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INTERSTATE DEPOSITION STATUTES: SURVEY AND ANALYSIS†

Timothy L. Mullin, Jr.††

The ability to make effective use of discovery outside a forum state requires a thorough understanding of interstate deposition statutes. In this article, the author compares various provisions of many interstate deposition statutes and the two uniform acts. Additionally, the author provides a detailed analysis of the practical problems involved in acquiring and making use of depositions from foreign jurisdictions.

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I. INTRODUCTION

Discovery in jurisdictions other than a forum state is often a necessity for proper litigation. With respect to lawsuits filed in federal court, the Federal Rules of Civil Procedure provide a convenient method for conducting discovery throughout the country.¹ While many states have adopted rules of civil procedure modeled after the federal rules,² state courts remain courts of limited territorial jurisdiction³ and enjoy neither nationwide service of process⁴ nor nationwide enforcement of their orders.

Although a court in the trial state⁵ may compel parties to the litigation to submit to discovery procedures through sanctions involving the pending action,⁶ non-parties outside the court's territory are generally not subject to its jurisdiction.⁷ Thus, absent

1. See, e.g., FED. R. CIV. P. 45(d).

2. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 63, at 294 (3d ed. 1976). See generally Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1960).

3. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

4. The trend has been to expand the reach of state service of process statutes. See, e.g., UNIF. INTERSTATE & INT'L PROC. ACT §§ 1.01-.06, 13 U.L.A. 463-78 (master ed. 1980) [hereinafter cited as UIIPA]. However, due process limits the reach of state "long-arm" statutes. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

5. Throughout this article, the term "trial state" is used to refer to the state in which the trial or proceeding, in contrast to the deposition, is being held.

6. See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1050 (1961) [hereinafter cited as *Discovery*]. For a good description of the sanctions available, see FED. R. CIV. P. 37. Sanctions similar to the ones described in rule 37 are available in most states. See, e.g., ARIZ. R. CIV. P. 37; ME. R. CIV. P. 37; MO. R. CIV. P. 61.01.

7. See *Discovery*, *supra* note 6, at 1050.

some mechanism for enforcing a trial state discovery order in the discovery state,⁸ any non-party not found within the trial state may escape the discovery process.⁹ The demands of litigation, which often require discovery of persons outside the state of trial, make this result untenable. In light of the questionable continuance of federal court diversity jurisdiction,¹⁰ the problem becomes particularly acute. If diversity jurisdiction is eliminated by Congress, familiarity with the discovery methods and procedures of foreign jurisdictions will be of even greater importance to every practitioner.

The most widely employed discovery method is the deposition. Fortunately, every state¹¹ has either a statute or rule providing for the taking of depositions of persons within the jurisdiction for use in an out-of-state proceeding.¹² These state provisions vary considerably, despite the existence of two uniform acts.¹³ More than thirty-three variations of foreign deposition statutes¹⁴ exist

8. Throughout this article, the term "discovery state" is used to refer to the state in which the person sought to be deposed is found.
9. See *Discovery*, *supra* note 6, at 1050.
10. See S. 677, 96th Cong., 1st Sess. (1979); S. 678, 96th Cong., 1st Sess. (1979); H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. H1553 (daily ed. Feb. 28, 1978). See also H.R. REP. NO. 95-893, 95th Cong., 2d Sess. (1978).
11. "State," as used throughout this article, includes the District of Columbia.
12. ALA. R. CIV. P. 28(b); ALASKA R. CIV. P. 27(c); ARIZ. R. CIV. P. 30(h); ARK. R. CIV. P. 28(c); CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); COLO. REV. STAT. § 13-90-111 (1973); CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981); DEL. CODE ANN. tit. 10, § 4311 (1974); D.C. CODE ANN. § 14-103 (1973); FLA. STAT. ANN. § 92.251 (West Supp. 1979); GA. CODE ANN. § 38-2201 (1974); HAWAII REV. STAT. § 624-27 (1976); IDAHO R. CIV. P. 28(e); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); IND. R. TRIAL P. 28(E); IOWA CODE ANN. § 622.84 (West Supp. 1981-1982); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; LA. REV. STAT. ANN. §§ 13:3821, 3824 (West 1968); ME. R. CIV. P. 30(h); MD. CTS. & JUD. PROC. CODE ANN. § 9-401 (1980); MASS. GEN. LAWS ANN. ch. 223A, § 11 (West Supp. 1981); MICH. COMP. LAWS ANN. § 600.1852(2) (1981); MINN. R. CIV. P. 45.04; MISS. CODE ANN. § 13-3-97 (1972); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); NEB. REV. STAT. § 25-1267.18 (1979); NEV. REV. STAT. § 53.060 (1973); N.H. REV. STAT. ANN. § 517:18 (1974); N.J. R. CIV. PROC. 4:11-4; N.M. STAT. ANN. § 38-8-1 (1978); N.Y. CIV. PROC. LAW § 3102(e) (McKinney 1970); N.C. R. CIV. P. 28(d); N.D. CENT. CODE § 31-05-22 (1976); OHIO REV. CODE ANN. § 2319.09 (Page 1953); OKLA. STAT. ANN. tit. 12, § 462 (West 1960); *id.* § 1703.02 (West 1980); OR. REV. STAT. § 45.910 (1979-1980); 42 PA. CONS. STAT. ANN. § 5326 (Purdon Supp. 1981); R.I. GEN. LAWS § 9-18-11 (1969); S.C. CODE § 19-15-90 (1976); S.D. COMP. LAWS ANN. § 19-5-4 (1967); TENN. CODE ANN. § 24-9-103 (1980); TEX. REV. CIV. STAT. ANN. art. 3769a (Vernon Supp. 1980-1981); UTAH R. CIV. P. 26(f); VT. STAT. ANN. tit. 12, § 1248 (1973); VA. CODE § 8.01-411 (1977); WASH. SUPER. CT. CIV. R. 45(d)(4); W. VA. R. CIV. P. 28(d); WIS. STAT. ANN. § 887.24 (West 1966); WYO. STAT. § 1-12-115 (1977). See also D.C. SUPER. CT. R. CIV. P. 28-1(b); MICH. GEN. CT. R. 305.11.
13. UIIPA, *supra* note 4, §§ 3.01-.03 at 487-94; UNIF. FOREIGN DEPOSITIONS ACT, 9B U.L.A. 62-63 (1966) (superseded by Uniform Interstate and International Procedure Act) [hereinafter cited as UFDA].
14. As used throughout this article, the term "foreign deposition" includes only those depositions taken in one state to be used in another state. The subject of discovery across international borders, while fascinating, is best left to other works.

among the fifty-one jurisdictions. Many of these statutes may be placed into one of several major categories. Nevertheless, there remain over twenty statutes that defy categorization.

This article discusses and compares different interstate deposition statutes and the uniform acts. Emphasis is placed on the procedural requirements of these statutes and the practical problems associated with compliance. Finally, acceptance of a unified system to facilitate out-of-state discovery is advocated.

II. THE UNIFORM ACTS

Two uniform acts dominate the area of interstate depositions: the Uniform Foreign Depositions Act (UFDA) and the Uniform Interstate and International Procedure Act (UIIPA). The UFDA was promulgated in 1920 and is presently in effect in fourteen states.¹⁵ Section 1 of the UFDA provides:

Whenever 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 or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.¹⁶

In 1962, the National Conference of Commissioners on Uniform State Laws approved the other uniform act, the UIIPA, parts of which were meant to supersede the UFDA.¹⁷ Section 3.02(a) of the UIIPA deals with the subject of assisting foreign tribunals in the taking of depositions:

[A court] . . . of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for

15. FLA. STAT. ANN. § 92.251 (West Supp. 1979); GA. CODE ANN. § 38-2201 (1974); LA. REV. STAT. ANN. § 13:3821 (West 1968); MD. CTS. & JUD. PROC. CODE ANN. § 9-401 (1980); NEB. REV. STAT. § 25-1267.18 (1979); NEV. REV. STAT. § 53.060 (1973); N.D. CENT. CODE § 31-05-22 (1976); OHIO REV. CODE ANN. § 2319.09 (Page 1953); OKLA. STAT. ANN. tit. 12, § 462 (West 1960); OR. REV. STAT. § 45.910 (1979-1980); S.D. COMP. LAWS ANN. § 19-5-4 (1967); TENN. CODE ANN. § 24-9-103 (1980); VA. CODE § 8.01-411 (1977); WYO. STAT. § 1-12-115 (1977); cf. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981) (adds procedural requirements to the UFDA); N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970) (similar statute based on the UFDA).

There are slight variations in some state versions of the UFDA. See N.D. CENT. CODE § 31-05-22 (1976); TENN. CODE ANN. § 24-9-103 (1980).

16. UFDA, *supra* note 13, § 1 at 62. Section 1 is the operative section of the Act. Sections 2 through 5 are boilerplate sections dealing with the title, repeal, and uniformity of interpretation.

17. See UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492-93.

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 the power to administer any necessary oath.¹⁸

Six states have enacted this section of the UIIPA.¹⁹

While certain sections of the UIIPA were meant to supersede the UFDA, two states, Louisiana and Oklahoma, have adopted the UIIPA without repealing the UFDA.²⁰ Because the two uniform acts describe different procedures for dealing with requests from foreign states for process, the question arises which procedure would be followed in these states. In both cases, the evidence points to the conclusion that either procedure may be followed.

Section 3.02 of the UIIPA was enacted in Louisiana in 1966.²¹ The preamble to the Act stated that the new section was "to provide additional methods . . . for taking the testimony of persons in this state for use in a court outside of Louisiana."²² Also, the comments to the codified section note that the UIIPA is to provide an alternative method for taking depositions.²³ Although the Act provided that "[a]ll laws or parts of laws in conflict or inconsistent herewith are repealed,"²⁴ the legislative history indicates that this

18. *Id.* § 3.02 at 492. Other sections of the UIIPA deal with a broad range of subjects in the interstate and international procedure field.

19. IND. R. TRIAL P. 28(E); LA. REV. STAT. ANN. § 13:3824 (West 1968); MASS. GEN. LAWS ANN. ch. 223A, § 11 (West Supp. 1981); MICH. COMP. LAWS ANN. § 600.1852(2) (1981); OKLA. STAT. ANN. tit. 12, § 1703.02 (West 1980); 42 PA. CONS. STAT. ANN. § 5326 (Purdon Supp. 1981). One state has made a non-uniform addition to the section. See MICH. COMP. LAWS ANN. § 600.1852(2) (1981).

20. See LA. REV. STAT. ANN. § 13:3821 (West 1968) (UFDA); *id.* § 13:3824 (UIIPA); OKLA. STAT. ANN. tit. 12, § 462 (West 1960) (UFDA); *id.* § 1703.02 (West 1980) (UIIPA).

21. Act No. 37, 1966 La. Acts 163 (codified at LA. REV. STAT. ANN. § 13:3824 (West 1968)).

22. *Id.*

23. LA. REV. STAT. ANN. § 13:3823 comments-1966(c) (West 1968).

24. Act No. 37, § 3, 1966 La. Acts 163. It may be noted that Louisiana did not adopt the UIIPA provision stating that "[t]his Act does not repeal or modify any other law of this state permitting another procedure for obtaining testimony, documents, or other things for use in this state or in a tribunal outside this state." UIIPA, *supra* note 4, § 3.03 at 493. In light of the intention to retain the provisions of the UFDA, this section should have been enacted. See *id.* § 3.03 commissioners' comment at 494.

section only added to the field of foreign deposition procedure. Consequently, the UFDA provision is not "in conflict or inconsistent" with the UIIPA. Based on the judicial decisions and the history of the statute, the only reasonable interpretation is that both the UFDA and the UIIPA exist concurrently in Louisiana, and parties have the option of proceeding under either one.²⁵

The same option exists under Oklahoma law. In adopting the UIIPA, Oklahoma enacted²⁶ a section of the UIIPA which provides that the Act does not change or repeal existing law.²⁷ This section negates any inference of implied repeal,²⁸ and the UFDA was not expressly repealed in Oklahoma. Therefore, both the UIIPA and the UFDA remain in effect in Oklahoma.

For several reasons, the UFDA should be repealed upon the enactment of the UIIPA. First, the draftsmen of the UIIPA intended for the later uniform act to supersede the former.²⁹ Second, the UFDA adds nothing to state procedure under the UIIPA. A court acting under the UIIPA has the discretion to require the same procedure for taking a deposition to be used elsewhere as is employed for taking a deposition to be used in state, thus making the UFDA same manner provision superfluous.³⁰ Finally, the UIIPA liberalizes the procedure for taking depositions that are to be used in another state. Maintaining the older provision can only result in confusion.³¹ Accordingly, the UFDA should be repealed in both Louisiana and Oklahoma.

III. PROCEDURE

A. *Tribunals and Persons to Whom Discovery State Court Assistance is Available*

When utilizing interstate deposition statutes, practitioners must first determine to whom the assistance of the discovery state court is available. This determination is twofold. First, the statutes often discuss the particular tribunal to which assistance

25. Because Louisiana courts do not favor repeals by implication, *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 587 (La. 1975); *Liter v. City of Baton Rouge*, 258 La. 175, 187, 245 So. 2d 398, 402 (1971), and only where the obvious purpose of the law is to cover the entire subject matter does it supersede prior pertinent legislation, see *Johnson v. Sewerage Dist. No. 2*, 239 La. 840, 858, 120 So. 2d 262, 268 (1960), the conclusion can be drawn that Louisiana's adoption of the UIIPA did not repeal the UFDA.

26. Act of May 24, 1965, ch. 144, § 6.01, 1965 Okla. Sess. Laws 168 (codified at OKLA. STAT. ANN. tit. 12, § 1706.01 (West 1980)).

27. UIIPA, *supra* note 4, § 6.01 at 506.

28. In any event, repeals by implication are not favored by the Oklahoma courts. *AMF Tuboscope Co. v. Hatchel*, 547 P.2d 374, 380 (Okla. 1976). There must be an irreconcilable conflict before a later statute will repeal an earlier one, and this is not the case here. See *Gulf Oil Co. v. Woodson*, 505 P.2d 484, 487 (Okla. 1972).

29. UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492.

30. See *id.* § 3.02 at 492; *id.* § 3.02 commissioners' comment at 493.

31. See *id.* § 3.02 commissioners' comment at 493.

will be given. Second, some statutes also mention the persons who may receive assistance from the discovery state.

1. Tribunals for Which a Discovery State Court Will Facilitate Discovery

Discovery is advantageous not only in judicial proceedings but also in adjudicatory hearings before state administrative agencies³² and in other types of civil investigations.³³ States in which discovery is to be had, however, may wish to limit the extent to which discovery requests emanating from the non-judicial arena may be assisted. The language of some interstate deposition statutes clearly reflects a preference for assisting courts rather than other, less formal adjudicatory bodies, while the language of other statutes is less clear.

A number of statutes contemplate that the discovery state court will assist only in the taking of depositions to be used in the court of another state. This is expressed in several different ways. One of the most restrictive statutes is found in Connecticut.³⁴ Depositions may be taken only if they will be "used as evidence in a civil action or probate proceeding in any court."³⁵ The "used as evidence" requirement may foreclose the use of depositions that may lead to admissible evidence, a common modern discovery practice.³⁶ This limitation causes the Connecticut statute to be unduly narrow.

Other statutes, while not as restrictive as the Connecticut statute, nevertheless reflect a preference for assisting only courts. In South Carolina, for example, the necessary commission must be issued by "any court of judicature" for testimony "touching any cause, matter or thing depending in such court."³⁷ The North Dakota statute adds a non-uniform provision to the UFDA. Although the statute follows the UFDA in requiring that the "mandate, writ, or commission" be issued by a "court of record," it adds that the testimony obtained must "be used in a civil action or proceeding."³⁸ Similarly, the Alabama and North Carolina rules allow assistance in taking depositions "to be used in proceedings pending in the courts of any other state,"³⁹ while the Arkansas

32. See generally 4 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 23.03 (1979).

33. See *In re Klein*, 309 N.Y. 474, 131 N.E.2d 888 (1956).

34. CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981).

35. *Id.*

36. See, e.g., FED. R. CIV. P. 26(b)(1); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2008 (1970) (discussing relevance under the federal rules) [hereinafter cited as 8 WRIGHT & MILLER].

37. S.C. CODE § 19-15-90 (1976).

38. N.D. CENT. CODE § 31-05-22 (1976). For a discussion of the UFDA in this context, see text accompanying notes 55-58 *infra*.

