



STATE OF NEW YORK
UNIFIED COURT SYSTEM
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ANN PFAU
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

December 23, 2010

TO: County Clerks

FROM: John W. McConnell
Holly Nelson Lütz

SUBJECT: Uniform Interstate Depositions and Discovery Act (L. 2010, c. 29)

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As you know, on January 1, 2011, the Uniform Interstate Depositions and Discovery Act (L. 2010 c. 29) takes effect in New York State. The Act, incorporated in a new CPLR section 3119, sets forth an efficient and inexpensive procedure for out-of-state litigants to conduct deposition and document discovery in New York State, eliminating the need to obtain letters rogatory or a commission. For your convenience, a copy of the new law is attached, together with the sponsor's memorandum (Exh. A). Because the County Clerks' offices will play a major role in the Act's implementation, we thought you might find useful the following brief summary of its provisions.

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Under the Act, litigants from other states may file with a County Clerk's office in the county where the discovery will take place an out-of-state subpoena seeking discoverable materials or individuals in New York. Following such filing, the Act directs the Clerk to issue a New York State subpoena for service upon the person or entity to which the original subpoena is directed. The terms of the subpoena issued in New York 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. There is no need to present the matter to a New York judge before issuing the subpoena.

Several practical points bear mention:

- The term “subpoena” under the Act includes subpoenas *duces tecum*, subpoenas *ad testificandum*, and subpoenas to permit inspection of premises; it does not include subpoenas for inspection of a person.
- The litigant is not required to commence an action in New York State or purchase an index number for the purposes of the Act; a request for issuance of a subpoena does not constitute an appearance in the courts of New York State.
- The Act does not require the County Clerk’s Office to draft the New York subpoena. Instead, the litigant presenting the out-of-state subpoena shall also provide a prepared New York subpoena to the clerk for approval and stamping.
- The New York subpoena presented to the County Clerk’s Office for approval should (1) identify the name of the deponent/recipient; (2) provide the date, time and location of the deposition, and/or description of the documents to be produced; (3) include a paragraph stating the consequences of a failure to appear; and (4) identify the out-of-state action and recite that it is issued under the provisions of the Act. For your convenience, we’ve attached an exemplar showing how this information might be presented in a typical subpoena (Exh. B). (Please note that this attachment is merely a suggested approach, and is not a model or form subpoena.)
- While the Act does not expressly provide for a new filing fee, we believe that County Clerks may assess a total of \$10 (outside the City of New York) or \$15 (within the City of New York) for the combined services of filing of the out-of-state subpoena and issuance of a New York subpoena, pursuant to CPLR §§8021(b)(1) and 8021(c)(1). Of course, it is recommended that revenue collection records for such fees be maintained in the normal course.
- The Clerk is not required to serve the subpoena.

Finally, the Act provides that a licensed New York attorney who has been retained by an out-of-state litigant and has received “the original or a true copy” of the out-of-state subpoena may issue the New York subpoena. CPLR 3119(b)(4). In such cases, no action is required by the County Clerk or the Court.

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Of course, this memorandum is designed to present only highlights of the Act. If you have any questions on its details or implementation, please feel free to contact Holly Nelson Lütz of Counsel's Office at (518) 474-7469.

And as always, thank you for your kind assistance.

cc: Hon. Fern A. Fisher
Hon. Michael V. Coccoma
Administrative Judges
Ronald P. Younkins, Esq.
Maria Logus, Esq.
Maria Barrington
District Executives
New York City Chief Clerks

EXHIBIT A

LAWS OF NEW YORK, 2010

CHAPTER 29

AN ACT to amend the civil practice law and rules, in relation to disclosure in New York state in an action pending in another jurisdiction

Became a law March 30, 2010, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "uniform interstate depositions and discovery act".

§ 2. The civil practice law and rules is amended by adding a new section 3119 to read as follows:

§ 3119. Uniform interstate depositions and discovery. (a) Definitions. For purposes of this section:

(1) "Out-of-state subpoena" means a subpoena issued under authority of a court of record of a state other than this state.

(2) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(3) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(4) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(i) attend and give testimony at a deposition;

(ii) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody or control of the person; or

(iii) permit inspection of premises under the control of the person.

(b) Issuance of subpoena. (1) To request issuance of a subpoena under this section, a party must submit an out-of-state subpoena to the county clerk in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute an appearance in the courts of this state.

(2) When a party submits an out-of-state subpoena to the county clerk, the clerk, in accordance with that court's procedure and subject to the provisions of article twenty-three of this chapter, shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed.

(3) A subpoena under paragraph two of this subdivision must:

(i) incorporate the terms used in the out-of-state subpoena; and

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

(4) Notwithstanding paragraph one of this subdivision, if a party to an out-of-state proceeding retains an attorney licensed to practice in this state, and that attorney receives the original or a true copy of an

EXPLANATION--Matter in italics is new; matter in brackets [-] is old law to be omitted.

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out-of-state subpoena, the attorney may issue a subpoena under this section.

(c) Service of subpoena. A subpoena issued under this section must be served in compliance with sections two thousand three hundred two and two thousand three hundred three of this chapter.

(d) Deposition, production and inspection. Sections two thousand three hundred three, two thousand three hundred five, two thousand three hundred six, two thousand three hundred seven, two thousand three hundred eight and this article apply to subpoenas issued under subdivision (b) of this section.

(e) Application to court. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.

(f) Uniformity of application and construction. In applying and constructing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 3. Subdivision (e) of section 3102 of the civil practice law and rules is amended to read as follows:

(e) Action pending in another jurisdiction. [When] Except as provided in section three thousand one hundred nineteen of this article, when under any mandate, writ or commission 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 the state, he or she may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to requests for discovery in cases pending on or after such effective date.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

MALCOLM A. SMITH
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4256

SPONSOR: SCHNEIDERMAN

TITLE OF BILL:

An act to amend the civil practice law and rules, in relation to disclosure in New York state in an action pending in another jurisdiction

This is one in a series of measures being introduced at the request of the Chief Administrative Judge on the recommendation of her Advisory Committee on Civil Practice.

