

Foreign Subpoenas and the UIDDA

Written by Patrick M. Brady



Revolutions in communications and transportation have drastically expanded the geographical reach of our relationships. There is no dispute that we now live in a much more interconnected world than we did before. This has had huge impacts on litigation, especially in discovery. It is now reasonable to assume that at some point you will have to request documents from a nonparty who lives outside your home jurisdiction. The need to serve a subpoena out of state can arise even in the simplest of cases. While the law can be slow to respond to the challenges posed by technological innovation, it has (in most jurisdictions) stepped up to the task of streamlining out-of-state subpoenas. This article intends to answer the question of how one can serve a subpoena in another jurisdiction for documents or a deposition.

WHAT IS A SUBPOENA?

A subpoena is a means of compelling a nonparty to a lawsuit to perform the act of either producing documents or other tangible things, making property available for inspection, or appearing for a deposition. If you are requesting documents or tangible things from a party to a lawsuit, then Rule 34 of the Federal Rules of Civil Procedure and its state equivalents provide a mechanism for serving requests for production

without a subpoena. Likewise, Rule 30 provides the mechanism for compelling a party's deposition.

A subpoena comes into play if the person from whom you wish to obtain documents, or whose deposition you want to compel, is not a party to a litigation. In many states, a subpoena simply requires the signature of an attorney of record on the case and can compel a person to comply. If the person does not comply, then he or she can be held in contempt for failing to respond (FRCP 45(g)). The process for serving and issuing the subpoena is relatively simple if the person receiving the subpoena is in the same jurisdiction as the lawsuit and is being asked to comply in that jurisdiction.

But what if the person receiving the subpoena lives in another state? There are three mechanisms available to a litigant, depending on what court the action is pending in, and on where the person receiving the subpoena is being asked to comply.

FEDERAL COURTS HAVE NATIONWIDE SUBPOENA POWER.

The process is easy if your case is pending in any federal court. FRCP 45 provides federal courts with nationwide subpoena power (FRCP 45(b)(2)). So long as you require the person receiving the subpoena

to attend a deposition or produce documents and tangible things within 100 miles of where that person resides, is employed, or regularly transacts business in person, then a subpoena issued in any federal district court is valid anywhere in the United States. A subpoena issued in Wyoming District Court can be served and enforced in the Southern District of Texas.

STATE COURT CASES REQUIRE A DIFFERENT PROCEDURE.

If your case is in a state court, then you do not have the nationwide subpoena power offered by FRCP 45. In order to compel compliance with a subpoena to be served in another state, you would need to make sure that subpoena was served pursuant to the laws of that state. This could require getting an order from your court requesting a foreign court to issue a subpoena and then hiring an attorney in the state where you intend to serve the subpoena to open a new action in that state for service of the subpoena.

For example, if you wish to serve a subpoena in the state of Texas, but your case is pending in Wyoming state court, then you need to first obtain a "mandate, writ, or commission" from the Wyoming court (Tex. R. Civ. P. 201.2). With that "mandate, writ, or commission" you can then get a Texas subpoena issued. Under Texas law, only

a Texas attorney, the clerk of a Texas court, or an officer authorized to take depositions under Texas law may issue a subpoena (Tex. R. Civ. P. 176.4). You do not necessarily need to open a Texas court case, but it may be advisable to ensure compliance with the subpoena. Moreover, Texas has specific notice requirements that would be unfamiliar to those used to applying the Federal Rules, and those requirements vary depending on the type of subpoena issued. While the Texas Rules are unclear as to whether you need to hire a Texas attorney, you probably should so that you do not inadvertently make a mistake in your review of Texas law. Either way, this procedure can be time-consuming and expensive. Worse yet, the procedure may vary from state to state.

ENTER THE UIDDA.

In 2007, the National Conference of Commissioners on Uniform State Laws, or the Uniform Law Commission (ULC), created the Uniform Interstate Depositions and Discovery Act (UIDDA). Since then, the UIDDA has been adopted by all but six states, the District of Columbia, and the U.S. Virgin Islands. The ULC's goal while drafting the UIDDA was "to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents."

For the most part, the UIDDA was successful in this goal. The process is remarkably simple, especially when compared with the process set forth above for the state of Texas. First, a litigant must issue a subpoena in the court where the action is pending (UIDDA, § 3). So, if you wish to serve a subpoena on a Colorado resident in an action pending in Wyoming, then

the first step is to issue a Wyoming subpoena that complies with Wyoming law. Then you submit the Wyoming subpoena to a clerk of court in the county, district, circuit, or parish in which you seek compliance (UIDDA, § 3(a)). In our hypothetical, if the deponent lives in Denver, Colorado, then you would submit the subpoena to the Clerk of the District Court for the 2nd Judicial District, Denver County (Colo. Rev. Stat. § 13-90.5-103(a)). The clerk of court must then "promptly issue a subpoena for service upon the person to which the foreign subpoena is directed" (UIDDA, § 3(b)). That subpoena must incorporate the terms of the original subpoena and be accompanied by the names, addresses, and telephone numbers of all counsel of record in the original proceeding (UIDDA, § 3(c)). You then serve the subpoena according to the laws of the state where the subpoena will be served – in our case Colorado (UIDDA, § 4). The best part of the UIDDA procedure is that "a request for issuance of a subpoena under this act does not constitute an appearance in the courts of this state" (UIDDA, § 3(a)). In other words, you do not need to hire an out-of-state lawyer.

The UIDDA procedure is much easier than the procedure discussed above in the context of Texas law. There is no need to get a "mandate, writ, or commission," no need to become aware of extensive notice provisions, and no need to hire outside counsel. The procedure is simple, inexpensive, and quick.

Of course, there are some wrinkles to consider. First this "uniform" act, like all uniform acts, is not as uniform as it seems. Each state, in enacting its version of the UIDDA, is free to make changes to the text of the Act. For example, Utah's version of the UIDDA states that only those attorneys from

states that have similarly adopted the UIDDA may avail themselves of the UIDDA's streamlined provisions (Utah Code § 78B-17-103(3); see also Va. Code § 8.01-412.14). In other words, a Texas or Wyoming lawyer cannot serve a subpoena in Utah using the UIDDA. They would have to follow other procedures authorized by Utah law. It is crucial that practitioners review the UIDDA as it has been specifically enacted in the state they wish to serve discovery.

Likewise, each court may have a slightly different practice for issuing a foreign subpoena. It is recommended that you contact the clerk of the Court where you wish to issue your foreign subpoena before you issue it. This will help you determine whether they prefer you use specific forms or whether there are any fees for issuing the foreign subpoena. A short conversation with the clerk's office on the front end could save hours of frustration if your subpoena request is rejected.

Finally, a foreign subpoena must be served according to the law of the state in which it will be served, and that law also governs the enforceability of the subpoena. If you foresee difficulties getting a deponent to comply with a subpoena or have any concerns about serving them properly, then it may be in your best interests to hire a local attorney. This will, of course, result in extra expense, but it could save you a lot of heartache on the back end.

In conclusion, the UIDDA presents an efficient and easy way of serving subpoenas outside your jurisdiction without the need for commissions, letters rogatory, or hiring out-of-state counsel. Next time you must get discovery from a nonparty that lives outside your jurisdiction, look to see if they live in a UIDDA state.



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