

Smooth Subpoenaing

Ohio Joins the Majority of States by Adopting the Uniform Interstate Depositions and Discovery Act

BY ERIC B. LEVASSEUR & BETH K. KAVOURAS

In a significant change to Ohio law that will streamline the process for out-of-state litigants to obtain discovery in Ohio, effective September 14, 2016, the Ohio legislature adopted the Uniform Interstate Depositions and Discovery Act (UIDDA). Designed to eliminate the procedural hoops one would typically need to jump through to obtain discovery and enforce a subpoena in a foreign jurisdiction, the UIDDA — already adopted in nearly 40 other states — simplifies the foreign discovery process to the benefit of Courts and practitioners alike.

Generally, a state court's power to subpoena is limited to the state in which it sits. As a result, each state historically had its own procedures to deal with the situation where parties in discovery in a second state sought to depose or obtain discovery from a non-party in the first state. This resulted in a complicated patchwork of laws with requirements that varied from state to state, often requiring parties to obtain discovery commissions in the first state and then local counsel in the second state to complete the process.

Before Ohio adopted the UIDDA, a non-Ohio party who wished to depose a person within Ohio had to conform to the Uniform Foreign Depositions Act as adopted by the now-repealed §2319.09 of the Ohio Revised Code — a statute that had been in effect since 1920. That statute provided that “[w]henver 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 in this state, witnesses may be compelled to appear and testify in

the same manner and by the same process and proceedings as are employed for the purpose of taking testimony in proceedings pending in this state.”

This meant that in Cuyahoga County, for example, for an out-of-state litigant to subpoena a deponent here for a deposition, or to obtain documents through a subpoena duces tecum, the out-of-state party needed to prepare a petition for issuance of foreign subpoena, fill out a Cuyahoga County Court of Common Pleas designation form, fill out the Cuyahoga County Rule 45 subpoena, and draft a proposed court order. The Cuyahoga County Clerk's Office then assigned a miscellaneous case number upon filing — even though this was a case pending in another state, and certainly not the Cuyahoga County Court of Common Pleas — and the subpoena needed to be approved by a judge. Furthermore, the petition needed to be filed by an attorney licensed to practice law in Ohio, and the Cuyahoga County Clerk's Office recommended that it be served in person and walked through for the judge's signature. After all that, the out-of-state party or local counsel then needed to forward the subpoena to the sheriff's department or an authorized process server for actual service. In other words, it was a complicated and onerous process, and many other states had similarly torturous procedures.

First introduced by the National Conference of Commissioners on Uniform Laws (now the Uniform Law Commission) in 2007, the UIDDA is designed to simplify this process. It is a uniform procedure for litigants to depose individuals and discover materials that are located out of state.

The UIDDA has already been adopted by the vast majority of states, including Ohio-adjacent states like Pennsylvania, West Virginia, Michigan, Kentucky, and Indiana. The other states and territories that have adopted the UIDDA are Alabama, Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, Wisconsin. The UIDDA is also currently pending legislative approval in Arkansas.

The new §2319.09 of the Ohio Revised Code specifically cites the need to promote uniformity of the law among states with similar rules, and the prevalence of the UIDDA around the country means that Ohio now stands in good stead with its neighboring jurisdictions.

Efforts to simplify and streamline the foreign discovery process are not without precedent. In 1920, the Uniform Foreign Depositions Act was introduced, and while it was adopted in Ohio under the now-repealed §2319.09, only 12 other states followed suit, meaning that the Act was hardly uniform. Even worse was 1962's Uniform Interstate and International Procedure Act, which was adopted by only four states. Before the UIDDA was enacted in Ohio, Ohio's laws on the subject remained unchanged since 1920, spanning a period of time in which interstate discovery has only been growing more and more common.

In the Ohio Senate, the UIDDA was sponsored by Bill Seitz, R-Cincinnati. It was introduced in May 2015, and was passed unanimously in both the House and Senate.

The process established by the UIDDA is much more straightforward than the previous rule. Under the UIDDA, a subpoena from the state in which the action is pending may be reissued as a subpoena from the state in which discovery is being sought. For example, now that Ohio has enacted the UIDDA, a party located outside of Ohio seeking to depose a person within Ohio need only to submit a foreign subpoena (read: no commission) to a clerk of court in the county in which discovery is sought, requesting that the clerk issue the subpoena. Then, the UIDDA requires the clerk to promptly issue the subpoena to be served upon the person to which the foreign subpoena is directed. The new Ohio subpoena must adhere to the Ohio Rules of Civil Procedure and to any statute relating to service of subpoenas and compliance with subpoenas. The terms of the new Ohio subpoena must incorporate the same terms as the original subpoena and contain the contact information for all counsel of record and any party not represented by counsel.

Out-of-state attorneys will no longer need to obtain local counsel in Ohio simply to obtain issuance and service of a subpoena. This is because the UIDDA specifies that causing the Ohio clerk of courts to issue a subpoena does not constitute an appearance in the court, but is still sufficient to invoke jurisdiction over the deponent. Since the clerk of courts is able to oversee the process,

this means that judges do not need to add this administrative task to their already overloaded dockets. The UIDDA also further minimizes judicial oversight by eliminating preliminary steps like obtaining a commission, letters rogatory, or filing a miscellaneous action. In so doing, the UIDDA parallels Rule 45 of the Federal Rule of Civil Procedure, with which many practitioners are likely already familiar.

Even though the new statute imposes fewer burdens on out-of-state litigants and requires less oversight from Ohio courts and judges, it does not mean that Ohio courts are relinquishing all control over subpoenas served here. The UIDDA requires that any application to the court for a protective order or motions brought to enforce, quash, or modify a subpoena issued in Ohio under the UIDDA must comply with the Ohio Rules of Civil Procedure. Furthermore, these motions must be submitted to the court in the county in which discovery is to be conducted. This means that Ohio courts are still able to protect Ohio residents from overly burdensome or harassing discovery requests. It also means that if there is a discovery dispute, the non-Ohio attorney will likely need to retain local counsel in Ohio.

With the passage of the UIDDA, Ohio has joined the ranks of the vast majority of states that have adopted versions of the law in a bid to make interstate discovery less arduous. Streamlining this process will likely save

time and money for all involved, and will spare attorneys the headache of having to interpret a new set of rules every time they need to subpoena discovery in another state. Non-Ohio attorneys who wish to serve subpoenas in Ohio can start enjoying the UIDDA's benefits immediately; while the new rule went into effect September 14th, it is important to note that it applies to requests for discovery not only in all new matters, but also in all cases pending on that date.



Eric B. Levasseur is a Partner with Hahn Loeser & Parks LLP, where he is a member of Firm's Litigation Area and Construction Law Practice Group. He attended Colgate University ('99) and Case Western Reserve University School of Law ('02). Eric has been a CMBA member since 2002. He can be reached at (216) 274-2346 or eblevasseur@hahnlaw.com.



Beth K. Kavouras is an Associate with Hahn Loeser & Parks LLP, where she practices in the areas of complex commercial litigation and art and museum law. She attended Colgate University ('09) and The University of Michigan Law School ('12). Beth has been a CMBA member since 2012. She can be reached at (216) 274-2476 or bkavouras@hahnlaw.com.

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