



STATE OF NEW JERSEY
LAW REVISION COMMISSION

Tentative Report

Relating to the

Uniform Interstate Depositions and Discovery Act

July 23, 2012

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN SEPTEMBER 24, 2012. Please send comments concerning this tentative report or direct any related inquiries, to:

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INTRODUCTION

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

OVERVIEW OF THE UIDDA

History of the UIDDA

Two uniform laws concerning interstate discovery procedures pre-date the UIDDA. The first, promulgated in 1920, is the Uniform Foreign Depositions Act (“UFDA”). Originally adopted in 13 states, UFDA provides that a witness in the discovery state (foreign jurisdiction) may be compelled to appear and testify in the same manner and by the same mechanism employed for taking testimony in matters pending in the courts of the trial state (forum or home state). The UFDA applies whenever a mandate, writ or commission is issued from the court in the foreign jurisdiction or whenever upon notice or agreement the foreign court is required to take the testimony of a witness in the home state.

The Uniform Interstate and International Procedure Act (“UIIPA”), promulgated in 1962, was designed to supersede UFDA. More extensive than its predecessor, the UIIPA covers personal jurisdiction and provides methods of taking depositions and serving notices. See UIIPA §3.02.¹ However, in 1977, having only been adopted in six jurisdictions, the UIIPA was withdrawn from recommendation “due to its being obsolete.” Nonetheless, several states -- including New Jersey (as will be discussed later) -- model their own statutes or rules on the UIIPA. See R. 4:11-5 of the Rules Governing

¹ This section provides that a court of the home state may order a person who is domiciled or is found within this state to give his or her testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. “The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.”

the Courts of the State of New Jersey, Annotated, Pressler & Verneiro, *Current N.J. Court Rules*, comment 1 on R. 4:11-5 (2011).

Reasons for and status of the UIDDA

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

The procedures for obtaining a deposition subpoena also differ among states as does determining the place for the deposition. Some states require that a notice of deposition be shown to the clerk or judge in the discovery state, after which a subpoena will automatically issue, while others require letters rogatory requesting the trial state to issue the subpoena. Still others require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed. Some states limit the place where a deposition may be taken to the discovery state while others limit the place to the deponent's home county.

Also important, is whether the procedure of the trial state or the discovery state should control and on what matters or issues. The general Restatement rule is that the procedure of the forum (in this case, forum means discovery) state applies. Many states provide that the discovery state may use the procedure of either the trial or discovery state, with a presumption in favor of the discovery state procedure. Some states reverse this presumption, while others are unclear, and still others are silent on this issue. Most states (but not all) expressly or implicitly allow courts in the discovery state to issue protective orders.

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

In order to bring uniformity to these inconsistencies, the UIDDA is patterned after Rule 45 of the Federal Rules of Civil Procedure ("FRCP"), establishing a simple clerical procedure under which a trial state subpoena may be used to ultimately enforce a discovery state subpoena. Under the act, litigants may submit to the county clerk of the county in the state where the discoverable materials or individuals are sought, a subpoena issued under the authority of a court in the trial state. Upon receiving the out-of-state subpoena, the clerk in the discovery state issues a subpoena for service on the person or

entity to which the original subpoena is directed. The terms of the subpoena issued in the discovery state must incorporate the terms of the original subpoena. The discovery state subpoena also must contain contact information for all counsel of record and any party not represented by counsel. The act calls for minimal judicial oversight in that it eliminates the need for obtaining a commission or letters rogatory, or for filing a miscellaneous action before obtaining a subpoena in the discovery state. It also eliminates the need to obtain local counsel in the discovery state in order to obtain an enforceable subpoena.

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

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

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

As of the date of this report, the UIDDA has been adopted by 26 jurisdictions, including Delaware and New York.² Laws/rules to adopt the act now are pending in six additional jurisdictions, including Connecticut and Pennsylvania. Notably, in at least seven of the total jurisdictions in which the act has been enacted or enactment is pending, the act has been or is proposed to be adopted by court rule rather than by statute.³

² These are Alabama, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia and Washington.