39. ALA. R. CIV. P. 28(b); N.C. R. CIV. P. 28(d).

rule refers to a "judicial proceeding."⁴⁰ Language to the same effect is found in the Arizona rule, which provides that a party seeking assistance file an application stating "the court in which [the action] is pending."⁴¹ Both the District of Columbia and Illinois allow assistance for depositions to be used "in an action pending in a court."⁴² Finally, the New Hampshire statute states that the deposition must be used "in causes pending in [a] court of record."⁴³

Other statutes do not mention the word court or similar terms and, thus, the argument can be made that court assistance may extend to other tribunals. In three states, however, there is other language in the statute that undercuts this argument. The New Mexico provision allows assistance to litigants taking depositions "for use in a legal proceeding or cause."⁴⁴ This language is qualified, however, by a requirement that the order for taking the deposition be "made by the court or judge in a foreign state,"⁴⁵ thereby limiting New Mexico's assistance to judicial proceedings. The Rhode Island statute authorizes assistance only in taking depositions "to be used on the trial of any cause pending in a tribunal of any other state."⁴⁶ Although the use of "tribunal" may be ambiguous, use of the word "trial" indicates that "tribunal" is synonymous with "court." The language of the Minnesota rule also indicates that assistance is available only for judicial proceedings.⁴⁷ It merely states that "[p]roof of service of notice . . . in a state where the action is pending" is sufficient to obtain assistance.⁴⁸ In the context of the rule, however, "action" takes on a decidedly judicial meaning.

Some statutes use even broader language in describing the tribunals that may obtain assistance. For instance, a fair number of statutes authorize assistance to persons wishing to obtain depositions for use in a "proceeding."⁴⁹ The Wisconsin statute authorizes assistance when the testimony is to be used "in any action, cause or proceeding pending in [another] state."⁵⁰ The

40. ARK. R. CIV. P. 28(c).

41. ARIZ. R. CIV. P. 30(h).

42. D.C. CODE ANN. § 14-103 (1973); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982). See also D.C. SUPER. CT. R. CIV. P. 28-1(b).

43. N.H. REV. STAT. ANN. § 517:18 (1974).

44. N.M. STAT. ANN. § 38-8-1 (1978).

45. *Id.*

46. R.I. GEN. LAWS § 9-18-11 (1969).

47. MINN. R. CIV. P. 45.04.

48. *Id.*

49. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; W. VA. R. CIV. P. 28(d).

50. WIS. STAT. ANN. § 887.24 (West 1966).

Utah rule is similar.⁵¹ The Washington rule has no restrictions on the use of a deposition, so long as the person to take it is "authorized . . . by the laws of another state."⁵² Also subject to broad interpretation are the statutes of Delaware and Hawaii. The Delaware provision states that "[w]hen a commission is issued by any court . . . or [when] any other proceeding has been taken for the purpose of taking testimony," a subpoena will be issued.⁵³ The Hawaii statute uses essentially the same language.⁵⁴ Both of these statutes leave open the possibility of assisting persons seeking to take a deposition for use in a tribunal other than a court.

The two uniform acts lend themselves to an expansive reading because they do not limit the use to which a deposition may be put. Instead, they require only that the deposition order come from a particular body. Under the UFDA, "any court of record in any other state, territory, district, or foreign jurisdiction" must issue the order.⁵⁵ The statutes of California and New York, based at least in part on the UFDA, contain the same language.⁵⁶ Similar language may also be found in the statutes of Colorado and Vermont.⁵⁷ Thus, the possibility exists that the taking of depositions for use in non-judicial proceedings may be assisted so long as a court of record is interposed and orders the deposition.⁵⁸ This interpretation should foreclose any abuses that might arise if a wide range of non-judicial bodies were able to seek assistance for discovery orders in the discovery state. The UIIPA adopts this broad interpretation. It states that a court in the discovery state will aid the taking of testimony "for use in a proceeding pending in a tribunal outside [the] state."⁵⁹ The Commissioners' Comment bolsters the argument that "tribunal" is to be viewed broadly: "The term 'tribunal' is intended to encompass any body performing a judicial function. Thus, for example, a request emanating from an investigating magistrate in a foreign country should be honored."⁶⁰ Furthermore, when fashioning its order, the discovery

51. UTAH R. CIV. P. 26(f).

52. WASH. SUPER. CT. CIV. R. 45(d)(4).

53. DEL. CODE ANN. tit. 10, § 4311 (1974).

54. HAWAII REV. STAT. § 624-27 (1976).

55. UFDA, *supra* note 13, § 1 at 62. For a compilation of those states in which the UFDA is presently in force, see note 15 *supra*. Because of a non-uniform addition, the North Dakota statute, N.D. CENT. CODE § 31-05-22 (1976), has already been discussed. See text accompanying note 38 *supra*.

56. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970).

57. COLO. REV. STAT. § 13-90-111 (1973); VT. STAT. ANN. tit. 12, § 1248 (1973). The Vermont statute has the broadest language, in stating that assistance may be rendered to "[a] person who is appointed or commissioned by the governor or a court of record of another state." *Id.*

58. *But see In re Klein*, 309 N.Y. 474, 131 N.E.2d 888 (1956).

59. UIIPA, *supra* note 4, § 3.02 at 492-93. For a compilation of those states in which § 3.02 of the UIIPA is currently in force, see note 19 *supra*.

60. UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492-93.

state court "may take into account . . . the character of the proceedings."⁶¹ Thus, the UIIPA prevents abuse by invoking the court's discretion.

There may be pitfalls to broadly interpreting interstate deposition statutes to include non-judicial bodies or proceedings, as illustrated by *In re Klein*.⁶² In that case, a New Jersey statute authorized judges to make a summary investigation into the affairs of a municipality when forty-nine or more freeholders petitioned the court alleging that municipal funds were being used improperly.⁶³ In response to such a petition, the New Jersey Superior Court appointed an attorney to investigate alleged corruption in the award of a garbage hauling contract to Klein.⁶⁴ The court then specially appointed the attorney to apply to the New York courts for a subpoena directed to Klein, a New York resident. A subpoena was issued in New York, but Klein failed to appear for the deposition. The case arose out of efforts to force Klein to obey the subpoena.⁶⁵

At the time of the case, the New York interstate deposition statute provided: "A party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, . . . may obtain . . . the testimony of a witness, and, in connection therewith, the production of books and papers, within the state, to be used in the action, suit or special proceeding."⁶⁶ Klein argued that the New Jersey investigation was not an "action, suit or special proceeding" and, thus, the New York courts were powerless to assist it.⁶⁷ After reviewing both New York law interpreting the language of the statute and New Jersey cases reviewing the actions of judges under the investigation statute, the Court of Appeals of New York agreed with Klein. The court looked to three important criteria for determining whether the proceeding was judicial: "(1) the presence of parties, (2) the trial and determination of issues, and (3) a final order or judgment of rights, duties or liabilities."⁶⁸ Because the action under the investigation statute failed to satisfy the last two criteria, the court felt it was restrained from acting:

61. *Id.* at 492.

62. 309 N.Y. 474, 131 N.E.2d 888 (1956).

63. *Id.* at 480, 131 N.E.2d at 889.

64. *Id.* at 477, 131 N.E.2d at 889.

65. *Id.* at 477-78, 131 N.E.2d at 889-90. Klein originally moved to quash the subpoena, but the motion was denied. *Id.* at 477, 131 N.E.2d at 889-90. Subsequently, the attorney sought and obtained a show cause order against Klein, and an order directing Klein to appear was issued. *Id.* at 477-78, 131 N.E.2d at 890.

66. *Id.* at 478, 131 N.E.2d at 890. For the statute presently in force in New York, see N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970).

67. 309 N.Y. 474, 479, 131 N.E.2d 888, 891 (1956).

68. *Id.* at 481, 131 N.E.2d at 891-92.

[T]his investigation is a proceeding whose very purpose is a broad and all-inclusive inquiry into municipal government looking to the publication of facts as such. . . . Such a proceeding does not fall within the definition of "action, suit or special proceeding" as those terms are used in our statutes. That being so, there was no authority for the issuance of the subpoena . . . , or for the subsequent order directing the examination of [Klein].⁶⁹

A short dissenting opinion was filed by Judge Desmond.⁷⁰ He noted that the statute was simple and should be liberally construed.⁷¹ Further, he stated that "[s]uch inclusive and sweeping language as 'action, suit or special proceeding, civil or criminal' must have been intended to cover any and every kind of foreign judicial proceeding, whatever its name or special features."⁷² Thus, Judge Desmond adopted a more expansive view of the New York statute.

Klein offers support for the proposition that courts will critically view non-traditional bodies and proceedings when requests for discovery assistance arise. However, its holding should not be broadly construed. Jurisdictions may empower non-judicial bodies to perform judicial functions, including powers to issue and enforce subpoenas. Discovery states should seek to enforce these orders, provided the interstate deposition statute has wording flexible enough to support such a result.⁷³ A court may protect against abuse by scrutinizing the nature of the proceeding and wielding its discretion in appropriate cases.⁷⁴

The result in *Klein* will hopefully not foreclose what appears to be a reasonable means of enforcing the discovery orders of non-court bodies within the bounds of statutes like the UFDA. As previously noted, the language of the UFDA supports the conclusion that, so long as a court of record rules on another body's discovery request before it is presented to the discovery state court, it should be enforced.⁷⁵ In *Klein*, however, the court did specifically authorize Klein's deposition.⁷⁶ Usually, the interposition of a trial state court between the discovery state court and the body seeking a deposition should be enough to protect against abuses and, thus, to ensure discovery state court assistance. Once a trial state court adds its "seal of approval" to the necessity for the deposi-

69. *Id.* at 486, 131 N.E.2d at 895.

70. *Id.* at 486-87, 131 N.E.2d at 895 (Desmond, J., dissenting).

71. *Id.* at 486, 131 N.E.2d at 895 (Desmond, J., dissenting).

72. *Id.* (Desmond, J., dissenting).

73. The statute at issue in *In re Klein* did have that flexibility. See *id.* (Desmond, J., dissenting).

74. See UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492.

75. See text accompanying notes 55-58 *supra*.

76. 309 N.Y. 474, 477, 131 N.E.2d 888, 889 (1956).

tion, the discovery state court should enforce a discovery request within the bounds of the interstate deposition statute.

2. Persons Who May Seek Discovery

Once it is established that the trial state proceeding is one that the interstate deposition statute empowers the discovery state court to assist, the language of the statute must be reviewed for possible limitations on individuals who may seek assistance. In most cases, it is unlikely that anyone but parties to an action would seek depositions. However, since it is possible for non-parties to take depositions,⁷⁷ it is important to look at any potential limitations.

A few interstate deposition statutes limit their reach to parties. The Arkansas rule states that "[a] party desiring to take a deposition . . . for use in a judicial proceeding" may have his witnesses subpoenaed.⁷⁸ Likewise, the Connecticut and Utah statutes provide that any party to an action or proceeding may apply for an order compelling a deposition.⁷⁹ Other statutes also use the term "party," but reading the term in context leaves open the possibility that it is meant in a less technical sense.⁸⁰ These statutes use "party" without the qualifying terms "to an action" or the like and thus indicate that "party" is synonymous with "person."⁸¹ Even though another interpretation would also be reasonable, a broad interpretation of these statutes is desirable.

Rules in two states provide that "[a] person desiring to take depositions . . . to be used in proceedings pending in the courts of any other state" may be assisted.⁸² Although limitations as to which tribunals may be assisted are indicated,⁸³ a person authorized to take a deposition to be used in a trial state proceeding, even if not a party, should be able to compel testimony in the discovery state under these rules.⁸⁴

A number of statutes make this result more explicit. The Iowa and Wisconsin statutes permit a "person authorized" to take a

77. See, e.g., MINN. R. CIV. P. 27.01(1); TEX. R. CIV. P. 187(1).

78. ARK. R. CIV. P. 28(c).

79. CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981); UTAH R. CIV. P. 26(f).

80. "Party" may be defined as "a person or group taking one side of a question, dispute or contest" or "a particular individual." WEBSTER'S NEW COLLEGIATE DICTIONARY 836 (1973); cf. BLACK'S LAW DICTIONARY 1010 (5th ed. 1979) (party may be defined both technically and non-technically).

81. See ARIZ. R. CIV. P. 30(h); DEL. CODE ANN. tit. 10, § 4311 (1974); D.C. SUPER. CT. R. CIV. P. 28-1(b); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h). The District of Columbia rule was promulgated to carry out the interstate deposition statute, D.C. CODE ANN. § 14-103 (1973).

82. ALA. R. CIV. P. 28(b); N.C. R. CIV. P. 28(d).

83. See text accompanying note 39 *supra*.

84. Cf. FED. R. CIV. P. 27 (depositions before action).

deposition to seek assistance in the discovery state.⁸⁵ Similarly, in Illinois and Washington, an "officer or person authorized" may seek assistance,⁸⁶ while in Mississippi and New Hampshire, the class of individuals includes any "commissioner or other person appointed."⁸⁷ Any "person having obtained [a] commission or his agent" may seek a subpoena for a deposition in South Carolina.⁸⁸ Finally, in Vermont, "[a] person who is appointed or commissioned" may compel testimony.⁸⁹ Generally, these statutes allow assistance to anyone authorized to take a deposition by the laws of the trial state.

The UIIPA also contains a broad provision. It authorizes assistance to any "interested person" who makes application.⁹⁰ Although the Commissioners' Comment does not mention the scope of the term "interested person," the liberal nature of the UIIPA should lead to an expansive construction of the term.⁹¹

A majority of states have discovery statutes that do not include limitations on the persons to whom the discovery court may grant assistance. While these statutes are of several types, the general rule seems to be that, so long as the law of the trial state authorizes a person to take a deposition, the discovery state court should assist him in doing so. One group of statutes expressly states this principle. These statutes generally provide that "[w]henver the deposition of any person is to be taken in this state pursuant to the laws of another state," the discovery state court may compel appearance at the deposition.⁹² While not as explicit as others, the Minnesota rule mandates a similar conclusion.⁹³ The language of these statutes indicates that the law of the trial state is dispositive; there is no indication that the discovery state may place further limits on the persons to be assisted. The UFDA also fails to mention limitations pertaining to persons who may request assistance.⁹⁴ Therefore, a non-party authorized by an out-of-state court to take a deposition should be assisted in the discovery state. The statutes of California, Colorado, Rhode Island, and Texas should be construed similarly.⁹⁵

85. IOWA CODE ANN. § 622.84 (West Supp. 1981-1982); WIS. STAT. ANN. § 887.24 (West 1966).

86. ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); WASH. SUPER. CT. CIV. R. 45(d)(4).

87. MISS. CODE ANN. § 13-3-97 (1972); N.H. REV. STAT. ANN. § 517:18 (1974).

88. S.C. CODE § 19-15-90 (1976).

89. VT. STAT. ANN. tit. 12, § 1248 (1973).

90. UIIPA, *supra* note 4, § 3.02 at 492.

91. *See id.* § 3.02 commissioners' comment at 492.

92. ALASKA R. CIV. P. 27(c); HAWAII REV. STAT. § 624-27 (1976); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; N.M. STAT. ANN. § 38-8-1 (1978); W. VA. R. CIV. P. 38(d).

93. MINN. R. CIV. P. 45.04.

94. *See UFDA, supra* note 13, § 1 at 62.

95. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); COLO. REV. STAT. § 13-90-111 (1973); R.I. GEN. LAWS § 9-18-11 (1969); TEX. REV. CIV. STAT. ANN. art. 3769a (Vernon Supp. 1980-1981).

B. Application for Discovery State Court Assistance in Taking a Deposition

Assuming that the trial state proceeding for which discovery is sought is one contemplated by the discovery state's authorizing legislation and that a proper person is before the discovery state court, the next issue for consideration is the procedure for applying to the discovery state court for assistance. To proceed with interstate discovery, it is usually necessary to file an application in the discovery state court requesting assistance in obtaining a deposition for use in a trial state. However, three states — Iowa, Mississippi, and New Hampshire — allow the person authorized by the trial state court to take depositions and to issue subpoenas without any special procedures or even the interposition of a discovery state court.⁹⁶ Most states, including those which have enacted the uniform acts, require at least some overtures to a court to gain assistance.⁹⁷ In some situations, it may even be necessary to obtain a commission from the trial state court before proceeding in the discovery state.

1. General Provisions

The UFDA does not provide a procedural framework for applying to a discovery state court, although the language of the Act does suggest some requirements of an application. The UFDA provides that "[w]hensoever any mandate, writ or commission is issued out of any [trial state] court of record . . . , or whenever upon notice or agreement it is required to take the testimony of a witness . . . , witnesses may be compelled to appear."⁹⁸ As the discovery state court possesses a vast amount of discretion under this statute, it probably has the authority to require an application which confirms the existence of the necessary order from the trial state. On the other hand, since the UFDA provides that depositions for use in trial states be taken in the same manner as those taken for use in the discovery state,⁹⁹ the court may follow the normal state procedure with little variation. Quite simply, the UFDA does not contain specific procedural application requirements.

In contrast to the UFDA, the UIIPA provides a comparatively detailed application procedure. Under the UIIPA, the proper court may compel witnesses to attend a deposition "upon the application of any interested person or in response to a letter rogatory."¹⁰⁰ The drafters of the UIIPA left each discovery state

96. IOWA CODE ANN. § 622.84 (West Supp. 1981-1982); MISS. CODE ANN. § 13-3-97 (1972); N.H. REV. STAT. ANN. § 517:18 (1974). The Iowa statute does explicitly provide for court enforcement of subpoenas.

97. *But see* WIS. STAT. ANN. § 887.24 (West 1966) (makes no mention of an application).