In 2008, on the advice of our Advisory Committee, we recommended amending the CPLR to adopt the Uniform Interstate Depositions and Discovery Act (" Act") as promulgated by the National Conference of Commissioners of Uniform State Laws in 2007. The Act sets forth an efficient and inexpensive procedure for litigants to depose out-of-state individuals and for the production of discoverable materials that may be located outside the trial state. In 2009, we again endorse New York's adoption of the Act. This year, however, we amend our proposal by (1) adding a subparagraph (b) (4) to CPLR section 3119 to ensure that the law is clear regarding the ability of an attorney, licensed to practice in this state and retained by a party to an out-of-state-proceeding, to issue a subpoena under this Act and (2) adding a reference to CPLR Article 23 in proposed new section 3119(b) (2) and a reference to CPLR Article 31 in proposed new section 3119(d) to make it explicit that these articles apply to this Act.

Under the Act, litigants can submit to the county clerk of the county, located in the state where discoverable materials or individuals are sought, a subpoena issued under the authority of a court in the trial state. Once the discovery state clerk receives the out-of-state subpoena, the clerk will issue a subpoena for service upon the person or entity to which the original subpoena is directed. The terms of the subpoena issued in the discovery state 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.

The Act requires minimal judicial oversight since there is no need to present the matter to a judge in the discovery state before a subpoena is issued. The procedure set forth is inexpensive because it eliminates the need to obtain a commission or local counsel in the discovery state or letters rogatory, or to file a miscellaneous action during the discovery phase of litigation.

Under the Act, discovery authorized by the subpoena must comply with the rules of state in which it occurs. Furthermore, motions to quash, enforce, or modify a subpoena issued pursuant to the Act shall be brought in and governed by the rules in the discovery state. The county clerk in the discovery state acts in a purely ministerial role, but in a manner that is sufficient to invoke jurisdiction of the discovery state over the deponent. The Act recognizes that the discovery state has a

significant interest in protecting its residents who become non-party witnesses in an action pending in another jurisdiction from unreasonable or burdensome discovery requests.

In particular, this measure adds a new section 3119 to the CPLR, and appropriately references sections of the CPLR where particularly applicable. Notably, under subdivision (a) the term "subpoena" includes a subpoena duces tecum, and does not include a subpoena for inspection of a person. We recognize that medical examinations in a personal injury case, for example, are separately controlled by existing discovery rules. Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena for his or her examination should never be necessary. Further, the term "court of record" is intended to exclude non-court of record proceedings to avoid expansion to arbitration proceedings. Also, the term "submit" to a county clerk is intended to include delivering to or filing. Submitting a subpoena to the clerk in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

This measure 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 (in contrast with CPLR 3108). The Act does, however, 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. Finally, this measure modifies existing section 3102(e), which currently governs compelling a witness found in New York to give testimony for use in a foreign jurisdiction, since the Act supersedes that section with respect to actions pending in another state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands and certain other territories subject to U.S. jurisdiction.

This measure, which would have no fiscal impact on the State, would take effect on the first day of January next succeeding the date on which it shall have become a law and apply to requests for discovery in cases pending on or after such effective date.

2008 LEGISLATIVE HISTORY:

OCA 2008-101 Senate 7572 (Sen. Volker)

Codes

EXHIBIT B

**COMPOSITE EXEMPLAR OF NEW YORK SUBPOENA
PURSUANT TO THE UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT (L. 2010, c.29)**

State of New York Civil Practice Law and Rules § 3119

**PLEASE NOTE:
COUNTY CLERKS IN NEW YORK DO NOT PROVIDE SUBPOENA FORMS.
THIS EXAMPLAR IS NOT AN OFFICIAL FORM, AND IS PRESENTED FOR
ILLUSTRATIVE PURPOSES ONLY.**

STATE OF NEW YORK
COUNTY OF _____ COUNTY CLERK LOG NO. _____

| | |
|---|--|
| <p>_____, Plaintiff/Petitioner, v. _____, Defendant/Respondent.</p> | |
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**SUBPOENA
(pursuant to the Uniform Interstate
Depositions and Discovery Act and
CPLR §3119)**

Originating State: _____
Originating County: _____
Originating Court: _____
Originating Case number: _____

**SUBPOENA/ SUBPOENA DUCES TECUM
pursuant to the Uniform Interstate Depositions and Discovery Act
(Personal Attendance Required/Not Required)**

TO: [NAME]
[ADDRESS]

WE COMMAND YOU to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. and each of you appear and attend before _____ at _____, on the _____ day of _____, 20____, at _____ o'clock, in the ____ noon, and at any recessed or adjourned date to give testimony in this action on the part of _____;

and/or that you bring with you, and produce at the time and place aforesaid, the following documents, electronically stored information, or objects, and permit their inspection, copying, testing or sampling of the material:

_____;

and/or that you permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date and location set forth below, so that we may inspect, measure, survey,, photograph, test, or sample the property or any designated object or operation on it

_____.

FAILURE TO COMPLY with this SUBPOENA is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed one hundred fifty dollars and all damages sustained by reason of your failure to comply.

Additional Information:
[if any is contained in the Out-of-State subpoena]

Contact Information of Counsel for all parties
(or contact information for parties pro se)
in the action:

Name
Address
Telephone Number
Party(ies) Represented:
(Repeat as required.)

Dated: _____, _____ (state)

FIRM

BY: _____
Attorney/Other
Address
Telephone