³ These are Arizona, Iowa, New York, North Dakota, Pennsylvania, South Dakota and Vermont, although at least both New York and Pennsylvania require legislative enactment of the rule.

Key provisions of the UIDDA

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

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

The last two defined terms, “person” and “state”, have meanings consistent with other uniform laws.

Sections 3 and 4 cover issuance and service of the subpoena. A party must submit a foreign subpoena to a clerk of the court in the county in which discovery is sought to be conducted. The request itself does not constitute an appearance in the courts of that state. Upon receipt of the foreign subpoena, the clerk, in accordance with that court’s procedure, must issue a subpoena for service upon the person to which the foreign subpoena is directed. The subpoena must be issued promptly, must incorporate the terms used in the foreign subpoena, and must contain or be accompanied by the names, addresses and telephone numbers of all counsel of record and any party not represented by counsel in the proceeding to which the subpoena relates.

The comment to section 3 clarifies that the act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. However, the act does repeal the law in those discovery states that require a commission or letter rogatory from a trial state before a deposition may be taken in those states. Of course, it is the ULC’s expressed hope that the act will encourage states that still require the use of commission or letters rogatory to repeal those laws.

Section 5 clarifies that the laws of *this state* (i.e., the state adopting the uniform act) applicable to compliance with subpoenas to attend and give testimony, produce designated books and records, etc., or permit inspection of premises, also apply to subpoenas issued under section 3 of the UIDDA. As noted in the commentary, the uniform law requires that the discovery permitted by this section must comply with the laws of the discovery state and “[t]herefore, . . . the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.”. The fee, if any, for issuing the subpoena must be sufficient to cover only the actual transaction costs, or the same as the fee for local deposition subpoenas.

Section 6 states that an application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under this act must comply with the rules or statutes of the discovery state, and be submitted to the court in the county in which discovery is to be conducted. The procedural, evidentiary and conflict of laws rules of the discovery state must all be followed.

Sections 7 (uniformity of application and construction), 8 (application to pending actions) and 9 (effective date) are consistent with similar provisions in other uniform laws.

CURRENT NEW JERSEY LAW

Like some other states, New Jersey's procedures for issuing and serving subpoenas are governed by state court rules and not by statute.

R. 4:14-7 of the Rules Governing the Courts of the State of New Jersey cover deposition subpoenas generally. Subsection (a) provides that attendance of a witness at the taking of depositions in New Jersey may be compelled by subpoena issued and served in accordance with R. 1:9. Subsection (b) addresses the time and place of examination and the reimbursement of out-of-pocket expenses and loss of pay, of both resident and non-resident witnesses. R. 1:9-1 prescribes the method for issuance of the subpoena and its contents. Rule 1:9-2 governs production of documentary evidence.

Taking depositions in New Jersey for use out-of-state

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

For practical purposes, a foreign litigant must retain a New Jersey licensed attorney in order to submit the R. 4:11-4 petition. The New Jersey attorney will file the petition, a proposed form of order and the appropriate filing fee with the Superior Court clerk in the county where the witness resides or works. A commission, letter rogatory or other similar judicial certificate issued in the forum state must support the petition. See Information for Out-Of-State Attorneys on the Procedure to Pursue Discovery of a New Jersey Resident for Use in Out-Of-State Litigation prepared by the New Jersey Superior Court Clerk's Office and the Administrative Offices of the Courts and available on the Judiciary's Internet website, www.njcourtsonline.com.

Taking depositions out-of-state for use in New Jersey

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

- 1) on notice pursuant to R. 4:14-2⁴, or, in the case of a foreign country, pursuant to R. 4:12-3⁵; or
- 2) in accordance with a commission or letter rogatory issued by a court of this state by the applicant's motion on notice; or
- 3) in any manner to which the parties stipulate.⁶

A party may be compelled to appear in an out-of-state deposition if the party is noticed as provided in R. 4:14-12. However, in order for the New Jersey attorney to be in a position to compel the deposition of an *out-of-state non-party* witness, the other state must have a procedure, by rule or statute (similar to R. 4:11-4), which authorizes the foreign court to issue a deposition subpoena on petition in aid of foreign litigation. If the other state has no such procedure, a New Jersey attorney must first obtain a letter rogatory or commission issued by the New Jersey court in order to be able to compel the non-party witness's attendance at the out-of-state deposition. In short, a New Jersey attorney cannot effectively initiate a discovery request on an out-of-state non-party witness without first obtaining a New Jersey court order.