98. UFDA, *supra* note 13, § 1 at 62.

99. *Id.*

100. UIIPA, *supra* note 4, § 3.02 at 492.

free to choose the specific courts that should receive the application for assistance.¹⁰¹ Of those states which have adopted the UIIPA, four have chosen not to limit which courts may render assistance.¹⁰² Conversely, the Pennsylvania version of the UIIPA allows only a "court of record" to render assistance to a trial state tribunal.¹⁰³ The Michigan statute is more explicit as to which courts may render assistance. It first provides that "[a]ny court of record" may assist a trial state tribunal in the taking of a deposition.¹⁰⁴ It then continues with the addition of a non-uniform provision: "The order [compelling testimony] shall be issued upon petition to a court of record in the county in which the deponent resides or is employed or transacts his business in person or is found" ¹⁰⁵ Thus, in Michigan, application must be made to a court in the proper place.

While some states have adopted the uniform acts, other states have enacted statutes regulating the procedures for seeking authorization to obtain interstate discovery. The New Jersey rule is illustrative of such a provision: "Whenever the deposition of a person is to be taken in this state pursuant to the laws of another state, the United States, or another country for use in proceedings there, the Superior Court may, on ex parte petition, order the issuance of a subpoena" ¹⁰⁶ Other states having similar statutes provide that assistance may be granted on "ex-parte petition," ¹⁰⁷ "ex-parte application," ¹⁰⁸ or simply "petition." ¹⁰⁹ Other statutes, not modeled after the New Jersey rule, permit subpoenas to be issued "on application of any party" ¹¹⁰ or merely require a "motion." ¹¹¹

A number of state statutes, following modern discovery practice, ¹¹² provide that a subpoena to compel the taking of a deposition will not issue unless the deposing party shows proof that notice of the deposition was duly served upon the deponent. These provisions appear in various forms. Idaho and Montana have rules similar to the one found in New Jersey but with the addition of a proof of notice requirement. ¹¹³ Alabama, Kentucky, and Min-

101. See *id.* § 3.02 commissioners' comment at 492.

102. IND. R. TRIAL P. 28(E); LA. REV. STAT. ANN. § 13:3824 (West 1968); MASS. GEN. LAWS ANN. ch. 223A, § 11 (West Supp. 1981); OKLA. STAT. ANN. tit. 12, § 1703.02 (West 1980).

103. 42 PA. CONS. STAT. ANN. § 5326 (Purdon Supp. 1981).

104. MICH. COMP. LAWS ANN. § 600.1852(2) (1981).

105. *Id.*

106. N.J. R. CIV. PRAC. 4:11-4.

107. KAN. STAT. ANN. § 60-228(d) (1976).

108. MO. R. CIV. P. 57.08.

109. W. VA. R. CIV. P. 28(d).

110. CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981).

111. ALASKA R. CIV. P. 28(b).

112. See FED. R. CIV. P. 45(d); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2458, at 441 (1971) [hereinafter cited as 9 WRIGHT & MILLER].

113. IDAHO R. CIV. P. 28(e); MONT. R. CIV. P. 28(d).

nesota offer the deposing party the option of producing either a commission or proof of notice duly served.¹¹⁴ Utah requires that the notice of taking of the deposition be filed with the clerk of the court.¹¹⁵

The District of Columbia statute offers an interesting variation. Parties wishing to compel testimony in the District of Columbia are provided with two options.¹¹⁶ First, the discovery provisions of the Federal Rules of Civil Procedure may be followed.¹¹⁷ In this case, proof of service of a notice to take a deposition is sufficient for the issuance of a subpoena to compel testimony.¹¹⁸ A party may also choose to proceed in accordance with the rules of the Superior Court of the District of Columbia. The pertinent provision of those rules requires the production of a certified copy of either a commission or notice.¹¹⁹ Thus, the procedure may vary slightly depending on whether the federal district court or the superior court is approached for assistance.

Several state provisions do not limit parties to the offering of either a commission or proof of notice. The Illinois and Washington provisions state that when "[a]ny officer or person [is] authorized by the laws of another State, . . . to take any depositions in this state, with or without a commission," a subpoena may be issued.¹²⁰ North Carolina finds sufficient the presentation of either "a commission, order, notice, consent or other authority under which the deposition is to be taken."¹²¹ Delaware and Hawaii require the presentation of a "verified petition" showing either a commission, notice of deposition, or "any other proceeding that has been taken for the purpose of taking testimony within the State, pursuant to the laws or practice of the state . . . wherein the deposition is to be used."¹²² Finally, New Mexico requires proof that either "an order has been made by the court or judge in a foreign state . . . or stipulation has been entered into or a notice given pursuant to the practice in such state."¹²³

Since deposition upon notice is the predominant method of procedure,¹²⁴ it should make little practical difference whether a discovery state requires proof of notice or if some other document

114. ALA. R. CIV. P. 28(b); KY. R. CIV. P. 28.03; MINN. R. CIV. P. 45.04.

115. UTAH R. CIV. P. 26(f).

116. D.C. CODE ANN. § 14-103 (1973).

117. See FED. R. CIV. P. 26-32, 45(d).

118. *Id.* 45(d).

119. D.C. SUPER. CT. R. CIV. P. 28-I(b).

120. ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); WASH. SUPER. CT. CIV. R. 45(d)(4).

121. N.C. R. CIV. P. 28(d).

122. DEL. CODE ANN. tit. 10, § 4311 (1974); HAWAII REV. STAT. § 624-27 (1976).

123. N.M. STAT. ANN. § 38-8-1 (1978).

124. This arises from the large number of states utilizing procedures similar to those found in the Federal Rules of Civil Procedure. See Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 86-87 (1960).

showing trial state court authorization may be produced. However, narrowly worded statutes in a few states may present difficulties. For example, in Texas, judicial assistance to courts in another state may only be granted when a "mandate, writ or commission is issued."¹²⁵ In Arkansas, "a commission, authorizing the taking of such depositions, on a notice duly served" must be produced.¹²⁶ Similarly, Rhode Island and South Carolina require the issuance of a commission by the trial state,¹²⁷ while Colorado requires either a commission or a *dedimus potestatem*.¹²⁸ Vermont requires that the person taking a deposition must be "appointed or commissioned by the governor or a court of record of another state."¹²⁹ The language of these statutes is reminiscent of a time when the commission was a prevalent device in the taking of depositions.¹³⁰ Today, however, the commission is rarely used and sometimes is not even available.¹³¹ Thus, the requirement of a commission renders the taking of depositions in the discovery state more difficult. These statutes should be changed to reflect current discovery practice.

2. Special Provisions in Arizona, California, and Maine

By far the most stringent application requirements are those found in the statutes of Arizona, California, and Maine.¹³² The procedures required by these states to compel testimony for use in another state deserve to be discussed at length.

Rule 30(h) of the Arizona Rules of Civil Procedure provides that a party to an action pending in a foreign state who wishes to take a deposition in Arizona must file an application, under oath, as a civil action. The application must contain the following:

(a) The caption of the case and the court in which it is pending including the names of all parties and the names of the attorneys for the parties;

(b) References to the law of the jurisdiction in which the action is pending which authorized the taking of the

125. TEX. REV. CIV. STAT. ANN. art. 3769a (Vernon Supp. 1980-1981).

126. ARK. R. CIV. P. 28(c).

127. R.I. GEN. LAWS § 9-18-11 (1969); S.C. CODE § 19-15-90 (1976).

128. COLO. REV. STAT. § 13-90-111 (1973). A *dedimus potestatem* is defined as "a writ or commission issuing out of chancery, empowering the persons named therein to perform certain acts, as to administer oaths to defendants in chancery and take their answers In the United States, a commission to take testimony was sometimes termed a '*dedimus potestatem*.'" BLACK'S LAW DICTIONARY 501 (5th ed. 1979) (citation omitted).

129. VT. STAT. ANN. tit. 12, § 1248 (1973).

130. See Pike & Willis, *The New Federal Deposition—Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1180-86 (1938).

131. See, e.g., MD. R.P. 400(b) (commission explicitly abolished); cf. ARIZ. R. CIV. P. 28(a) (depositions may be taken upon notice without a commission).

132. ARIZ. R. CIV. P. 30(h); CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); ME. R. CIV. P. 30(h).

deposition in this state and such facts as, under that law, must appear to entitle the party to take the deposition and have a subpoena issued for the attendance of the witness;

(c) A certified copy of the notice of taking deposition, order of the court authorizing the deposition, commission or letters rogatory or such other pleadings as, under the law of the foreign jurisdiction, are necessary in order to take the deposition;

(d) A description of the notice given to other parties and a description of the service of the application to be made upon other parties to the action.¹³³

An affidavit of service of the application must also be filed.¹³⁴

Subsections (c) and (d) of the rule contain provisions similar to those of other states¹³⁵ and are not unusual, aside from the fact that they must be included in the lengthy affidavit. Subsection (b), however, contains provisions that are different from those found in most other states.¹³⁶ Subsection (b) sets out two distinct requirements. First, a party desiring a subpoena must state the laws of the trial state which permit the use of an out-of-state deposition. Second, the applicant must also recite any facts which the law of the trial state would require for the issuance of a subpoena there.

Nowhere is it suggested that a deposition taken outside the trial state would be inadmissible at trial, while a deposition taken in the trial state would be admissible. Subsection (b) might present a problem, however, if no trial state statute or judicial decision explicitly touched on the use of foreign depositions. Fortunately, all states have rules or statutes which either explicitly provide that depositions taken out of state may be used or detail the procedure for taking a foreign deposition.¹³⁷ Such provisions are of two major varieties. The first type, exemplified by section 3.01 of

133. ARIZ. R. CIV. P. 30(h).

134. *Id.*

135. For a discussion of state provisions similar to subsection (c), concerning the documents sufficient to trigger discovery court assistance, see text accompanying notes 96-131 *supra*. For a discussion of notice requirements such as those embodied in subsection (d), see text accompanying notes 168-87 *infra*.

136. Only California has a similar provision. CAL. CIV. PROC. CODE § 2023(3) (West Supp. 1981).

137. ALA. CODE tit. 36, § 36-1-1 (1977); ALASKA R. CIV. P. 28(b); ARIZ. R. CIV. P. 28(a); ARK. R. CIV. P. 28(a); CAL. CIV. PROC. CODE § 2024 (West Supp. 1981); COLO. R. CIV. P. 28(a); CONN. GEN. STAT. ANN. § 52-148c(b) (West Supp. 1981); DEL. SUPER. CT. R. 28(a); D.C. CODE ANN. § 14-104 (1973); FLA. R. CIV. P. 1.300(a); GA. CODE ANN. § 38-2103 (1974); HAWAII R. CIV. P. 28(a); IDAHO R. CIV. P. 28(a); ILL. ANN. STAT. ch. 110A, § 205(a) (Smith-Hurd Supp. 1981-1982); IND. R. TRIAL P. 28(D); IOWA R. CIV. P. 153(b); KAN. STAT. ANN. § 60-227(f) (1976); KY. R. CIV. P. 28-02; LA. REV. STAT. ANN. § 13:3823 (West 1968); ME. R. CIV. P. 28(b); MD. R.P. 403(b); MASS. GEN. LAWS ANN. ch. 223A, § 10 (West Supp. 1981); MICH. GEN. CT. R. 304.1; MINN. R. CIV. P. 28.01; MISS.

the UIIPA,¹³⁸ explicitly authorizes the use of foreign depositions in the trial state.¹³⁹ The second type is modeled after rule 28(a) of the Federal Rules of Civil Procedure, which states:

Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending.¹⁴⁰

In describing the procedure by which a deposition may be taken out of state for use in the trial state, these provisions create a strong inference that such a deposition is as acceptable as one taken within the trial state.¹⁴¹ A reference to any of these statutes would seem to satisfy the first requirement of Arizona Rule 30(h)(b).¹⁴²

CODE ANN. § 13-1-228 (Supp. 1981); MO. ANN. STAT. § 492.110 (Vernon 1952); MONT. R. CIV. P. 28(e); NEB. REV. STAT. § 25-1267.15 (1979); NEV. R. CIV. P. 28(a); N.H. REV. STAT. ANN. §§ 517:15--:17 (1974); N.J. R. CIV. P. 4:12-2; N.M. R. CIV. P. 28(a); N.Y. CIV. PRAC. R. 3108 (McKinney 1970); N.C. R. CIV. P. 28(a); N.D. R. CIV. P. 28(a); OHIO R. CIV. P. 27(F); OKLA. STAT. ANN. tit. 12, § 1703.01 (West 1980); OR. REV. STAT. §§ 45.320, .370 (1979-1980); 42 PA. CONS. STAT. ANN. § 5325 (Purdon Supp. 1981); R.I. GEN. LAWS § 9-18-5 (1969); S.C. CODE § 19-15-10 (1976); S.D. COMP. LAWS ANN. § 15-6-28(a) (1967); TENN. R. CIV. P. 28.01; TEX. REV. CIV. STAT. ANN. art. 3746 (Vernon Supp. 1980-1981); UTAH R. CIV. P. 28(a); VT. R. CIV. P. 28(b); VA. SUP. CT. P. 28(a); WASH. SUPER. CT. CIV. R. 45(d)(3); W. VA. CODE § 57-4-2 (1966); WIS. STAT. ANN. § 804.03(1) (West 1977); WYO. R. CIV. P. 28(a). *See also* ALA. R. CIV. P. 28(a); DEL. SUPER. CT. R. 45(d); D.C. SUPER. CT. R. CIV. P. 28(a), 28-I(a); LA. CODE CIV. PROC. ANN. art. 1435 (West Supp. 1979); MASS. R. CIV. P. 28(a); MICH. GEN. CT. R. 305.3; MO. R. CIV. P. 57.05; N.Y. CIV. PRAC. R. 3113(a)(2) (McKinney 1970); OKLA. STAT. ANN. tit. 12, § 436 (West 1960); PA. R. CIV. P. 4015; WASH. SUPER. CT. CIV. R. 28(a); W. VA. R. CIV. P. 28(a).

138. UIIPA, *supra* note 4, § 3.01 at 487-88.

139. *See, e.g., id.* Of those states adopting the deposition provisions of the UIIPA, four have adopted § 3.01. *See* LA. REV. STAT. ANN. § 13.3823 (West 1968); MASS. GEN. LAWS ANN. ch. 223A, § 10 (West Supp. 1981); OKLA. STAT. ANN. tit. 12, § 1703.01 (West 1980); 42 PA. CONS. STAT. ANN. § 5325 (Purdon Supp. 1981). For other state statutes explicitly authorizing foreign depositions but not based on § 3.01 of the UIIPA, *see, for example*, CAL. CIV. PROC. CODE § 2024 (West Supp. 1981); KAN. STAT. ANN. § 60-227(f) (1976); R.I. GEN. LAWS § 9-18-5 (1969).

140. FED. R. CIV. P. 28(a). For similar state statutes, *see, for example*, ARIZ. R. CIV. P. 28(a); GA. CODE ANN. § 38-2103 (1974); MISS. CODE ANN. § 13-1-228 (Supp. 1981); S.D. COMP. LAWS ANN. § 15-6-28(a) (1967). For state statutes not based on rule 28(a) of the Federal Rules of Civil Procedure but which also set up a procedure for taking out-of-state depositions, *see, for example*, ALA. CODE tit. 36, § 36-1-1 (1977); OR. REV. STAT. §§ 45.320-.370 (1979-1980); S.C. CODE § 19-15-10 (1976); TEX. REV. CIV. STAT. ANN. art. 3746 (Vernon Supp. 1980-1981).

141. *See* ALA. R. CIV. P. 28(a) committee comments.

142. *See also* 13 H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PRACTICE, DISCOVERY PRACTICE § 424 comment at 465 (1972) (suggests that an affidavit setting forth the opinion of a qualified expert in foreign law might be sufficient to satisfy a similar California requirement) [hereinafter cited as GROSSMAN & VAN ALSTYNE].

The second requirement of rule 30(h)(b), that a party requesting discovery court assistance set out any facts that would be required to obtain a subpoena in the trial state, is probably not onerous. Many states allow the issuance of a subpoena upon proof of notice of the taking of a deposition.¹⁴³ And a certified copy of the notice must be attached to the application under rule 30(h) in any event.¹⁴⁴ In states requiring a greater showing for the issuance of a subpoena,¹⁴⁵ a statement of other facts might be necessary.

The application must be filed as a civil action in the Arizona Superior Court.¹⁴⁶ Therefore, it seems that the Arizona courts have full control over the application proceeding. This inference is buttressed by the language of the rule, which states that "any party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure."¹⁴⁷ However, "[n]o further proceedings in the Superior Court . . . are required."¹⁴⁸ Thus, parties need not spend time or money continuing proceedings in the Arizona courts after the deposition has been taken.

