains counsel who is an active member of the California State Bar, the California attorney can issue the subpoena upon receipt of a subpoena from the foreign state.[21] The only additional requirement for either method is that, when served, the subpoena must be accompanied by the names, addresses, and telephone numbers of all counsel of record and any party not represented by counsel.[22] Once issued, the subpoena is subject to the same substantive law as any other California subpoena.[23] Any person, not merely natural persons, can be subpoenaed in this manner.[24]

California's version of the UIDDA is slightly altered from the model statute. One change approved by the California Legislature involves the filing fees that apply when a discovery dispute arises in an out-of-state litigation and a nonparty petitions for relief in a California court.[25] The standard language of the UIDDA applies the same fee ($40) for a nonparty seeking relief in a discovery dispute in a foreign case as an in-state case.[26] However, the legislature raised the fee for nonparties in discovery disputes originating out-of-state to $80 to reflect the increased cost.[27] The legislature also clarified the language giving nonparties the right to obtain reimbursement of the filing fee if they prevail in the discovery dispute.[28]

## Out-of-State Depositions, California Litigation

The procedures for taking a deposition in another state for an action pending in California do not change under the UIDDA. When deposing an out-of-state party in a California state action, an attorney need only comply with the ordinary discovery procedures outlined in Code of Civil Procedure Sections 2025.010 et seq.[29] However, depositions for nonparty witnesses or independent experts may require compliance with California statutes in addition to laws peculiar to the state in which the witness resides.[30] Although California law still governs most aspects of taking depositions, the method for compelling an uncooperative nonparty witness to attend, testify, or produce documents is governed exclusively by the law of the foreign state.[31] Out-of-state depositions may be simplified by retaining an attorney in the foreign state; nonetheless, understanding the process can minimize the need for outside help.

The critical question is how to issue an enforceable subpoena to out-of-state deponents. If nonparty witnesses voluntarily agree to be deposed (and show up for the deposition), there is no need to use out-of-state processes. However, if they fail to show up or otherwise change their minds, attorneys are powerless to obtain sanctions.[32] Even worse, an attorney may be held responsible for the cost opposing counsel bears in attending the failed deposition.[33] When deponents refuse to show up or produce documents, their cooperation may only be compelled under the law of the place where the deposition is taken.[34] These laws vary from state to state; worse, they often vary from county to county within a state. In addition, many states (including California) are in the process of changing their discovery statutes. Because of this, there are no hard and fast rules for the out-of-state deposition process. Attorneys must therefore rely on local court clerks for help. Nonetheless, understanding some of the general categories into which states fall can provide some insight into determining a course of action.

The first step an attorney should take is to find the court that has jurisdiction over the witness. To find the county name for the deponent's address, simply search by zip code or city name on any number of Web sites, including the National Association of Counties, which is available at www.naco.org/counties/queries/city_srch.cfm. Then, find the court's Web site at the National Center for State Courts at www.ncsconline.org. If the court Web site does not provide specific requirements for taking depositions in out-of-state actions, it will at least provide the court clerk's phone number. Even after researching the pertinent discovery statutes and rules for the foreign state, contacting the clerk's office is an essential step in determining how to proceed as some courts will impose requirements that others do not.

Although each state has its own process for issuing subpoenas in out-of-state actions, these systems generally fall into one of five categories. However, the variety of state laws and their application even within these categories makes them more of a compass than a procedural road map that gives precise directions.

The first category consists of states that have adopted the UFDA. California, New York, Florida, Texas, and others have either adopted the act or enacted virtually equivalent statutes and rules.[35] As current California law and practices show, UFDA states often take inconsistent approaches to compelling witnesses to testify "in the same manner and by the same process and proceeding" as the state in which the action is based.[36] However, in most UFDA states an attorney may simply issue a California subpoena to the out-of-state witnesses and serve them with what ordinarily constitutes valid process under California law.[37] A good resource for finding local process servers is available at www.napps.org (National Association of Professional Process Servers). Attorneys may also work with a local process server to find an affiliate in the foreign state.