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

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

⁵ R. 4:12-3, which governs depositions in foreign countries, provides that such depositions shall be taken on notice before a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or before such person or officer as may be appointed by commission or under letters rogatory. The rule further provides, among other things, that a commission or letters rogatory shall be issued on application and notice, and on such terms and with such directions "as are appropriate" without any further explanation of what is meant by the term "appropriate". R. 4:12-2, which governs depositions outside of New Jersey but within the United States or its territories, provides that such depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held.

⁶ R. 4:11-5 further provides that commissions and letters rogatory shall be issued in accordance with R.4:12-3 and if the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath.

A unique aspect of New Jersey practice is that an attorney cannot issue a subpoena solely for production of documents. Instead, regardless of whether the deposition will actually ever take place, the subpoena must be issued for the deposition of the custodian of records with instructions to produce the relevant documents at the time of the deposition and no sooner. See R. 4:14-7 (c). Although the end result remains production of documents only, the full process and timeline for giving notice of the oral deposition must be followed. This further complicates the process of compelling New Jersey witness document production by an out-of-state court.

New Jersey also differs from other states because of *Winberry v. Salsbury*, 5 N.J. 240, cert. denied, 340 U.S. 877 (1950), where the New Jersey Supreme Court interpreted Article VI, §2, ¶3 of the New Jersey Constitution (1947) to mean that the rule-making power of the Supreme Court is confined to practice, procedure and administration. The Court held that when its rule-making authority is exercised in those areas, the Court's authority is not subject to conflicting legislation. Thus, under a *Winberry* analysis, the UIDDA would be adopted by court rule rather than by statute.

Notably, according to the National Center for State Courts, there are 38 states which have state constitutions that provide rulemaking authority, though only a handful of these states have constitutional provisions that are similar to New Jersey's. Most of these state constitutions give their legislatures either the right to approve the court rules and thus the ability to override the judiciary, or an equal right, along with the judiciary, to promulgate the rules.⁷ In addition, a December 30, 2008 report prepared by senior attorneys at the Connecticut Office of Legislative Research Center, states that courts in 22 states (with minor exceptions in three states) appear to have exclusive authority to adopt court rules, 11 of which do so by explicit constitutional provision. The remaining 11 state courts do so by the courts' interpretations of inherent authority under their respective constitutions or under a statute, or under a combination of both.

CHANGES TO COURT RULES OF OTHER STATES BASED ON UIDDA

Other states – such as Arizona, Iowa, New York, North Dakota, Pennsylvania, South Dakota and Vermont-- have promulgated or are contemplating rule changes as a result of the UIDDA. The states that already have promulgated amended rules will be discussed first.

⁷ The 38 states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. States with provisions similar to New Jersey are, e.g., Arizona, Delaware, Georgia, Hawaii, Kentucky and Michigan. The New Hampshire courts have been battling with the legislature on this issue as evidenced by a recent court challenge to the state's constitutional rulemaking provisions.

Already promulgated state court rules that adopt the UIDDA

Effective January 1, 2011, New York amended its Civil Practice Law and Rules (“CPLR”) to incorporate UIDDA procedures. See section 3119.⁸ The language of the UIDDA is adopted almost verbatim with the appropriate references to already existing New York rules that govern service and form of the deposition subpoena.