California is another state requiring an affidavit before assistance in taking a deposition is granted.¹⁴⁹ While the first paragraph of the California provision is identical to the UFDA,¹⁵⁰ the statute goes on to provide:

A subpoena re deposition or a subpoena duces tecum re deposition directed to [a] witness shall be issued by the clerk of the superior court if it appears by affidavit filed:

(1) That the witness resides within 150 miles from the court issuing such subpoena and from the place at which his attendance is required;

(2) That the testimony of such witness or the documents described in any such subpoena duces tecum are relevant to the subject matter involved in the action or proceeding; and

(3) That under the law of the state, territory, district or foreign jurisdiction in which the action or proceeding is pending, the deposition of a witness taken under such circumstances may be used in such action or proceeding.¹⁵¹

143. See, e.g., FLA. R. CIV. P. 1.410(d); MO. R. CIV. P. 57.09(d).

144. ARIZ. R. CIV. P. 30(h)(c).

145. See, e.g., CAL. CIV. PROC. CODE § 2023 (West Supp. 1981) (affidavit required).

146. ARIZ. R. CIV. P. 30(h).

147. *Id.*

148. *Id.*

149. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981).

150. Compare *id.* with UFDA, *supra* note 13, § 1 at 62.

151. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981). The requirement of subsection (1) is the same as the one for depositions to be used in California. *Id.* § 2019(a)(2). For a form of an affidavit complying with § 2023, see GROSSMAN & VAN ALSTYNE, *supra* note 142, § 424 at 463-65.

Subsection (2), the relevance requirement, presents a difficult issue concerning which state law is used to determine relevance and is discussed more fully later.¹⁵² Nevertheless, because subsection (3) mentions that a deposition must be able to be "used" rather than be "admissible" in the trial state, and because no restrictions on use are stated,¹⁵³ broad relevance concepts¹⁵⁴ should be applicable here. Of course, if a witness' testimony is clearly relevant, no significant problem arises under the subsection. The third requirement of the California statute is similar to the Arizona provision dealing with the use of a foreign deposition in the trial state.¹⁵⁵ As already noted, all states have statutes touching on this subject¹⁵⁶ and, thus, the use of a foreign deposition in a trial state should not be seriously questioned.¹⁵⁷ Accordingly, this final California requirement should be easily met.

Maine is the last of the three states with statutes that set out detailed application procedures.¹⁵⁸ As in Arizona, the application for a subpoena in Maine is docketed as a civil action, giving the Maine courts firm control over the discovery process.¹⁵⁹ The application must contain the following information:

(i) The name and location of the court in which the action or proceeding is pending.

(ii) The title and docket or other identifying number of the action or proceeding in the court where pending.

(iii) A brief statement of the nature of the action or proceeding and the provisions of the laws of the jurisdiction where the action or proceeding is pending which authorize the deposition.

(iv) The time and place for taking each deposition.

(v) The name and address of each person to be examined, if known, and if the name is not known a general description sufficient to identify him or the particular class or group to which he belongs.

(vi) If a subpoena duces tecum is to be served, a designation of the materials to be produced.

152. See notes 300-21 and accompanying text *infra*.

153. GROSSMAN & VAN ALSTYNE, *supra* note 142, § 416 at 455 n.46; see CAL. CIV. PROC. CODE § 2023(2) (West Supp. 1981).

154. See, e.g., FED. R. CIV. P. 26(b)(1) (allows discovery of evidence which may not be admissible at trial but which may lead to admissible evidence).

155. Compare CAL. CIV. PROC. CODE § 2023(3) (West Supp. 1981) with ARIZ. R. CIV. P. 30(h)(b).

156. For a compilation of these statutes, see note 137 *supra*.

157. Even without the statutory references, an affidavit setting forth the opinion of a qualified expert in foreign law should be sufficient to show that a deposition may be used in a forum state. GROSSMAN & VAN ALSTYNE, *supra* note 142, § 424 comment at 465.

158. ME. R. CIV. P. 30(h).

159. *Id.* 30(h)(2)(i). Compare *id.* with ARIZ. R. CIV. P. 30(h).

(vii) A statement that timely and adequate notice of the taking has been given to all opposing parties either in the manner required by the laws of the jurisdiction where the action or proceeding is pending or in the manner provided in paragraph (1) of subdivision (b) of this rule.¹⁶⁰

Like the Arizona rule and the California statute, the Maine rule requires a statement of the trial state law that authorizes the use of a foreign deposition.¹⁶¹ A brief statement of the nature of the action is also required.¹⁶² Other requirements, such as the time and place for the taking of the deposition¹⁶³ and the name and address of the deponent,¹⁶⁴ are largely administrative in nature and are easily complied with.

The Maine rule contains one provision unique among all states. Rule 30(h) states that "[t]he application shall be signed by a member of the bar of this state."¹⁶⁵ Thus, local counsel must be obtained to take a deposition in Maine. Ostensibly, the purpose of this is to prevent fraud, since counsel's signature acts as a certification of the truth of the application.¹⁶⁶ However, the provision is an unfortunate additional burden on the person seeking discovery, especially where no other state has deemed it necessary to do likewise.¹⁶⁷

C. Notice of Deposition

State interstate deposition statutes may also require that notice of the deposition be provided to all parties. Although the deposition process ordinarily requires notice to all parties,¹⁶⁸ some interstate deposition statutes provide explicitly for the issuance of a subpoena after *ex parte* proceedings.¹⁶⁹ On the other hand,

160. ME. R. CIV. P. 30(h)(3).

161. *Id.* 30(h)(3)(iii). Compare *id.* with ARIZ. R. CIV. P. 30(h)(b) and CAL. CIV. PROC. CODE § 2023(3) (West Supp. 1981). It is possible that this Maine provision might be construed to require a determination under the laws of the trial state whether the deposition is relevant.

162. ME. R. CIV. P. 30(h)(3)(iii). Perhaps this is included to aid the court in making relevance determinations.

163. *Id.* 30(h)(3)(iv).

164. *Id.* 30(h)(3)(v).

165. *Id.* 30(h)(3)(vii).

166. Cf. FED. R. CIV. P. 11 (signing of pleadings).

167. Arizona and California both require the application to be under oath, thus preventing fraud, but do not require that local counsel sign the application. ARIZ. R. CIV. P. 30(h); CAL. CIV. PROC. CODE § 2023 (West Supp. 1981).

168. See, e.g., FED. R. CIV. P. 30(b)(1).

169. ILL. ANN. STAT. ch. 110A, §204(b) (Smith-Hurd Supp. 1981-1982); KAN. STAT. ANN. § 60-228(d) (1976); MICH. COMP. LAWS ANN. § 600.1852(2) (1981) (non-uniform addition to UIIPA); MO. R. CIV. P. 57.08.

some states make proof of notice a prerequisite for the issuance of a subpoena.¹⁷⁰

Four states have interstate deposition statutes that authorize a court to act *ex parte* when issuing a subpoena to compel attendance at a deposition to be used in another state. The Kansas and Missouri statutes merely state that the court may act on an *ex parte* petition.¹⁷¹ The Illinois statute is slightly different: "The court may hear and act upon the petition with or without notice as the court directs."¹⁷² Similarly, the Michigan statute, adding a non-uniform provision to the UIIPA, gives the court discretion to require notice or act *ex parte*.¹⁷³

In contrast, a few states specifically require notice to all parties. In Arizona, an affidavit of service of the application for a subpoena must be submitted with the application.¹⁷⁴ Maine requires that the application itself contain a statement "that timely and adequate notice of the taking has been given to all opposing parties."¹⁷⁵ Other state statutes simply provide that proof of duly served notice is required.¹⁷⁶ Although this form of statute leaves room for some ambiguity,¹⁷⁷ it probably requires that notice be sent to all parties that a subpoena is being sought outside the trial state.

Most state statutes do not explicitly require notice; however, from the language of these statutes, inferences may be drawn that notice is required. The majority of statutes that are silent on the

170. ARIZ. R. CIV. P. 30(h); ARK. R. CIV. P. 28(c); IDAHO R. CIV. P. 28(e); ME. R. CIV. P. 30(h)(3)(vii); MINN. R. CIV. P. 45.04; MONT. R. CIV. P. 28(d); UTAH R. CIV. P. 26(f); *cf.* ALA. R. CIV. P. 28(b) (either proof of notice or a commission required); KY. R. CIV. P. 28.03 (same).

171. KAN. STAT. ANN. § 60-228(d)(1976); MO. R. CIV. P. 57.08.

172. ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982).

173. MICH. COMP. LAWS ANN. § 600.1852(2) (1981). *Compare id. with UIIPA, supra note 4, § 3.02 at 492.*

174. ARIZ. R. CIV. P. 30(h).

175. ME. R. CIV. P. 30(h)(3)(vii). Notice may be sent in accordance with either the procedure in the trial state or Maine procedure. *Id.*

176. ARK. R. CIV. P. 28(c); IDAHO R. CIV. P. 28(e); MINN. R. CIV. P. 45.04; MONT. R. CIV. P. 28(d); UTAH R. CIV. P. 26(f).

177. For example, questions concerning to whom notice is required and the procedure to be followed for providing notice are left unanswered.

notice requirement may be described as "same manner" statutes.¹⁷⁸ These statutes provide that depositions for use out of state should be taken in the same manner as depositions for use within the discovery state. Since many states require notice for the taking of a deposition to be used in the state,¹⁷⁹ notice will also be necessary for depositions to be used out of the state.¹⁸⁰ Additionally, discovery state procedure usually provides for attack on the issuance of the subpoena by interested persons.¹⁸¹ While it is important to consult discovery state procedure in a state which has a like manner statute, the general rule is that notice is required.

Other state statutes are similar to same manner provisions in that they follow discovery state procedure to a certain extent when dealing with depositions to be used out of state. Unlike same manner provisions, however, these statutes explicitly refer to the portions of the discovery state rules that apply.¹⁸² To the extent that the discovery state statutes or rules referred to require notice, notice is necessary for a deposition to be used in the trial state.

The UIIPA does not specifically require notice to any party, but the Act does note that the order requiring testimony

178. "Same manner" statutes are those which require that depositions to be taken in the discovery state for use in the trial state be taken in the same manner as depositions to be used in the discovery state. A good example of a same manner statute is the UFDA. See UFDA, *supra* note 13, § 1 at 62. For a compilation of those states in which the UFDA is presently in force, see note 15 *supra*.

Other state statutes clearly fall into the same manner category. CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981); HAWAII REV. STAT. § 624-27 (1976); N.H. REV. STAT. ANN. § 517:18 (1974); N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970); TEX. REV. CIV. STAT. ANN. art. 3769a (Vernon Supp. 1980-1981); UTAH R. CIV. P. 26(f); VT. STAT. ANN. tit. 12, § 1248 (1973); *cf.* CAL. CIV. PROC. CODE § 2023 (West Supp. 1981) (same manner statute as to everything but the application procedure).

It is unclear whether a few statutes fall into the same manner category for all purposes, since these statutes provide that only obedience to a subpoena may be enforced in like manner. COLO. REV. STAT. § 13-90-111 (1973); DEL. CODE ANN. tit. 10, § 4311 (1974); IOWA CODE ANN. § 622.84 (West Supp. 1981-1982).

Finally, the District of Columbia statute is at least partially a same manner provision. Parties may proceed "in like manner and with like effect as other depositions are taken in United States district courts," *i.e.*, by the Federal Rules of Civil Procedure, or parties may proceed by the rules of the Superior Court of the District of Columbia. D.C. CODE ANN. § 14-103 (1973). The superior court rules have a special provision relating to depositions to be used in other jurisdictions. D.C. SUPER. CT. R. CIV. P. 28-I(b).

179. See, e.g., FLA. R. CIV. P. 1.310(b)(1); ME. R. CIV. P. 30(b)(1).

180. Note, however, that this notice will not necessarily inform parties of an intention to seek out-of-trial-state process. Since a party may want to challenge a deposition subpoena in the discovery state, the notice and applicable discovery state laws should be scrutinized to determine from which court such a subpoena would issue.

181. In many states, this may be done by means of a motion for a protective order. See, e.g., MD. R.P. 406; MINN. R. CIV. P. 30.04.

182. ALA. R. CIV. P. 28(b); ALASKA R. CIV. P. 27(c); KY. R. CIV. P. 28.03; N.J. R. CIV. PRAC. 4:11-4; N.C. R. CIV. P. 28(d); S.C. CODE § 19-15-90 (1976); W. VA. R. CIV. P. 28(d).

may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state 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.¹⁸³

Thus, under the UIIPA, notice requirements may be ordered by the discovery state court. If they are not, procedure under the UIIPA would be analogous to that under a same manner statute.

In the remaining states, notice is not mentioned and it is impossible to derive from the language of the statutes what the discovery state courts might require.¹⁸⁴ Of course, where the court's power to issue a subpoena is discretionary,¹⁸⁵ it may in any case require notice to parties or other persons as a prerequisite to the exercise of its discretion.

It seems clear that the better procedure requires notice to all parties that an out-of-state subpoena to compel discovery is being sought. First, this may save the expense of an out-of-state proceeding entirely, since a recalcitrant deponent may relent once he realizes that he cannot escape process.¹⁸⁶ Second, this procedure provides opposing parties an opportunity to challenge the relevance of the out-of-state testimony or the necessity of the expense required to take an out-of-state deposition. Finally, giving notice is an inexpensive courtesy to opposing parties.

In any event, few situations exist where an opposing party would not receive notice of an application or petition for the issuance of a subpoena to compel testimony outside the trial state. Almost all states require some type of notice of the taking of the deposition itself. Additionally, lack of notice of a petition for a foreign subpoena will not prevent an opposing party from participating in the questioning.¹⁸⁷ But because notice to parties of an intention to proceed in a foreign court requires so little effort, *ex parte* proceedings should be discouraged.

D. Location Limitations

Other procedural requirements found in many states concern the location where the deponent may be served and where he may

183. UIIPA, *supra* note 4, § 3.02 at 492.

184. MISS. CODE ANN. § 13-3-97 (1972); N.M. STAT. ANN. § 38-8-1 (1978); R.I. GEN. LAWS § 9-18-11 (1969); WASH. SUPER. CT. CIV. R. 45(d)(4); WIS. STAT. ANN. § 887.24 (West 1966).

185. See notes 229-66 and accompanying text *infra*.

186. *Cf.* UIIPA, *supra* note 4, § 3.02(b) at 492 (voluntary testimony provision).

187. If notice is not given and a party is not present or represented at the taking of the deposition, the deposition may not be used against the party. *See, e.g.,* OHIO R. CIV. P. 32(A).

be deposed. These location limitations are not confined to depositions taken for use in another state.¹⁸⁸ They are closely intertwined with the venue requirements placed on state courts by a wide variety of statutes.¹⁸⁹ These jurisdictional limitations, though usually not found in an interstate deposition statute,¹⁹⁰ apply to all service of process within the state. Thus, unless an interstate deposition statute mentions limits placed on either the place of service or the place of deposition, it must be assumed that limits are placed on the subpoena power by other discovery state statutes or rules. These statutes or rules must be consulted in order to ascertain which location limitations are applicable.

In those states having same manner statutes,¹⁹¹ including the states that have adopted the UFDA, location limitations found outside the interstate deposition provision are applicable to depositions taken for use in another jurisdiction. This conclusion follows from the language of those provisions, which states that depositions for use in another state may be taken and subpoenas issued "in the same manner and by the same process and proceeding" as depositions taken for use in the discovery state.¹⁹² Other states have rules which provide that subpoenas may be issued pursuant to a particular procedural rule.¹⁹³ Therefore, careful scrutiny of discovery state procedure is required to determine the jurisdictional limits that apply.

Some states have location limitations included in their interstate deposition statutes. These usually relate either to the court to which application must be made¹⁹⁴ or to the place where the deposition may be taken.¹⁹⁵ The language of each statute differs, and these statutes must be discussed separately to ensure proper practice.

188. *E.g.*, MINN. R. CIV. P. 45.04; *cf.* CAL. CIV. PROC. CODE § 2023(1) (West Supp. 1981) (requiring deponents for depositions for use in foreign state to reside within 150 miles of court and place of deposition).

189. Venue requirements are intended for the convenience of the parties and may easily be waived. *See* FED. R. CIV. P. 12(h)(1); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 42, at 169-70 (3d ed. 1976). Whether similar location requirements for depositions may be disregarded by the parties is an open question.

190. Perhaps this is because rule 45 of the Federal Rules of Procedure, on which many state statutes are based, does not contain any reference to foreign depositions. FED. R. CIV. P. 45(d)(2). *But see* MINN. R. CIV. P. 45.04 (based on rule 45 and containing interstate deposition provision).

191. *See* note 178 *supra*.

192. UFDA, *supra* note 13, § 1 at 62; *see* statutes cited note 15 *supra*.

193. ALASKA R. CIV. P. 27(c); N.J. R. CIV. PRAC. 4:11-4; N.C. R. CIV. P. 28(d). *See also* IDAHO R. CIV. P. 28(e); MONT. R. CIV. P. 28(d).

194. ALA. R. CIV. P. 28(b); ARK. R. CIV. P. 28(c); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h); MO. R. CIV. P. 57.08; UTAH R. CIV. P. 26(f); WASH. SUPER. CT. CIV. R. 45(d)(4); W. VA. R. CIV. P. 28(d).