States that follow the UFDA will enforce the subpoena as though it originated in the state. If the subpoenaed witness fails to attend, the attorney may need to file a motion to compel with the foreign state court.[38] Although the court will enforce the subpoena, the California attorney may need to retain local counsel for the enforcement proceeding.

A second category of states, including New Mexico, will issue a subpoena to a nonparty witness upon receipt of a copy of a California Notice of Deposition or of an agreement between the parties to a deposition.[39] In these states, the California attorney may usually provide the court of a deponent's residence with a copy. For some courts, the documents may simply be sent with a cover letter from counsel; other courts require a more detailed submission process. The court or clerk will then issue a subpoena upon request, and the California attorney follows the same course of action to ensure its enforcement as in a UFDA state.

A third category of states, including Alabama and Kentucky, requires a letter rogatory or commission from a California court before issuing a subpoena to the out-of-state deponent.[40] California's Code of Civil Procedure authorizes the issuance of a commission whenever "necessary or convenient."[41] Although very few states have statutes requiring these documents, other state courts may still request them in reliance on old rules or court tradition. This underscores the importance of consulting the local clerk.

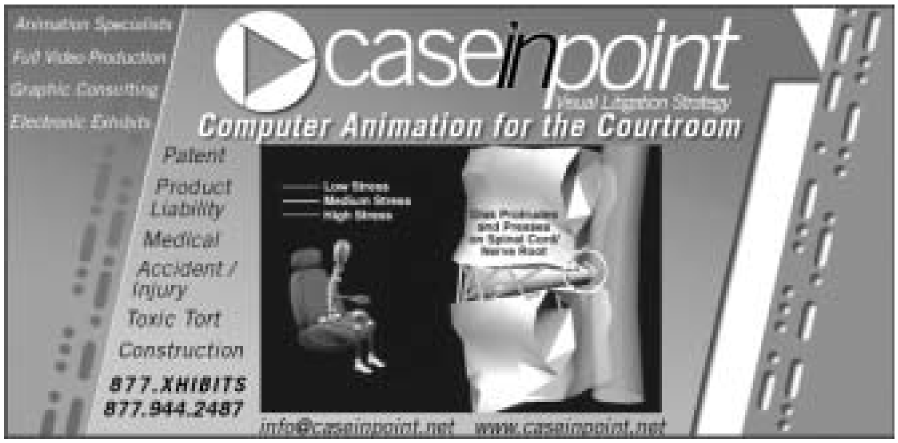
The commission or letter rogatory may contain whatever terms the foreign jurisdiction requires to initiate the process; forms are widely available in various practice guides.[42] After drafting the document, the California attorney should ask the clerk the best way to get the document to the judge. Some courts allow the documents to be sent with a letter, but others require a more formal petition.

### Local Counsel Still Required

A fourth category of states, including Arizona and New Jersey, still require the California attorney to retain local counsel and file an entirely new action (usually a miscellaneous action) in the state where the deponent resides before the court will issue a subpoena.[43] This can be an expensive and time-consuming process because of the need to learn the local pleading requirements before filing. After initiating the action, the California attorney files a motion in that state requesting permission to take the deposition. Again, the court clerk is the most valuable source of information. However, if local counsel will be hired, they may be better situated to draft and file the appropriate pleadings.

Finally, the fifth and newest category of states are those that have adopted the UIDDA. At least five states, including Colorado, Utah, and Maryland, already have adopted the UIDDA. Other states, including California, have bills currently pending in their state legislatures or have adopted the act with an effective date in the near future. The process for issuing an enforceable subpoena in a UIDDA state is








fairly straightforward. The attorney need only issue a California subpoena and deliver it to the foreign court's clerk along with an application and fee, whereupon the foreign court will issue its own enforceable subpoena.[44]

Regardless of which category applies, compelling the deponent's cooperation is the most difficult aspect of taking an out-of-state deposition. After the subpoena is issued and enforced, attorneys may proceed with the deposition using the same rules and procedures with which they are familiar in California.[45]

It remains to be seen how California courts will apply the new interstate deposition law, but the detailed provisions of the UIDDA should bring more consistency to the process. In the interim, attorneys who are deposing California witnesses in out-of-state actions should not forget to talk with the foreign court clerk about how best to obtain a subpoena in that county. Attorneys deposing witnesses in foreign jurisdictions for California matters should similarly rely on court clerks and, if possible, the experience of local counsel.