Rule 45(f) of the Vermont Rules of Civil Procedure was added by Order of the Vermont Supreme Court during its August 2011 term to incorporate the provisions of the UIDDA with modifications as appropriate to Vermont practice. The rule clarifies that its purpose is to provide a procedure enabling litigants in a proceeding in another state to use the procedures of the Vermont court rules to obtain the forms of discovery covered by the rule. The definitions of the UIDDA are adopted, but the rule requires that the subpoena must conform to the requirements of the Vermont rules and must advise the person to whom the subpoena is directed that such a person has a right to petition the Vermont court to quash or modify the subpoena.

Pennsylvania recently promulgated a new Rule 234.10 which adopts the UIDDA except regarding the procedure for service of the subpoena. (However, the rule must be approved by the full legislature and thus far has been approved only by the Senate.) When a subpoena is to be served on a non-party witness pursuant to the rule, the subpoena must include a notice stating that the party serving the subpoena is required to enforce the subpoena and the nonparty witness is not required to defend against it. The Civil Procedural Rules Committee explains that this notice is being provided so as not to impose too heavy a burden on a witness who does not have an interest in the outcome of a case.

In March of 2012, the Supreme Court of the State of South Dakota ordered the adoption of new rule SDCL 15-6-28A after a public hearing. Added to the proposed form of rule is a provision which states that a request for issuance of a subpoena under this rule, although not constituting an appearance in the courts of South Dakota, does create the necessary jurisdiction in South Dakota to enforce the subpoena, quash or modify the subpoena, issue any protective order or resolve any other dispute relating to the subpoena and impose sanctions on the attorney requesting the issuance of the subpoena for any violation of the South Dakota Rules of Civil Procedure. The proposed rule also requires that the subpoena must conform to the South Dakota Rules of Civil Procedure and must advise the person to whom the subpoena is directed that such a person has a right to petition the South Dakota court to quash or modify the subpoena.

Proposed rule changes that adopt the UIDDA

In Arizona, a proposed new rule would adopt the essence of UIDDA while preserving the original standards that govern subpoenas for taking discovery for out-of-

⁸ New York state court rules must be consistent with legislation and may be subsequently changed by statute. See *In the Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986). The CPLR are statutes enacted by the New York legislature, and not court rules established by judges.

state civil proceedings. Proposed Rule 45.1 would replace current Arizona Rule 30 (h) which requires the party in an out-of state case to file an application with the Superior Court “as a civil action” asking for the issuance of the deposition subpoena. Under current Rule 30(h), the application must reference the law of the other jurisdiction that authorizes the discovery, and must attach a certified copy of the notice of taking deposition or other necessary papers, under the law of the foreign jurisdiction, to take the discovery in Arizona. Under proposed Rule 45.1, the requesting party would not need to file an application with a court before obtaining a subpoena. Instead, the requesting party would be required to present the foreign subpoena to the clerk, eliminating the need to retain local counsel to make a court filing. And, as in federal court, nothing would need to be filed unless (and until) a motion to compel or quash the discovery. The State Bar of Arizona has endorsed this rule change with minor modifications.⁹

The Supreme Court of Iowa issued an Order in December of 2011, requesting public comment regarding proposed amendments to Iowa’s Rules of Civil Procedure, Rules 1.1702 (1) through (5), which would adopt the substance of the UIDDA. The Order states that the Iowa Supreme Court Advisory Committee on Rules of Civil Procedure recommends adoption of the substance of the UIDDA with “some modifications reflecting Iowa’s subpoena process that authorizes an attorney licensed to practice law in Iowa to issue a subpoena.” The proposed rule amendments, which would incorporate the majority of the language of the UIDDA verbatim, have not yet been made part of the Iowa rules although the date for public comment has passed.

Finally, the North Dakota Supreme Court is considering adoption of N.D.R.Ct. Rule 5.1 which would incorporate the UIDDA. Consideration is still pending.

SUGGESTIONS FOR COURT RULE CHANGES

In order to depose out-of-state non-party witnesses for use in a New Jersey proceeding, or to depose New Jersey witnesses for use in another state proceeding, New Jersey court rules require the intervention of a court. In either case, current practice is cumbersome and expensive. In contrast, the UIDDA presents a simple and convenient process for issuing and enforcing deposition subpoenas. The Commission’s conclusion is that the UIDDA should be adopted in New Jersey, with modifications to accommodate New Jersey practice.