195. CAL. CIV. PROC. CODE § 2023(1) (West Supp. 1981); MINN. R. CIV. P. 45.04; N.M. STAT. ANN. § 38-8-1 (1978).

Of those states which have a provision limiting the courts to which application for a subpoena may be made, Illinois uses the broadest language. A party desiring to depose a witness in Illinois has the option of petitioning the circuit court in the county in which the deponent either "resides or is employed or transacts his business in person or is found."¹⁹⁶ Similarly, Missouri allows the circuit court in the county where the deponent is found to issue a subpoena,¹⁹⁷ and Arkansas requires a commission to be produced "to a judge of the circuit, chancery or probate court in the county where the witness . . . resides or may be found."¹⁹⁸ In any of these states, therefore, a subpoena might issue from one of several courts. Three other states offer choices almost as wide as those offered by Illinois. These statutes provide that the out-of-state party must deal with the court in the county where "the deponent resides or is employed or transacts his business in person."¹⁹⁹ Although not offering the broadest option of dealing with the court where the deponent may be found, these statutes are liberal with respect to the courts which may issue a subpoena. A few states view only the residence of the witness as dispositive. Alabama requires that the commission authorizing the deposition be produced "to a judge of the circuit where the witness resides."²⁰⁰ The Kentucky provision similarly states that the commission be produced before a judge in the district where the witness resides.²⁰¹ Both Idaho and Montana have rules providing that subpoenas may issue from the court in the county where the witness is to be served.²⁰² A similar rule is found in Utah: It requires that a notice of deposition be filed with the court in the county where the witness either resides or is to be served.²⁰³ These rules therefore require an examination of the discovery state procedure to determine the limits on service before the proper court may be selected.

A few states also have provisions limiting the places where the deponent may be required to testify. The California provision requires that the deponent reside within 150 miles of the court issuing the subpoena and within 150 miles of the place where the deposition is to be taken.²⁰⁴ The Minnesota rule provides: "A resident of this state may be required to attend an examination only

196. ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982).

197. MO. R. CIV. P. 57.08.

198. ARK. R. CIV. P. 28(c).

199. KAN. STAT. ANN. § 60-228(d) (1976); ME. R. CIV. P. 30(h); W. VA. R. CIV. P. 28(d).

200. ALA. R. CIV. P. 28(b).

201. KY. R. CIV. P. 28.03.

202. IDAHO R. CIV. P. 28(e); MONT. R. CIV. P. 28(d).

203. UTAH R. CIV. P. 26(f).

204. CAL. CIV. PROC. CODE § 2023(1) (West Supp. 1981). This requirement is the same as the one for depositions to be used in California. *Id.* § 2019(a)(2).

in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court."²⁰⁵ This provision, although limiting the places where depositions may be taken, also allows the court a large measure of discretion. The New Mexico provision is more limited, in stating that "no witness shall be compelled to attend outside the judicial district in which he shall reside, or sojourn."²⁰⁶

Notwithstanding jurisdictional limitations found elsewhere, some interstate deposition statutes place few limits on the place of deposition, the place the witness must be served, or the court which must act. The Rhode Island statute, for example, merely provides that depositions may be taken "before any person residing in this state."²⁰⁷ Wisconsin has a similar provision.²⁰⁸ The Colorado statute gives the district court "of the county where the party holding the commission resides" the power to issue subpoenas, thus looking more towards the convenience of the commissioner than of the deponent.²⁰⁹ Perhaps the widest latitude is given by the Mississippi statute. It allows any person appointed by any court "without the limits of [the] state" to issue subpoenas "returnable at such time and place" as the appointee chooses.²¹⁰ On its face, this statute allows the deposing party broad discretion in service of the subpoena and place of taking the deposition. Whether it is as broad in practice as its language suggests is an open question.²¹¹ The language of both the Arizona and South Carolina provisions implies that any judge of the proper court may receive an application, and then the necessary subpoena will issue from the clerk's office nearest the place of taking the deposition.²¹² In practice, it would be wise to approach the court issuing the subpoena in order to avoid problems and delay.

The provisions of the UIIPA strike a middle ground between those states which have strict limitations and those which have none. The UIIPA merely provides that "[a] court of this state may order a person who is domiciled or is found within this state to give his testimony."²¹³ This implies that statewide service of process may issue from any state court for the taking of a deposition to be used in another state. It also implies that a deposed individual may be required to give his testimony anywhere within the

205. MINN. R. CIV. P. 45.04. Compare *id.* with FED. R. CIV. P. 45(d)(2). By its own terms, this Minnesota rule also applies to depositions taken for use in Minnesota.

206. N.M. STAT. ANN. § 38-8-1 (1978).

207. R.I. GEN. LAWS § 9-18-11 (1969).

208. WIS. STAT. ANN. § 887.24 (West 1966).

209. COLO. REV. STAT. § 13-90-111 (1973).

210. MISS. CODE ANN. § 13-3-97 (1972).

211. *Cf. id.* § 13-1-226(c) (Supp. 1980) (protective orders).

212. ARIZ. R. CIV. P. 39(h); S.C. CODE § 19-15-90 (1976).

213. UIIPA, *supra* note 4, § 3.02 at 492.

discovery state. It is unlikely, though, that a court would exceed any jurisdictional boundaries imposed by other state statutes.²¹⁴ Moreover, since courts have a large amount of discretion under the UIIPA,²¹⁵ a deponent may be protected from traveling great distances. Thus, although the UIIPA is flexible, other state statutes must be examined for possible restrictions.

E. Witness Fees for Deponents

Four states have provisions dealing with witness fees in their interstate deposition statutes. As most states have other statutes dealing with witness fees,²¹⁶ payment of witness fees is probably also required in states whose interstate deposition statutes are silent on the subject.²¹⁷ This is especially true in states having a same manner provision.²¹⁸

The Delaware statute provides that a subpoena may not be enforced unless the witness has been tendered "the legal witness fees, including mileage, as provided for attendance before the Superior Court."²¹⁹ Similarly, the New Mexico statute states that "no witness shall be compelled to attend . . . unless . . . [he] is paid witness fees and mileage in the same manner as are required upon the service of a subpoena in a cause pending in the district court."²²⁰ The Tennessee statute simply provides that a witness is entitled to the same fees as a witness in the circuit court.²²¹ Since each state also provides elsewhere that witnesses are entitled to fees,²²² these statutes do not operate as a special requirement for persons seeking depositions for use out of state.

The North Carolina rule takes a different tack. Under this rule, a person appointed as a commissioner to take a deposition may not act under his appointment

214. See notes 188-93 and accompanying text *supra*. The Washington rule makes this explicit, in providing that a judge or justice of the peace may issue a subpoena "for attendance at any places within his jurisdiction." WASH. SUPER. CT. CIV. R. 45(d)(4).

215. See notes 230-35 and accompanying text *infra*.

216. *E.g.*, CAL. CIV. PROC. CODE § 1986.5 (West Supp. 1981); FLA. STAT. ANN. § 90.14 (West Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. § 9-202 (1980); OHIO REV. CODE ANN. § 2335.06 (Page Supp. 1981); WASH. REV. CODE ANN. § 2.40.010 (Supp. 1981).

217. Another question is whether deponents are "witnesses" and therefore entitled to fees under the fee statutes. Some statutes explicitly provide for this. *E.g.*, ILL. ANN. STAT. ch. 110A, § 208(b) (Smith-Hurd Supp. 1981-1982); KY. REV. STAT. ANN. § 421.010 (Baldwin 1978); MONT. CODE ANN. § 26-2-507 (1981); R.I. GEN. LAWS § 9-29-7 (Supp. 1981); VT. STAT. ANN. tit. 32, § 1551 (1981). Others, however, are not so clear. *E.g.*, NEB. REV. STAT. § 33-139 (Supp. 1981); OR. REV. STAT. § 44.410 (1979-1980); UTAH CODE ANN. § 21-5-4 (1976).

218. See note 178 *supra*.

219. DEL. CODE ANN. tit. 10, § 4311 (1974).

220. N.M. STAT. ANN. § 38-8-1 (1978).

221. TENN. CODE ANN. § 24-9-103 (1980). That portion of the Tennessee statute dealing with witness fees is a non-uniform addition to the UFDA. Compare *id.* with UFDA, *supra* note 13, § 1 at 62.

222. See DEL. CODE ANN. tit. 10, § 8903 (1974); N.M. STAT. ANN. § 39-2-8 (1978); TENN. CODE ANN. § 24-4-101 (1980).

until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including . . . witness fees From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition²²³

No similar requirement of deposit is imposed on those wishing to take a deposition for use within North Carolina²²⁴ and, thus, this provision adds an unnecessary administrative burden to the taking of a deposition for use out of the state. Also, it is unwise to allow the commissioner to set the "sufficient" sum of money without some type of guidelines. Nevertheless, as costs must be paid in any event, the advance deposit requirement should not prove to be an undue burden.

F. Reciprocity Requirement of Wisconsin

Wisconsin has a requirement unique among all of the states. Subpoenas may be issued to compel testimony for a deposition to be used in another state "provided, its laws contain provisions similar to this section, requiring persons within its borders to give their testimony by deposition in actions pending in Wisconsin."²²⁵ Since all states have interstate deposition provisions,²²⁶ the Wisconsin reciprocity requirement would seem to be but a small hurdle. Although no litigation has arisen on this point, the Wisconsin proviso might be a problem if a court were to interpret the strict requirements imposed by, for instance, the Arizona²²⁷ or Maine²²⁸ rules as making them not "similar" and thus not reciprocal. Such an interpretation would be inconsistent with the purpose of the Wisconsin statute and, thus, would be unjustified.

IV. ISSUANCE OF SUBPOENAS

Once the procedural hurdles have been overcome, the next important issue is whether the discovery state court is required to issue process upon the filing of a proper application or whether the court may exercise its discretion in determining whether or not to facilitate discovery. Allowing a court discretion in deciding whether or not to compel testimony may provide another battleground for a person opposing the deposition. Mandatory action,

223. N.C. R. CIV. P. 28(d).

224. See N.C. GEN. STAT. § 6-55 (1969) (fees for witnesses at depositions used in state).

225. WIS. STAT. ANN. § 887.24 (West 1966).

226. For a compilation of these provisions, see note 12 *supra*.

227. ARIZ. R. CIV. P. 30(h).

228. ME. R. CIV. P. 30(h).

on the other hand, is desirable by those wishing to depose persons found outside the trial state. Not surprisingly, the interstate deposition statutes differ. Although some statutes clearly use discretionary language, others use terms most often described as "directory."²²⁹

Both the UFDA and the UIIPA give a court discretion to compel appearance.²³⁰ The UFDA provides that "witnesses *may* be compelled to appear and testify."²³¹ Likewise, the UIIPA states that "[a] court . . . *may* order a person . . . to give his testimony,"²³² and the Commissioners' Comment makes it clear that mandatory action is not required: "The court . . . retains complete discretion to frame an appropriate order. In exercising this power, the court may take into account the nature and attitudes of the requesting government and the character of the proceedings."²³³ In addition, "[t]he court has complete discretion to prescribe the procedure to be followed."²³⁴ Thus, in those states having one of the uniform acts, issuance of a subpoena to compel attendance at a deposition to be used in another state is completely within the court's control.²³⁵

Another group of states, although not adopting either the UFDA or the UIIPA, have similar provisions which grant their courts discretion in issuing subpoenas to compel attendance at a deposition.²³⁶ These statutes provide that the appropriate court may issue or order the issuance of subpoenas as provided in the state rules of civil procedure.²³⁷ Other states, having provisions that differ considerably, also allow their courts discretion when asked to assist a foreign tribunal. For example, the Connecticut, District of Columbia, Maine, and Rhode Island provisions state

229. See generally 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 57.01-.26 (4th ed. 1973) [hereinafter cited as SANDS].

230. See UFDA, *supra* note 13, § 1 at 62; UIIPA, *supra* note 4, § 3.02 at 492.

231. UFDA, *supra* note 13, § 1 at 62 (emphasis added). For the full text of § 1 of the UFDA, see text accompanying note 16 *supra*. "May" is usually considered to be discretionary language. SANDS, *supra* note 229, § 57.03 at 416.

232. UIIPA, *supra* note 4, § 3.02 at 492 (emphasis added). For the full text of § 3.02(a) of the UIIPA, see text accompanying note 18 *supra*.

233. UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492.

234. *Id.*

235. The New York provision also falls within this category. N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970).

236. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; W. VA. R. CIV. P. 28(d). See also 2 R. DEL DEO, NEW JERSEY PRACTICE, COURT RULES ANNOTATED 170-71 (3d ed. 1973).

237. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; W. VA. R. CIV. P. 28(d).

that depositions or testimony for use in another state "may be taken."²³⁸ Colorado, Illinois, Washington, and Wisconsin have statutes simply providing for the discretionary issuance of subpoenas.²³⁹ None of the provisions contain any particular interpretive problems, and the discretionary nature of the power is clear.

Outside the realm of statutes that are clearly discretionary, it is often difficult to determine whether a court has a choice to act. The statutes of three states — California, Michigan, and Hawaii — contain certain language which is ambiguous on its face.²⁴⁰ Yet, in each case, the ambiguity would probably be resolved in favor of granting a court discretion to act.

Although the UFDA constitutes the first paragraph of the California statute, a lengthy affidavit requirement is also added.²⁴¹ While the UFDA is couched in discretionary terms, the California statute additionally provides that if the affidavit establishes the necessary facts, "[a] subpoena . . . shall be issued by the clerk of the superior court."²⁴² Thus, an interpretation of the statute as mandatory would not be unreasonable, although the better view is that the California statute provides for discretionary issuance.²⁴³

Another ambiguity created by a state's addition to a uniform act is present in the Michigan statute. Michigan has generally adopted section 3.02 of the UIIPA. After the UIIPA language that "[a]ny court of record of this state may order a person to give his testimony," however, the Michigan provision adds: "The order shall be issued upon petition to a court of record in the county in which the deponent resides or is employed or transacts his business in person or is found for a subpoena to compel the giving of testimony by him."²⁴⁴ This location requirement does not change

238. CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981); D.C. CODE ANN. § 14-103 (1973); ME. R. CIV. P. 30(h); R.I. GEN. LAWS § 9-18-11 (1969). As to the District of Columbia, see also FED. R. CIV. P. 45(d)(1); D.C. SUPER. CT. R. CIV. P. 28-I(b).

239. COLO. REV. STAT. § 13-90-111 (1973); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); WASH. SUPER. CT. CIV. R. 45(d)(4); WIS. STAT. ANN. § 887.24 (West 1966).

240. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); HAWAII REV. STAT. § 624-27 (1976); MICH. COMP. LAWS ANN. § 600.1852(2) (1981). It is interesting to note that ambiguities in two of these statutes arise from additions to uniform acts. See CAL. CIV. PROC. CODE § 2023 (West Supp. 1981) (affidavit requirement added to UFDA); MICH. COMP. LAWS ANN. § 600.1852(2) (1981) (location requirement added to UIIPA).

241. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); see notes 150-51 and accompanying text *supra*.

242. CAL. CIV. PROC. CODE § 2023 (West Supp. 1981).

243. GROSSMAN & VAN ALSTYNE, *supra* note 142, § 416 at 454, 456. "Shall" is probably used here in the indicative rather than the imperative sense. See Driedger, *Legislative Drafting*, 27 CAN. B. REV. 291, 303-04 (1949) [hereinafter cited as Driedger]. Directory language may be overcome by other considerations. SANDS, *supra* note 229, § 57.03 at 415.

244. MICH. COMP. LAWS ANN. § 600.1852(2) (1981).

the main thrust of the UIIPA, which grants courts a large amount of discretion.²⁴⁵ The use of the mandatory "shall" in the second sentence probably is the result of careless draftsmanship,²⁴⁶ because the discretionary language in the UIIPA was not altered by the Michigan legislature. In addition, the legislature was presented with the Commissioners' Comment to section 3.02 of the UIIPA, which clearly delineates the discretion granted to the court.²⁴⁷ Therefore, the Michigan statute should be interpreted as giving the court discretion to act.

The last of the ambiguous provisions, that of Hawaii, states as follows:

Where a commission to take testimony within the State has been issued from a court without the State, or where a notice has been given or any other proceeding has been taken for the purpose of taking testimony within the State, . . . the circuit court, in a proper case, on the presentation of a verified petition *shall* order the issuance of a subpoena²⁴⁸

The mandatory "shall" in the section indicates that the court must issue a subpoena when a verified petition is presented, but the words "in a proper case" point to the use of judicial discretion in the issuance of subpoenas. Again, while sloppy draftsmanship may to a limited extent indicate lack of discretion,²⁴⁹ the Hawaii statute should be interpreted so as to afford a court discretion in assisting a foreign tribunal.

Even when statutory language is unambiguously directory on its face, questions may arise as to whether discretion is allowed. Although the Delaware statute states that "the Prothonotary of the Superior Court . . . shall issue a subpoena" upon the presentation of a verified petition,²⁵⁰ a Delaware court has held that a court has discretion to quash the issuance of a subpoena issued under the statute.²⁵¹ In *In re Denning*,²⁵² parties requesting a subpoena had complied with all of the provisions of the Delaware foreign deposition statute.²⁵³ When the deponent moved to quash the sub-

245. See text accompanying notes 230-35 *supra*.

246. The use of "shall" in the indicative rather than the imperative sense is generally considered to be poor draftsmanship. See Driedger, *supra* note 243, at 303-04.