All attorneys should realize that while the adoption of the UIDDA promises to bring more clarity to the muddled procedures presently in force, until it is adopted by every state, the best approach is to consult local clerks. ■

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[1] The Uniform Interstate Depositions and Discovery Act (codified at Code Civ. Proc. §§2029.100 *et seq.*).
[2] Uniform Foreign Depositions Act §1.
[3] Uniform Interstate Depositions and Discovery Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/iddda/2007act_final.pdf (last visited July 22, 2008).
[4] California Law Revision Commission: Tentative Recommendation, Civil Discovery, Miscellaneous Issues, *available at* http://www.clrc.ca.gov/pub/Misc-Report/TR-DiscMisc.pdf (last visited July 22, 2008) (hereinafter California Law Revision Commission).
[5] *Id.*
[6] AB 2193: Bill Analysis, *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2151-2200/ab_2193_cfa_20080701_133818_sen_floor.html (last visited July 22, 2008).
[7] California Law Revision Commission, *supra* note 4.
[8] *Id.*
[9] Code Civ. Proc. §2029.010.
[10] Code Civ. Proc. §2025.250(a).
[11] *Id.*
[12] California Law Revision Commission, *supra* note 4.
[13] Code Civ. Proc. §§2025.010, 2029.010.
[14] California Law Revision Commission, *supra* note 4.
[15] Cal. R. Ct. 9.47.
[16] California Law Revision Commission, *supra* note 4. Unfortunately, the UIDDA has not clarified this ambiguity.
[17] Uniform Interstate Depositions and Discovery Act (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/iddda/2007act_final.pdf (last visited July 22, 2008).
[18] *Id.*
[19] Code Civ. Proc. §2029.300(a)-(b).
[20] Code Civ. Proc. §2029.300(c).
[21] Code Civ. Proc. §2029.350(a).
[22] Code Civ. Proc. §2029.350(b).
[23] Code Civ. Proc. §§2029.400, 2029.500.
[24] Code Civ. Proc. §§2029.200(c), 2029.500.
[25] Third Supplement to Memorandum 2008-12, 2008 Legislative Program: AB 2193 (Tran), *available at* http://www.clrc.ca.gov/pub/2008/MM08-12s3.pdf (last visited July 22, 2008).
[26] *Id.*
[27] Code Civ. Proc. §2029.620(c)(2).
[28] Code Civ. Proc. §2029.500.
[29] Code Civ. Proc. §2026.010(a).
[30] Code Civ. Proc. §2026.010(c).
[31] International Ins. Co. v. Montrose Chem. Corp., 231 Cal. App. 3d 1367, 1370-71 (1991).
[32] Code Civ. Proc. §2025.440(b).
[33] Code Civ. Proc. §2025.440(a).
[34] Code Civ. Proc. §2026.010(c).
[35] Code Civ. Proc. §2026.010; N.Y. C.P.L.R. §3102; Fla. Stat. §92.251; Tex. Civ. Prac. & Rem. §20.002.
[36] Uniform Foreign Depositions Act §1.
[37] *Id.*
[38] Warford v. Medeiros, 160 Cal. App. 3d 1035 (1984).
[39] Utah R. Civ. P. 26(h); N.M. Stat. Ann. §38-8-1.
[40] Ala. R. Civ. P. 28(c); Ky. R. Civ. P. 28.03.
[41] Code Civ. Proc. §2026.010(f).
[42] *See, e.g.*, Weil et al., California Practice Guide: Civil Procedure before Trial (2007).
[43] Ariz. R. Civ. P. 30(h); N.J. R. Civ. P. 4:11-4.
[44] Uniform Interstate Depositions and Discovery Act (2007), *supra* note 17.
[45] The law of the state where a deposition is taken may apply to claims of privilege of a nonparty deponent. *See* Palmer v. Fisher, 228 F. 2d 603, 608 (7th Cir. 1955).