Although the advantages for all states of adopting the UIDDA are readily apparent, there are particular advantages to adopting the UIDDA in New Jersey. Litigation in New Jersey increasingly is complex, often involving parties with connections to other states, including the immediate neighboring states of New York and

⁹ According to the *Comment of the State Bar of Arizona Regarding Petition to Amend Arizona Rule of Civil Procedure 45 (b)(1) and to Adopt a New Rule 45.1* submitted to the Supreme Court of the State of Arizona in the matter of *Petition to Amend Arizona Rules of Civil Procedure*, Supreme Court No. R-12-022, these modifications would clarify the new rule and conform it to the format and language used elsewhere in the Arizona Rules of Civil Procedure. The Bar also commented about the benefits and costs that would accrue as a result of implementation of the new rule, asserting that the benefits outweighed any additional costs to the out-of-state applicant because of filing fees incurred if discovery motions were subsequently required.

Pennsylvania. The United States Government census indicates, for example, that in 2010, two of the top ten most common state-to-state moves were from New Jersey to Pennsylvania and New York to New Jersey.¹⁰ (New York has adopted the UIDDA and a Pennsylvania court rule adopting the UIDDA is pending before the Pennsylvania legislature.) Some of the largest companies also are headquartered in New Jersey.¹¹ While at the same time, in the past year alone, there have been between 50 to 55 judicial vacancies.¹² Having a mechanism in place in New Jersey, like the UIDDA, which would virtually eliminate court involvement in the initiation of interstate discovery, could enhance pre-trial state court practice and help ease our overburdened courts.

Although this Commission ordinarily recommends to the Legislature regarding the adoption of uniform laws, the Commission respectfully suggests that here, because of *Winberry* considerations, the better course would be court rule revision. This suggestion is made in the spirit of cooperation and comity between the legislative and judicial branches of state government. Revising the court rules to conform to the UIDDA also makes sense in light of the fact, as discussed earlier in this report, that R. 4:11-5 currently follows the UIIPA, an earlier uniform act abandoned by the ULC and now superseded by the UIDDA.

This will not be the first time the Commission has urged the courts to consider rule amendments (although it will be the first time that this Commission has issued a report *solely* suggesting such changes.) In its 1997 report on the service of process statutes, in the context of a larger project that primarily revised statutory language, the Commission concluded that the regulation of service of process should be left to court rules, recommending that the Supreme Court consider amending the rules to allow service of process by private parties.¹³

If incorporated in our court rules, the UIDDA framework would not affect the procedures for *taking* depositions for use in actions pending in New Jersey, as set forth in Rules 4:14-1, 4:14-2, 4:14-3 and 4:14-7. However, Rules 4:11-4 and 4:11-5 would need to be modified consistent with UIDDA principles. A fee schedule for filing and serving out-of-state subpoenas also would need to be established.

Suggested rule changes that could be used are set forth below. Modifications from current rules are noted by underscoring (additions) and strikethroughs (deletions.)

¹⁰ See Release CB11-193 of the U.S. Census, American Community Survey. According to the 2010 Survey, 45.3 million people lived in a different house within the United States one year earlier.

¹¹ See CNN Money, a service of CNN, Fortune and Money magazines which states that New Jersey is one of the top ten states with twenty or more Fortune 500 companies.

¹² See May 2, 2012 speech of Acting Administrative Director of the Courts, Judge Glenn A. Grant, before the Assembly Budget Committee.

¹³ This report considered revision of Title 2A provisions concerning the courts and the administration of civil justice (some of which overlapped or conflicted with the Supreme Court's power over practice and procedure) and not, as here, adoption of a uniform law.

SUGGESTED RULE CHANGES:

4:11-4. Testimony for Use in Foreign Jurisdictions.

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

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

4:11-5. Depositions Outside the State.

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

PROPOSED NEW:

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

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

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

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

(d) A subpoena under this rule shall:

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

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

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

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

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

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

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