247. See MICH. COMP. LAWS ANN. § 600.1852(2) practice commentary 1968 (1981). See also UIIPA, *supra* note 4, § 3.02 commissioners' comment at 492-93.

248. HAWAII REV. STAT. § 624-27 (1976) (emphasis added).

249. See note 246 *supra*.

250. DEL. CODE ANN. tit. 10, § 4311 (1974).

251. *In re Denning*, 44 Del. 470, 61 A.2d 657 (1948).

252. 44 Del. 470, 61 A.2d 657 (1948).

253. *Id.* at 472, 61 A.2d at 658.

poena, the petitioners argued that the court had no power to act. The court responded by saying:

A Court always has inherent power over its own process and, in a proper case, may vacate or quash writs, returns, or other process incorrectly or improvidently issued. Here the right to take the depositions of the very witness sought to be examined is challenged. Surely this Court is not without power to determine the fundamental question involved²⁵⁴

The rationale of the court in *Denning* is applicable to other provisions couched in mandatory language. For example, the Arizona rule has language directing the clerk to issue subpoenas.²⁵⁵ The Minnesota rule states that “[p]roof of service of notice to take a deposition as provided in . . . a state where the action is pending constitutes a sufficient authorization for the issuance of subpoenas.”²⁵⁶ The Utah provision is similar to that of Minnesota.²⁵⁷ Under these rules, the clerk of the court issues subpoenas as a matter of course, without judicial intervention.²⁵⁸ But *Denning* indicates that a court has the power to block the issuance of subpoenas, or quash them if already issued, even when all the statutory prerequisites are met.²⁵⁹

Another group of states has provisions granting the commissioner or other person appointed to take the deposition the power to issue subpoenas.²⁶⁰ Although these rules do not provide for mandatory issuance in the same manner as the statutes discussed above, *i.e.*, by directing the issuance of a subpoena, it must be assumed that the person appointed to take a deposition will use subpoenas if necessary. Again, however, a court in the discovery state would have authority to entertain a motion to quash.²⁶¹

Two statutes make explicit what is implicit in all the statutes containing mandatory language — proper proof of facts is necessary for the issuance of subpoenas. The New Mexico statute provides:

Where an order has been made by the court or a judge in a foreign state, territory or country, or stipulation has been entered into, or a notice given pursuant to the practice in

254. *Id.*

255. ARIZ. R. CIV. P. 30(h).

256. MINN. R. CIV. P. 45.04.

257. UTAH R. CIV. P. 26(f); *see id.* 45(d). The Utah rule also requires that proof of notice be filed with the clerk. *Id.* 26(f).

258. *See* 9 WRIGHT & MILLER, *supra* note 112, § 2453 at 424.

259. 44 Del. 470, 472, 61 A.2d 657, 658 (1948).

260. ALA. R. CIV. P. 28(b); KY. R. CIV. P. 28.03; N.C. R. CIV. P. 28(d). The Arkansas rule, although of slightly different language, has the same effect. ARK. R. CIV. P. 28(c).

261. *In re Denning*, 44 Del. 470, 472, 61 A.2d 657, 658 (1948).

such state, territory or country for the taking of the deposition of a witness within this state for use in a legal proceeding "or cause pending" in such state, territory or country, *any judge shall, upon proof of such facts, issue an order directing the witness . . . to attend.*²⁶²

Similarly, the South Carolina statute requires a person obtaining a commission to produce it to a judge "who, on being satisfied of its authenticity and regularity, shall direct a subpoena to issue in due form from the clerk's office of the nearest circuit court."²⁶³ In both of these states, judges have a certain amount of discretion in deciding whether facts are "proven" or a commission is "regular." This adds little to a court's power, however, since there is little doubt that a court could protect itself against fraud without these statutory directives.²⁶⁴

Four states provide that a party desiring to take a deposition may produce either a commission or notice of deposition, whereupon it shall be the duty of the judge to issue the necessary subpoenas.²⁶⁵ This language is more directory than most, and a compelling argument can be made that the court must act if the procedural requirements are met. Yet this argument is outweighed by a court's "inherent power over its own process" and even this directory language would probably fall in the face of that power.²⁶⁶

V. CONFLICT OF LAWS

Inevitably, when proceedings are bifurcated between two state forums, conflicts of laws arise. In the area of interstate depositions, conflicts arise in four main areas: first, in the choice of procedure to be followed in taking the deposition; second, in deciding questions of relevance; third, in deciding questions of privilege; and finally, in the protection of the deponent.

A. *Choice of Procedure to be Followed in Taking Depositions*

Discovery is in large measure procedural and, thus, questions may arise during the course of a deposition regarding the manner of taking the examination. For example, questions may arise concerning whether videotaping is an appropriate transcription or how objections should be noted. When a deposition is being taken

262. N.M. STAT. ANN. § 38-8-1 (1978) (emphasis added).

263. S.C. CODE § 19-15-90 (1976).

264. Nor could it be seriously argued that a clerk must accept a totally irregular or patently false application and issue a subpoena based on it.

265. IOWA CODE ANN. § 622.84 (West Supp. 1981-1982); MISS. CODE ANN. § 13-3-97 (1972); N.H. REV. STAT. ANN. § 517:18 (1974); VT. STAT. ANN. tit. 12, § 1248 (1973).

266. *In re Denning*, 44 Del. 470, 472, 61 A.2d 657, 658 (1948).

in one state for use in another state, the issue becomes which state procedure governs the taking of the deposition.²⁶⁷ Unfortunately, few interstate deposition statutes touch directly on this subject.

The general rule is that the procedure of the forum state, in this case the discovery state, is followed.²⁶⁸ However, this rule is not tailored to the situation in which a deposition is to be taken in one state for use in another state. Rather, it is usually applied when a deposition is being taken in one state for use in its trial court and the substantive law of another state is to be applied at trial. Since no general rule is directly applicable to the interstate deposition situation, the language of the various statutes must be examined.

The UIIPA contains the most detailed and reasonable provision with respect to the procedure to be used. It states that the order compelling testimony

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. . . . 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.²⁶⁹

Thus, the UIIPA provides for flexibility in detailing the procedure for taking depositions in the discovery state that are to be used in the trial state.

In states that have adopted the UIIPA, the discovery state court may allow a deposition to be taken as if it were being taken in the trial state.²⁷⁰ This is a very sensible procedure. The parties are familiar with the practice of the trial state. Therefore, extra expense is avoided if they do not have to spend a great amount of time familiarizing themselves with the law of the discovery state. Also, the trial state has an interest in seeing that its discovery procedure is followed because its law will ultimately determine the use to which the deposition will be put.²⁷¹

Under the UIIPA, the discovery state court is also permitted to retain the procedures of the discovery state. This has obvious

267. The issue of choice of law, principally arising in the areas of relevance and privilege, is a separate subject, although related to choice of procedure.

268. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (1971) [hereinafter cited as RESTATEMENT]. Comment a to §127 states that "[t]he local law of the forum governs . . . pre-trial practice, including the taking and use of depositions, discovery and penalties for refusal to comply with proper request for information."

269. UIIPA, *supra* note 4, § 3.02 at 492.

270. This may be particularly important if the deposition is taken under a protective order issued by the trial state because, in this situation, the trial state has already made a determination that some aspects of the deposition must be performed in a certain manner.

271. See *Discovery*, *supra* note 6, at 1050.

advantages in certain situations, particularly where the deponent, rather than a party, is making objections to the deposition,²⁷² since the discovery state has an interest in protecting its own domiciliary.²⁷³ Following discovery state procedures may also make the process easier to administer.²⁷⁴ Since the deposition is taken in the discovery state, there is little reason to follow the trial state rules regarding the distance a witness may be required to travel or the fees to be paid to him.²⁷⁵ Sufficient flexibility is provided under the UIIPA so that these competing interests may be properly balanced.

While the UIIPA provides that the discovery state procedure will be followed absent a contrary prescription in the order compelling testimony, in Rhode Island, these presumptions are reversed. The Rhode Island statute provides that the commission issued by the trial state authorizing the deposition may prescribe the "formalities" to be followed; otherwise, the deposition is taken "according to the laws of the jurisdiction whence said commission issues."²⁷⁶ In Rhode Island, then, the court in the discovery state acts merely as an extension of the trial state court.

One group of states has rules providing that "[w]henver the deposition of any person is to be taken in this state pursuant to the laws of another state or of the United States or of another country for use in proceedings there," the proper subpoenas may be issued.²⁷⁷ This language may be interpreted in two ways. First, the rules may direct that depositions to be used in another state must be taken in accordance with the laws of the trial state. On the other hand, "pursuant to the laws of another state" could mean merely that the trial state must have a statute authorizing the use of an out-of-state deposition. Other provisions of these rules shed little light on this ambiguity, although applying the general rule that the procedure of the forum state should govern resolves the ambiguity in favor of the discovery state.²⁷⁸

Other statutes, although having similar wording, contain additional language that provides insights into the procedure to be followed. The Hawaii statute states that

[w]here a commission . . . has been issued from a court without the State . . . pursuant to the laws or practice of

272. *Id.*

273. *Id.*

274. *Id.*

275. Some states have covered these areas within their interstate deposition statutes. See notes 204-06, 216-24 and accompanying text *supra*.

276. R.I. GEN. LAWS § 9-18-11 (1969).

277. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; W. VA. R. CIV. P. 28(d).

278. See RESTATEMENT, *supra* note 268, § 127.

the State . . . wherein the deposition is to be used . . . the circuit court . . . shall order the issuance of a subpoena to any witness commanding him . . . to testify in the same manner as is provided by the rules of court relating to depositions for use in State.²⁷⁹

Thus, the Hawaii statute is of the same manner type.²⁸⁰ In addition to the "pursuant to" language, the Missouri rule provides that the court "in aid of the taking of the deposition, and having due regard for the laws and rules of [the trial state], may make such orders as could be made if the deposition were intended for use in this jurisdiction."²⁸¹ Although this language relates to protective orders,²⁸² it also indicates that a Missouri court may apply its own procedure in taking depositions to be used out of state. The procedure of the trial state, however, must at least be taken into account. The Kansas statute, which describes the types of orders that a court may make, is similar.²⁸³ It indicates that Kansas procedure should be followed at least to a certain extent. The Delaware statute is another that details the Delaware procedure that should be followed.²⁸⁴ Although the Maine rule begins by stating that "[t]he deposition of any person may be taken in this state upon oral examination pursuant to the laws of another state,"²⁸⁵ its main thrust indicates that Maine procedure is to be followed. First, it details those protective orders which may be issued by the court pursuant to the Maine rule.²⁸⁶ More importantly, the Maine rule provides that the necessary application for a subpoena be docketed as a civil action, thus indicating that this is more than a minimal contact with the Maine court and that the usual procedure should apply.²⁸⁷ The Maine rule does provide, though, for notice to be given in accordance with the procedure of the trial state.²⁸⁸ Arizona is another state that requires the application for a subpoena to be filed as a civil action. Arizona procedure is clearly contemplated by the language of the discovery provision, which states that "any party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure."²⁸⁹

In those states having same manner statutes,²⁹⁰ the wording of the provisions supports the inference that the procedure of the

279. HAWAII REV. STAT. § 624-27 (1976).

280. See note 178 *supra*.

281. MO. R. CIV. P. 57.08.

282. See text accompanying notes 339, 344 *infra*.

283. KAN. STAT. ANN. § 60-228(d) (1976).

284. DEL. CODE ANN. tit. 10, § 4311 (1974).

285. ME. R. CIV. P. 30(h)(1).

286. *Id.* 30(h)(2)(ii).

287. *Id.* 30(h)(3)(vii).

288. *Id.*

289. ARIZ. R. CIV. P. 30(h).

290. See note 178 *supra*.

discovery state should be followed when taking a deposition.²⁹¹ Unlike the statutes that speak in terms of depositions to be taken pursuant to the laws of another state, the UFDA provides that where a commission is issued by a trial state court, depositions will be taken "by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state."²⁹² States that have adopted the UFDA,²⁹³ therefore, clearly maintain their own procedure and do not act as a mere extension of the trial state court.²⁹⁴ The same result is necessary for other same manner provisions.²⁹⁵

The remaining state interstate deposition statutes do not indicate which state's procedure for the taking of depositions should be followed.²⁹⁶ The fact that a majority of these provisions are contained within the state rules of civil procedure offers an inference that the discovery state practice prevails.²⁹⁷ On the other hand, a few of these provisions set out such detailed procedures dealing with contempt, witness fees, and protective orders that one might suggest that a special procedure, one dealing specifically with depositions to be used in a foreign state, be followed.²⁹⁸ The detailed procedures, however, track the practice normally followed in the discovery court, and presumably discovery state procedure would be followed. In the absence of any language indicating otherwise, the general rule that discovery state procedure is to be followed must be looked to for guidance.²⁹⁹

B. Law Governing Questions of Relevance

Questions of relevance may arise in two procedural settings. Relevance considerations may arise first in the trial state court.³⁰⁰

291. See *Discovery*, *supra* note 6, at 1050.

292. UFDA, *supra* note 13, § 1 at 62.

293. For a compilation of these states, see note 15 *supra*.

294. See *Discovery*, *supra* note 6, at 1050.

295. The Utah provision buttresses this position. It states that "all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken." UTAH R. CIV. P. 27(f).

296. See ALA. R. CIV. P. 28(b); ARK. R. CIV. P. 28(c); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); KY. R. CIV. P. 28.03; MINN. R. CIV. P. 45.04; MISS. CODE ANN. § 13-3-97 (1972); N.M. STAT. ANN. § 38-8-1 (1978); N.C. R. CIV. P. 28(d); WASH. SUPER. CT. CIV. R. 45(d)(4); WIS. STAT. ANN. § 887.24 (West 1966).

297. See ALA. R. CIV. P. 28(b); ARK. R. CIV. P. 28(c); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); KY. R. CIV. P. 28.03; MINN. R. CIV. P. 45.04; MISS. CODE ANN. § 13-3-97 (1972); N.C. R. CIV. P. 28(d); WASH. SUPER. CT. CIV. R. 45(d)(4); WIS. STAT. ANN. § 887.24 (West 1966).

298. See MINN. R. CIV. P. 45.04; N.M. STAT. ANN. §§ 38-8-1 to -3 (1978); N.C. R. CIV. P. 28(d).

299. See RESTATEMENT, *supra* note 268, § 127.

300. See Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, LAW & CONTEMP. PROBS., Spring 1977, at 85, 99 [hereinafter cited as Reese & Leiwant].

In this case, questions may be raised when a party seeks a trial court order or commission for an out-of-state deposition³⁰¹ or, if notice is the proper procedure, the opposing party may seek an order to stop or limit the examination after notice is received.³⁰² Clearly, such objections should be ruled on by the trial state court.³⁰³ Relevance questions may also arise in the discovery state court if objections are made there to the taking of testimony.³⁰⁴ Usually, such objections would be made by the deponent, but opposing parties might also ask the discovery state court to limit or terminate the deposition.³⁰⁵

Different considerations apply depending upon who seeks the action of the discovery state court. First, if a domiciled deponent is subpoenaed in the discovery state, that state has an interest in protecting its citizens from harassment.³⁰⁶ Therefore, it would be reasonable for the court to rule on objections.³⁰⁷ On the other hand, if an opposing party chooses to object in the discovery state court rather than in the trial state court, the discovery state court need not make potentially difficult and lengthy determinations about relevance. Since the trial court is more conversant with the action, it is preferable for the discovery state court to allow the deposition to proceed and have objections ruled upon later by the trial state court, absent any statutory necessity for the discovery state court's deciding relevance.³⁰⁸

A few state statutes seem to mandate that the discovery court decide relevance before issuing a subpoena.³⁰⁹ In California, a subpoena may be issued if it appears "[t]hat the testimony of [the] witness . . . [is] relevant to the subject matter involved in the

301. See *In re Hild*, 124 N.Y.S.2d 271, 274 (Sup. Ct. 1953). See also, e.g., N.Y. CIV. PRAC. R. 3108 (McKinney 1970).

302. See, e.g., N.J. R. CIV. PRAC. 4:10-3; N.Y. CIV. PRAC. LAW § 3103 (McKinney 1970).

303. See *Discovery*, supra note 6, at 1051; cf. Schmertz, *Written Depositions Under Federal and State Rules as Cost-Effective Discovery at Home and Abroad*, 16 VILL. L. REV. 7, 27 (1970) (party objections to Federal Rule 31 interrogatories should be decided by trial state court) [hereinafter cited as Schmertz].

304. Reese & Leiwant, supra note 300, at 101-03.

305. See, e.g., ARIZ. R. CIV. P. 30(d); DEL. SUP. CT. R. 30(d); NEV. R. CIV. P. 30(d); VT. R. CIV. P. 30(d).

306. See *Discovery*, supra note 6, at 1050.

307. See Schmertz, supra note 303, at 27; *Discovery*, supra note 6, at 1050.

308. See *In re Cromwell*, 50 N.Y.S.2d 255, 256-57 (Sup. Ct.), *aff'd*, 268 A.D. 846, 50 N.Y.S. 2d 670 (1944); cf. *Discovery*, supra note 6, at 1050-51 (interests of discovery and trial states). But see Schmertz, supra note 303, at 27 ("It is submitted that objections to depositions should be handled where the deposition is to be taken.")

309. ARIZ. R. CIV. P. 30(h); CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); N.M. STAT. ANN. § 38-8-1 (1978).

action or proceeding.”³¹⁰ In New Mexico, a deponent may only be required to produce documents that are “material.”³¹¹ In a less direct manner, the Arizona rule requires a recitation of “such facts as . . . must appear to entitle the party to take the deposition.”³¹² This language indicates that the Arizona court will make relevance determinations.

A large number of other statutes imply that the discovery state court is to make relevance determinations. In states having same manner statutes, for example, the court would be authorized to determine relevance, since the usual state deposition proceeding clearly contemplates this.³¹³ The same conclusion is warranted in states that authorize the issuance of a subpoena under a specific state rule, because these rules usually allow discovery only of relevant information.³¹⁴ In these states, however, unlike Arizona, California and New Mexico, the command is less direct, and it is submitted that the court could decline to decide relevance questions based on the considerations discussed above.³¹⁵

If the discovery state court chooses to decide relevance questions,³¹⁶ a most important question arises: Under the law of which state is relevance to be determined?³¹⁷ In a few New York cases, the courts have held that relevance is to be determined under the law of the trial state, so long as the testimony to be elicited is not entirely irrelevant.³¹⁸ This seems to be the better view. In determining relevance, a discovery state court has little interest in protecting its citizens, unlike situations in which questions of privilege arise.³¹⁹ Also, the evidence has to be admitted at trial according to the laws of the trial state; without an overriding interest,

310. CAL. CIV. PROC. CODE § 2023(2) (West Supp. 1981).

311. N.M. STAT. ANN. § 38-8-1 (1978). Although the terms “relevant” and “material” may be distinguished, they are often used interchangeably. E. CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 185, at 434 (2d ed. 1972) [hereinafter cited as CLEARY].

312. ARIZ. R. CIV. P. 30(h)(b).

313. For example, rule 26 of the Federal Rules of Civil Procedure, after which many state statutes are modeled, provides that “[p]arties may obtain discovery regarding any matter . . . which is relevant.” FED. R. CIV. P. 26(b)(1).

314. See note 313 *supra*.

315. See text accompanying notes 306-08 *supra*.

316. It may be assumed that the trial state court would apply its own law when confronted with relevance objections.

317. Section 138 of the *Restatement (Second) of Conflict of Laws* states that “[t]he local law of the forum determines the admissibility of evidence.” RESTATEMENT, *supra* note 268, § 138. However, this rule merely begs the question in cases involving depositions taken in one state to be used in another, since both states have attributes of the “forum.”

318. *In re Roberts*, 214 A.D. 271, 275-76, 212 N.Y.S. 183, 187-88 (1925); *In re Hild*, 124 N.Y.S.2d 271, 274 (Sup. Ct. 1953); *In re McGillvra*, 60 N.Y.S.2d 658, 659 (Sup. Ct. 1946); *In re Cromwell*, 50 N.Y.S.2d 255, 255 (Sup. Ct.), *aff’d*, 268 A.D. 846, 50 N.Y.S.2d 670 (1944); *cf. Discovery*, *supra* note 6, at 1050 (where deponent objects, discovery state law should apply).

319. See text accompanying notes 322-37 *infra*.

the discovery state court should not deny parties even potentially relevant evidence.³²⁰ Finally, testimony to be obtained in the discovery state may already have the trial state court's imprimatur — a commission or order — that indicates its relevance, and a discovery state court should not overrule these findings.³²¹ For all of these reasons, relevance should be determined under the law of the trial state.

C. Law Governing Questions of Privilege

Questions of privilege are more difficult to resolve than those concerning relevance for several reasons. Unlike relevance issues, privilege issues involve the clash of important interests of both the discovery state and the trial state. The discovery state has a strong interest in protecting its citizens from the revelation of privileged communications, and the trial state has an equally strong interest in seeking out all relevant evidence for trial.³²² Also, whereas relevance law may differ slightly from state to state, privilege jurisprudence differs markedly.³²³ Although questions of privilege may arise in the trial state court, this discussion centers on the considerations to be examined by the discovery state court when confronted with objections, on privilege grounds, to its issuance of a subpoena to compel a deposition that is to be used in another state.³²⁴

Choice of law questions involving privilege may be complicated by the interposition of another state's interest — that of the state with the most significant relationship to the communication.³²⁵ This state has made the determination of which communications made within it should be privileged, and if the parties to the communication rely on any law at all, it will be that of the state with the most significant relationship.³²⁶ Therefore, the interests of all three states must be balanced.

The easiest case for the discovery state court arises when the communication is not privileged under either its law or that of the state with the most significant relationship.³²⁷ Even if the infor-

320. See *In re Cromwell*, 50 N.Y.S.2d 255, 255 (Sup. Ct.), *aff'd*, 268 A.D. 846, 50 N.Y.S.2d 670 (1944).

321. See *In re Hild*, 124 N.Y.S.2d 271, 274 (Sup. Ct. 1953). Of course, since deposition by notice is more prevalent today, this is not always the case. See notes 168-87 and accompanying text *supra*.

322. See RESTATEMENT, *supra* note 268, § 139 Comments c, d; Reese & Leiwant, *supra* note 300, at 99, 103; *Discovery*, *supra* note 6, at 1050.

323. See, e.g., CLEARY, *supra* note 311, § 77 at 156-60; 8 J. WIGMORE, EVIDENCE § 2286, at 528-37 (J. McNaughton rev. 1961) (both discussing the proliferation of statutory privileges).

324. For a good discussion of the principles to be applied by the trial state court, see Reese & Leiwant, *supra* note 300, at 99-100.

325. See, e.g., RESTATEMENT, *supra* note 268, § 139 Comment e.

326. See, e.g., *id.* Comment c.

327. See Reese & Leiwant, *supra* note 300, at 101.

mation might be privileged and, thus, inadmissible in the trial state, the discovery state court should issue any necessary subpoenas, leaving the debate on admissibility to be waged in another forum.³²⁸

If the communication is not privileged under the discovery state's law but is privileged under the law of the state with the most significant relationship, the discovery state court is in a most difficult situation.³²⁹ Having no law of its own to apply, the court must decide whether the interests of the state with the most significant relationship or of the trial state should govern.³³⁰ If the information is privileged in the trial state also, the deposition should not be compelled.³³¹ However, the interests of the trial state may be at odds with those of the state with the most significant relationship when the communication is not privileged under the laws of the trial state. Although it has been suggested that the discovery state court allow the deposition to proceed in that case,³³² the interests of the discovery state in protecting its citizens, even relating to communications privileged in one state but not in the discovery state, would probably be decisive.³³³

Another situation is presented when the communication is privileged under the laws of the discovery state.³³⁴ When the discovery state is also the state with the most significant relationship to the communication, the cases indicate that the discovery state will bar the taking of the deposition.³³⁵ Even if the discovery state is not the state with the most significant relationship, it may have compelling reasons for refusing to assist the trial state in the taking of the deposition.³³⁶ When the discovery state has no relationship with the communication, though, there are few instances in which it should deny the issuance of a subpoena.³³⁷

VI. PROTECTIVE ORDERS

Although this article has focused primarily on the party wishing to take a deposition outside the trial state, the interests of the deponent must not be overlooked. The discovery state court's

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* Whether such an argument could often be made, especially if the trial state court authorized the deposition by order, is another question.

332. *Id.* at 102.

333. *See Discovery*, *supra* note 6, at 1051.

334. *See Reese & Leiwant*, *supra* note 300, at 102-03.

335. *See In re Franklin Wash. Trust Co.*, 1 Misc. 2d 697, 148 N.Y.S.2d 731 (1956); *In re Topliffe*, 191 Misc. 466, 77 N.Y.S.2d 716, *aff'd*, 274 A.D. 760, 80 N.Y.S.2d 360 (1948); *Reese & Leiwant*, *supra* note 300, at 103 & n.58.

336. *See Reese & Leiwant*, *supra* note 300, at 103.

337. *See id.* at 102.

ability to protect the deponent, usually a domiciliary of the discovery state, via a protective order is of importance. To the extent that a deponent seeks a protective order based on the grounds of relevance or privilege, the case should be analyzed in terms of the principles discussed above.³³⁸ When a deponent seeks protection on other grounds, such as harassment or inconvenience, relevance and privilege concepts may not apply. Some interstate deposition statutes touch directly on the subject of protective orders.

A few states have statutes expressly providing for the issuance of protective orders.³³⁹ Alabama Rule 28(b) provides that "[o]rders of the character provided in Rules 30(d) . . . and 45(b) [dealing with protective orders] may be made upon proper application therefor by the person to whom such a subpoena is directed."³⁴⁰ Substantially identical language may be found in the Kansas and North Carolina provisions.³⁴¹ The Maine rule states that "any deponent or party" may obtain a protective order, thereby providing a broader scope of those entitled to relief.³⁴² Although not mentioning the rule under which protective orders may be granted, the Arizona rule clearly provides for them: "[A]ny party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure."³⁴³ Similarly, the Missouri rule states that "the circuit court . . . may make such orders as could be made if the deposition were intended for use in this jurisdiction."³⁴⁴ Also, New York has a provision that allows courts to "make any appropriate order in aid of taking such a deposition."³⁴⁵

A large number of state statutes provide for the issuance of protective orders by implication. For instance, four states have statutes that allow a court to punish disobedience or contempt in

338. See notes 300-21 and accompanying text *supra* (relevance); notes 322-37 and accompanying text *supra* (privilege).

339. ALA. R. CIV. P. 28(b); KAN. STAT. ANN. § 60-228(d) (1976); ME. R. CIV. P. 30(h)(2)(ii); N.C. R. CIV. P. 28(d); see ARIZ. R. CIV. P. 30(h); MO. R. CIV. P. 57.08.

340. ALA. R. CIV. P. 28(b).

341. KAN. STAT. ANN. § 60-228(d) (1976); N.C. R. CIV. P. 28(d).

342. ME. R. CIV. P. 30(h)(2). Since an application for a subpoena from a Maine court is docketed as a civil action, *id.* 30(h)(2)(i), true "parties" exist in the Maine courts. It is not wise, however, to allow party litigants to use the Maine courts as another forum to block the taking of a deposition, especially where their pleas have been heard and rejected by the trial court. See text accompanying notes 304-08 *supra*. Therefore, protective orders should be confined as much as possible to those made on the deponent's motion.

343. ARIZ. R. CIV. P. 30(h). The Arizona procedure is similar to that of Maine. See text accompanying notes 146, 159 *supra*. Therefore, the considerations discussed in note 342 *supra* apply.

344. MO. R. CIV. P. 57.08.

345. N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970).

the same manner as when the deposition is to be used in the discovery state.³⁴⁶ These statutes also permit a court to refuse to punish a deponent for contempt in cases where a protective order would have been issued. To relieve parties of the uncertainty of that procedure, a court should be able to issue a protective order in advance. Section 3.02 of the UIIPA also implies that a court may issue a protective order. The UIIPA grants courts a large amount of discretion in issuing an order to compel testimony³⁴⁷ and provides that "[t]he order . . . may prescribe the practice and procedure . . . for taking the testimony or statement."³⁴⁸ This language gives a court the power to compel testimony on the condition that the deponent not be required to answer certain questions or be harassed in a particular way. States having same manner statutes present a simple case.³⁴⁹ Since every state having a same manner statute also provides for the protection of the deponent,³⁵⁰ a deponent merely has to follow the individual state procedure.

A number of states have statutes that neither expressly nor impliedly authorize the issuance of protective orders.³⁵¹ Generally,

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346. COLO. REV. STAT. § 13-90-111 (1973); DEL. CODE ANN. tit. 10, § 4311 (1974); HAWAII REV. STAT. § 624-27 (1976); IOWA CODE ANN. § 622.84 (West Supp. 1981-1982). The Hawaii statute also provides that "such additional or other orders as would be proper if the deposition were for use in this state" may be issued. HAWAII REV. STAT. § 624-27 (1976). Although this language is similar to that found in the Arizona and Missouri rules, ARIZ. R. CIV. P. 30(h); MO. R. CIV. P. 57.08, it follows the phrase "[i]f any witness fails to obey the subpoena," which casts into doubt its general applicability.
347. See text accompanying notes 230-35 *supra*.
348. UIIPA, *supra* note 4, § 3.02 at 492.
349. For a compilation of those states with same manner provisions, see note 178 *supra*. Some provisions normally considered same manner statutes have already been discussed. See text accompanying notes 345 (New York) & 346 (Colorado, Delaware, Hawaii, and Iowa) *supra*.
350. See CAL. CIV. PROC. CODE § 2019(b)(1), (d) (West Supp. 1981); CONN. SUP. CT. R. §§ 167D, 187A(e); FED. R. CIV. P. 26(c), 30(d) (District of Columbia); D.C. SUPER. CT. R. CIV. P. 26(c), 28-1(b), 30(d); FLA. R. CIV. P. 1.280(c); GA. CODE ANN. § 38-2105(c) (1981); LA. CODE CIV. PROC. ANN. art. 1426 (West Supp. 1981); MD. R.P. 406; NEB. REV. STAT. §§ 25-1267.22, .24 (1979); NEV. R. CIV. P. 26(c), 30(d); N.H. SUPER. CT. R. 44; N.D. R. CIV. P. 26(c), 30(d); OHIO R. CIV. P. 26(C), 30(D); OKLA. STAT. ANN. tit. 12, § 548 (West 1960); OR. REV. STAT. §§ 41.618, 45.185 (1979-1980); S.C. CIR. CT. PRAC. R. 87H(1), (2); S.D. COMP. LAWS ANN. §§ 15-6-26(c), -30(d) (Supp. 1980); TENN. R. CIV. P. 30.02, .04; TEX. R. CIV. P. 186b; UTAH R. CIV. P. 26(c), 30(d); VT. R. CIV. P. 26(c), 30(d); VA. SUP. CT. R. 4:1(c); WYO. R. CIV. P. 26(c), 30(d).
351. ALASKA R. CIV. P. 27(c); ARK. R. CIV. P. 28(c); IDAHO R. CIV. P. 28(e); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); KY. R. CIV. P. 28.03; MINN. R. CIV. P. 45.04; MISS. CODE ANN. § 13-3-97 (1972); MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; N.M. STAT. ANN. § 38-8-1 (1978); R.I. GEN. LAWS § 9-18-11 (1969); WASH. SUPER. CT. CIV. R. 45(d)(4); W. VA. R. CIV. P. 28(d); WIS. STAT. ANN. § 887.24 (West 1966).

courts in these states should be able to issue orders protecting deponents from harassment or inconvenience. In about half of these provisions, reference is made to other sections that allow the quashing of subpoenas duces tecum.³⁵² Thus, at least limited power to protect deponents exists. More importantly, most of these statutes allow for judicial discretion in issuing subpoenas.³⁵³ Deponents may therefore be protected from harassment or inconvenience by the exercise of this discretion. Finally, even in the absence of an implied or express provision, deponents may be protected by the court's power over its own process; no court would refuse to provide a deponent relief from a subpoena issued by the same court.³⁵⁴

VII. SUBPOENAS DUCES TECUM

To the litigator, discovery of documents³⁵⁵ is as important as the taking of testimony.³⁵⁶ Between parties, discovery of documents may be accomplished by a request to produce, as set out in either the federal or state rules.³⁵⁷ Because non-parties are not susceptible to requests for the production of documents,³⁵⁸ some other procedural device is necessary to obtain documents in their possession. The subpoena duces tecum fills this need.

Production of documents creates the same problems as the taking of testimony when, in a state court action, discovery is sought from a non-party found outside of the trial state.³⁵⁹ An inquiry must therefore be made as to whether state interstate deposition statutes provide for or prohibit the issuance of a subpoena duces tecum to aid a proceeding in a court of another state.

Interstate deposition statutes vary with respect to subpoenas duces tecum. Some statutes explicitly provide for them. Others allow for their use by providing that the usual discovery state procedures apply when taking a deposition for use in another state. In turn, these procedures provide for the issuance of a subpoena duces tecum. Finally, some states have statutes that are silent on

352. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(c); KY. R. CIV. P. 28.03; MINN. R. CIV. P. 45.04; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; W. VA. R. CIV. P. 28(d).

353. ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; R.I. GEN. LAWS § 9-18-11 (1969); WASH. SUPER. CT. CIV. R. 45(d)(4); W. VA. R. CIV. P. 28(d); WIS. STAT. ANN. § 887.24 (West 1966).

354. See, e.g., *In re Denning*, 44 Del. 470, 61 A.2d 657 (1948).

355. The phrase "discovery of documents" is used here to mean not only discovery of actual papers but also discovery of any other physical evidence allowed by state law.

356. See 8 WRIGHT & MILLER, *supra* note 36, § 2202 at 585-86.

357. See, e.g., FED. R. CIV. P. 34; ARIZ. R. CIV. P. 34; MASS. R. CIV. P. 34; OHIO R. CIV. P. 34; VT. R. CIV. P. 34.

358. See, e.g., FED. R. CIV. P. 34; ARIZ. R. CIV. P. 34; MASS. R. CIV. P. 34; OHIO R. CIV. P. 34; VT. R. CIV. P. 34.

359. See text accompanying notes 5-9 *supra*.

the subject. In these states, the use of a subpoena duces tecum must be inferred.

A. Statutes Explicitly Providing for Subpoenas Duces Tecum

A number of state statutes have language that explicitly mentions the production of documents to be used in a proceeding outside the discovery state. Of those, a few stipulate the subpoena duces tecum.³⁶⁰ Most states in this category provide for the "production of documents" rather than for the issuance of a subpoena duces tecum, although the result is the same.³⁶¹

The UIIPA, for instance, provides that "[a] court of this state may order a person who is domiciled or is found within this state . . . to produce documents or other things for use in a proceeding in a tribunal outside this state."³⁶² The Arkansas rule also provides for the production of a "document or other thing."³⁶³ The Minnesota rule uses even broader language: "The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things."³⁶⁴

In two states, discovery may not be as broad. The New Hampshire statute provides for the "production of papers."³⁶⁵ This does not seem to encompass the "other things" allowed by the UIIPA states. New Mexico allows the production of "such books, papers and writings as may be deemed material."³⁶⁶ Again, physical evidence such as parts of a car involved in an accident or an ore sample would not seem to fall within the bounds of the New Mexico statute.³⁶⁷ Discovery of documents is clearly encompassed in both statutes.

The language of the Hawaii statute lies on the border between those provisions which explicitly mention the production of docu-

360. ARIZ. R. CIV. P. 30(h); CAL. CIV. PROC. CODE § 2023 (West Supp. 1981); DEL. CODE ANN. tit. 10, § 4311 (1974).

361. ARK. R. CIV. P. 28(c); IND. R. TRIAL P. 28(E); LA. REV. STAT. ANN. § 13:3824 (West 1968); MASS. GEN. LAWS ANN. ch. 223A, § 11 (West Supp. 1981); MICH. COMP. LAWS ANN. § 600.1852(2) (1981); MINN. R. CIV. P. 45.04; N.H. REV. STAT. ANN. § 517:18 (1974); N.M. STAT. ANN. § 38-8-1 (1978); OKLA. STAT. ANN. tit. 12, § 1703.02 (West 1980); 42 PA. CONS. STAT. ANN. § 5326 (Purdon Supp. 1981).

362. UIIPA, *supra* note 4, § 3.02 at 492.

363. ARK. R. CIV. P. 28(c).

364. MINN. R. CIV. P. 45.04. Despite the broader language, the scope of discovery should not be significantly greater in Minnesota than in a UIIPA state.

365. N.H. REV. STAT. ANN. § 517:18 (1974).

366. N.M. STAT. ANN. § 38-8-1 (1978). A second New Mexico provision relating to the production of documents states that "no witness shall be required to deliver up any book, paper or writing to be annexed to the said deposition and taken out of this state, but a copy of the same may be annexed to such deposition." *Id.* § 38-8-2.

367. This may present problems if the scope of discovery is significantly narrower in the discovery state than in the trial state. See Schmertz, *supra* note 303, at 26-27. Hopefully, the discovery state court would allow the broader discovery.

ments and those which refer to other statutes allowing the issuance of a subpoena duces tecum. Although the Hawaii provision generally requires that depositions to be used in foreign courts be taken in the same manner as those to be used in Hawaii, the statute also provides that any witness who "fails to . . . produce a book or paper pursuant to a subpoena" may be punished for contempt.³⁶⁸ Thus, at least in part, the use of a subpoena duces tecum is expressly authorized by the Hawaii statute.³⁶⁹

B. Statutes Implicitly Allowing Subpoenas Duces Tecum

The great majority of states allow the use of subpoenas duces tecum not by providing for them in the interstate deposition statute but rather by adopting by reference other statutes that allow compulsory process for production of documents. These statutes are of two different types: first, those that refer to a specific statute; and second, same manner provisions.

Most states referring to a specific statute provide that a court may issue a subpoena pursuant to the state analogue to Federal Rule 45(d).³⁷⁰ All of the statutes or rules to which the interstate deposition provisions refer allow the issuance of a subpoena duces tecum;³⁷¹ thus, this device is available to out-of-discovery-state litigants wishing to have documents produced for a foreign court proceeding. The South Carolina statute, however, makes reference to another provision that does not explicitly provide for subpoenas duces tecum, thus casting their availability to foreign litigants into doubt.³⁷² South Carolina courts do recognize that a subpoena may be accompanied by a request to produce documents³⁷³ and, thus, the procedure should be available to aid a foreign state court.³⁷⁴

The question of the availability of subpoenas duces tecum also arises in those states having same manner provisions. Since these provisions merely adopt the usual state procedure for taking depositions to be used out of state, the procedure of each state

368. HAWAII REV. STAT. § 624-27 (1976).

369. In any event, rule 45(d) of the Hawaii Rules of Civil Procedure provides for the issuance of a subpoena duces tecum.

370. ALA. R. CIV. P. 28(b); ALASKA R. CIV. P. 27(c); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.J. R. CIV. PRAC. 4:11-4; N.C. R. CIV. P. 28(d); W. VA. R. CIV. P. 28(d).

371. See ALA. R. CIV. P. 45(d); ALASKA R. CIV. P. 45(d); IDAHO R. CIV. P. 45(d); KAN. STAT. ANN. § 60-245(b) (1976); KY. R. CIV. P. 45.04; ME. R. CIV. P. 45; MO. R. CIV. P. 57.09(b); MONT. R. CIV. P. 45(d); N.J. R. CIV. PRAC. 4:14-7; N.C. R. CIV. P. 45; W. VA. R. CIV. P. 45.

372. S.C. CODE § 19-15-90 (1976). See also *id.* § 19-15-50.

373. See *Mills Mill v. Hawkins*, 232 S.C. 515, 532, 103 S.E.2d 14, 21 (1957).

374. See *In re Bolster*, 59 Wash. 655, 110 P. 547 (1910).

must be examined to determine whether production of documents is allowed. Each state having a same manner provision also provides elsewhere for the issuance of a subpoena duces tecum, however,³⁷⁵ and their use to aid in discovery for a foreign judicial proceeding should not be questioned.

A few interstate deposition statutes neither explicitly allow the issuance of a subpoena duces tecum nor refer to other provisions of state law that allow for them.³⁷⁶ In these states, the argument might be made that, since the statutory language refers only to testimony, production of documents is foreclosed.³⁷⁷ This argument was rejected by a Washington court in *In re Bolster*.³⁷⁸

In *Bolster*, a commission authorizing the taking of a deposition and production of books and records was issued by a California court to a Washington notary.³⁷⁹ The witness appeared to testify but failed to bring the requested books and records with him.³⁸⁰ The lower court refused to require the witness to produce the documents, and on appeal it was argued that the court did not have the authority to issue a subpoena duces tecum. Although the Washington interstate deposition provision made no mention of the production of documents,³⁸¹ other provisions of the Washington statute did allow for their production. In concluding that a narrow construction of the interstate deposition statute was inappropriate,³⁸² the *Bolster* court stated: "Manifestly the [interstate deposition provision was] intended to make effective the previous sections of the statute and these, as we have seen, authorize officers empowered to take depositions to issue subpoenas requiring the production of books and other documents."³⁸³

The approach taken by the court in *Bolster* is applicable to other interstate deposition statutes mentioning testimony only.

375. CONN. GEN. STAT. ANN. § 52-148e(b) (West Supp. 1981); D.C. SUPER. CT. R. CIV. P. 45(d)(1); FLA. R. CIV. P. 1.410(d)(1); GA. CODE ANN. § 38-2112(a) (West 1974); MD. R.P. 407(b); NEB. REV. STAT. § 25-1224 (1979); NEV. R. CIV. P. 45(d)(1); N.Y. CIV. PRAC. R. 3111 (McKinney 1970); N.D. R. CIV. P. 45(d); OHIO R. CIV. P. 45(D)(1); OR. REV. STAT. §§ 44.110, 45.190 (1979-1980); S.D. COMP. LAWS ANN. § 15-6-45(d) (Supp. 1980); TENN. R. CIV. P. 45.04; TEX. R. CIV. P. 201; UTAH R. CIV. P. 45(d)(1); VT. R. CIV. P. 45(a)(1); VA. SUP. CT. R. 4:9(c); WYO. R. CIV. P. 45(d).

376. COLO. REV. STAT. § 13-90-111 (1973); ILL. ANN. STAT. ch. 110A, § 204(b) (Smith-Hurd Supp. 1981-1982); IOWA CODE ANN. § 622.84 (West Supp. 1981-1982); MISS. CODE ANN. § 13-3-97 (1972); R.I. GEN. LAWS § 9-18-11 (1969); WASH. SUPER. CT. CIV. R. 45(d)(4); WIS. STAT. ANN. § 887.24 (West 1966).

377. See *In re Bolster*, 59 Wash. 655, 657, 110 P. 547, 548 (1910).

378. 59 Wash. 655, 110 P. 547 (1910).

379. *Id.* at 655-56, 110 P. at 547.

380. *Id.* at 656, 110 P. at 547-48.

381. *Id.* at 657, 110 P. at 548. The current version may be found at WASH. SUPER. CT. CIV. R. 45(d)(4).

382. 59 Wash. 655, 657, 110 P. 547, 548 (1910).

383. *Id.* at 657-58, 110 P. at 548.

Since in these states subpoenas duces tecum are recognized either by statute³⁸⁴ or by judicial decision,³⁸⁵ there is little reason to make them unavailable to foreign litigants. Therefore, it appears that production of documents may also be accomplished in these states.

C. *Special Procedures Relating to Subpoenas Duces Tecum*

A few states have special procedures that are used only when subpoenas duces tecum are requested. Also, many states have procedures for quashing a subpoena duces tecum in addition to the procedures for protecting a deponent, although these procedures often are not reflected in the interstate deposition provision. Therefore, an examination of those procedures is in order.

The Delaware statute has a special procedure for obtaining a subpoena duces tecum.³⁸⁶ While a subpoena for taking testimony is ordinarily issued by the Prothonotary of the Superior Court, "[n]o subpoena duces tecum shall be issued by the Prothonotary except upon an order of the Superior Court entered upon an application therefor to such Court, upon such notice to such witnesses as to the Court may seem proper."³⁸⁷ This language adds two additional requirements to the normal procedure for obtaining a subpoena duces tecum. First, it automatically interposes a court between the out-of-state litigant and the Prothonotary. Second, it explicitly provides that notice to the deponent may be required before a subpoena duces tecum will be issued. These requirements probably reflect the additional burdens that may be imposed by a subpoena duces tecum.

New Mexico has two requirements that relate solely to the production of documents. First, a deponent may only be required to produce documents "as may be deemed material."³⁸⁸ Another provision states that "no witness shall be required to deliver up any book, paper or writing to be annexed to the said deposition

384. Statutes or rules authorizing subpoenas duces tecum are found in Colorado, COLO. R. CIV. P. 45(b), Illinois, ILL. ANN. STAT. ch. 110A, § 204(a) (Smith-Hurd Supp. 1981-1982), Iowa, IOWA R. CIV. P. 155(c), Rhode Island, R.I. R. CIV. P. 45(d), and Wisconsin, WIS. STAT. ANN. § 805.07(1), (2) (West 1977).

385. Courts in Mississippi and New Hampshire have long recognized the use of a subpoena duces tecum. See *Long v. Sledge*, 209 So. 2d 814, 819 (Miss. 1968); *Hall v. Young*, 37 N.H. 134 (1858). As noted above, Washington courts have decided that the use of subpoenas duces tecum is allowed under the state interstate deposition rule. *In re Bolster*, 59 Wash. 655, 110 P. 547 (1910).

386. DEL. CODE ANN. tit. 10, § 4311 (1974).

387. *Id.* See also text accompanying notes 250-54.

388. N.M. STAT. ANN. § 38-8-1 (1978).

and taken out of this state, but a copy of the same may be annexed to such deposition."³⁸⁹ This provision should create no particular problems.³⁹⁰

The most important provisions relating to production of documents deal with the quashing of a subpoena duces tecum. These provisions may be applied to subpoenas for the production of documents to be used in other states in several ways. For example, an interstate deposition statute may provide explicitly for the quashing of subpoenas duces tecum.³⁹¹ More frequently, state foreign deposition statutes refer to other state procedural laws that deal with quashing subpoenas duces tecum.³⁹² Finally, the laws of the discovery state may be used through application of a same manner statute.³⁹³ As with both location requirements and witness fees, it must be assumed that a state has some provision relating to quashing a subpoena duces tecum. If it is not found in the interstate deposition statute, state procedure must be examined further.³⁹⁴

The Minnesota interstate deposition rule provides:

The person to whom the subpoena is directed may . . . serve upon the attorney designated in the subpoena written objection to the production, inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to the production or [sic], nor the right to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.³⁹⁵

This rule provides for protection of the person who is to produce documents by allowing objection and court action. If no objection is made, no court intervention is required.

389. *Id.* § 38-8-2.

390. Although copies of documents may sometimes be inadmissible in the trial state court under the "best evidence rule," see CLEARY, *supra* note 311, § 236 at 567-69, a recital of the New Mexico statute should provide ample excuse for not tendering the original. See *id.* § 238 at 571-72.

391. See MINN. R. CIV. P. 45.04(2).

392. See ALA. R. CIV. P. 28(b); ALASKA R. CIV. P. 27(c); ARIZ. R. CIV. P. 30(h); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.C. R. CIV. P. 28(d); W. VA. R. CIV. P. 28(d).

393. See note 397 and accompanying text *infra*.

394. It is beyond the scope of this article to discuss each state's procedure. This section will merely touch upon those state provisions arising, or referred to, in interstate deposition statutes. For a discussion of whether discovery state procedure need apply at all, see text accompanying notes 267-99 *supra*.

395. MINN. R. CIV. P. 45.04(2). Compare *id.* with FED. R. CIV. P. 45(d)(1).

Although Minnesota is the only state providing for such a procedure in its interstate deposition rule, many state statutes adopt a similar one by reference.³⁹⁶ The same result may be reached in states with same manner statutes which also have special provisions relating to the quashing of subpoenas duces tecum.³⁹⁷ Therefore, discovery state procedure in this area must be closely scrutinized.

VIII. CONCLUSION

Interstate deposition statutes provide a means of facilitating discovery across state lines when litigants are involved in an action in state court. In so doing, they have the potential of making interstate discovery as simple in the state court system as it is in the federal court system. Unfortunately, the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities leave them far short of their potential.

A unified system is desirable in this area, and often it is a uniform act which meets this goal. The UFDA, the earliest attempt at uniformity, was adopted by less than half of the states. Because the UFDA is overly simplistic, it fails to meet some of the complex problems arising when depositions are taken in one state to be used in another. The UIIPA is a vast improvement over the UFDA. Its approach is to allow the discovery state court discretion in fashioning the methods of interstate discovery. Discovery is traditionally an area in which the court has discretionary power, and this Act provides the flexibility necessary to deal with the many possible situations.

Few states have abandoned their older statutes in favor of the UIIPA, thus contributing to the jumble of provisions dealing with interstate depositions. Unless one statute can be fashioned and adopted by a great majority of states, the practitioner will remain saddled with the unwieldy variety of interstate deposition statutes whenever litigation leads out of the home state. The UIIPA offers a handy solution to this problem and should be closely examined by the state legislatures.

396. See ALA. R. CIV. P. 28(b); ALASKA R. CIV. P. 27(c); ARIZ. R. CIV. P. 30(h); IDAHO R. CIV. P. 28(e); KAN. STAT. ANN. § 60-228(d) (1976); KY. R. CIV. P. 28.03; ME. R. CIV. P. 30(h); MO. R. CIV. P. 57.08; MONT. R. CIV. P. 28(d); N.C. R. CIV. P. 28(d); W. VA. R. CIV. P. 28(d).

397. See, e.g., CONN. GEN. STAT. ANN. § 52-148e(f) (West Supp. 1981) (same manner statute); *id.* § 52-148e(c) (objection to subpoena duces tecum); D.C. CODE ANN. § 14-103 (1973) (same manner statute); FED. R. CIV. P. 45(d)(1) (applicable in District of Columbia) (objection to subpoena duces tecum); D.C. SUPER. CT. CIV. R. 45(d)(1) (objection to subpoena duces tecum); HAWAII REV. STAT. § 624-27 (1976) (same manner statute); HAWAII R. CIV. P. 45(d)(1) (objection to subpoena duces tecum). For a compilation of other same manner provisions, see note 178 *supra*.