

THIRD PARTY WITNESS SUBPOENAS

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Procedural hurdles often abound when serving subpoenas on third party witnesses both within New Jersey and beyond state lines. While certain measures have been implemented to streamline the process of compelling a third party's deposition and/or document production, as well as ensure appropriate enforcement and protection, family law practitioners are often left wondering if the correct steps were taken and rules followed. As third-party witnesses often prove critical to the outcome of an ongoing litigation, understanding and correctly applying these rules could be pivotal. This article is designed to provide a degree of clarity to those wondering whether they are moving in the right direction when addressing third party witness subpoenas.

General Subpoena Principles.

As a general matter, R. 4:14-7 details how a subpoena must be issued to compel the deposition of a third-party witness and production of requested documentation. Specifically, subsection (a) provides:

The attendance of a witness at the taking of depositions may be compelled by subpoena, issued and served as prescribed by R. 1:9 insofar as applicable, and subject to the protective provisions of R. 1:9-2 and R. 4:10-3. The subpoena may command the person to whom it is directed to produce designated books, papers, documents or other objects which constitute or contain evidence relating to all matters within the scope of examination permitted by R. 4:10-2.

When seeking to compel the deposition of a fact witness who is a New Jersey resident, subpart (b) addresses the appropriate "time and place" where the deposition may occur. Specifically, this subpart provides:

A resident of this State subpoenaed for the taking of a deposition may be required to attend an examination only at a reasonably convenient time and only:

- (A) in the county of this State in which he or she resides, is employed or transacts business in person; or
- (B) at a location in New Jersey within 20 miles from the witness's residence or place of business; or
- (C) at such other convenient place fixed by court order.

Regarding nonresidents of New Jersey, if the third party is subpoenaed in New Jersey that person may be required to attend "only at a reasonably convenient time and only in the county

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in which he or she is served, at a place within this State not more than 40 miles from the place of service, or at such other convenient place fixed by court order.” The witness is entitled to reimbursement from the subpoenaing party for out-of-pocket expenses and loss of pay, if any, because of attending the deposition.

As to expert witnesses and treating physicians, the Rule also provides for certain geographic restrictions and parameters. Specifically:

If the expert or treating physician resides or works in New Jersey, but the deposition is taken at a place other than the witness' residence or place of business, the party taking the deposition shall pay for the witness' travel time and expenses, unless otherwise ordered by the court.

If the expert or treating physician does not reside or work in New Jersey, the proponent of the witness shall either:

(A) produce the witness, at the proponent's expense, in the county in which the action is pending or at such other place in New Jersey upon which all parties shall agree, or

(B) pay all reasonable travel and lodging expenses incurred by all parties in attending the witness' out-of-state deposition, unless otherwise ordered by the court.

The remainder of Rule 4:14-7 addresses the timing of when subpoenas must be served, and certain language that must be included to provide an opportunity for filing a motion to quash the subpoena.

The Uniform Interstate Deposition and Discovery Act (“UIDDA”) – A Simplifying of the Foreign State Discovery Process.

Pursuant to the Uniform Law Commission, the UIDDA, which was drafted in 2007, “provides simple procedures for courts in one state to issue subpoenas for out-of-state depositions.” At its most basic level, the UIDDA allows you to issue a New Jersey subpoena to a foreign state without the procedural steps and complexities previously experienced in such matters, although certain hurdles may remain in those states where the UIDDA has not been enacted. To that end, almost every state has adopted the UIDDA, including New Jersey.² Notably, the UIDDA does not apply when seeking discovery in federal and international courts.

² The following states and territories have adopted the UIDDA: Alabama, Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

In drafting the law, the National Conference provided as follows regarding how the streamlined subpoena process would function:

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ____ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules). Uniform Interstate Depositions and Discovery Act § 3 (2007).

In simple terms, one no longer needs to retain a New Jersey attorney or file an application with the court simply for permission to issue such a subpoena.

New Jersey Rule 4:11-4 – Testimony for Use in Foreign Jurisdictions, provides in pertinent part:

- If a deposition is to be taken of a third party in New Jersey pursuant to the laws of another state, the United States or another country for use in connection with a New Jersey matter, the New Jersey Superior Court may – on *ex parte* petition – issue a subpoena to the third party pursuant to Rule 4:14-7, which is outlined above. The caption on the subpoena shall specifically designate its issuance in the Superior Court, Law Division, and notate it as a "petition pursuant to R. 4:11-4".
- When a third party deposition is to be taken in New Jersey pursuant to the laws of another state in connection with a New Jersey proceeding, an out-of-state attorney or party may:

- Submit a foreign subpoena “along with a New Jersey subpoena which complies with subparagraph (3)”;
 - To an attorney authorized to practice in New Jersey or to the clerk of the court in the county in which discovery is sought to be conducted in this State; and
 - The foreign subpoena must provide under the case number, “For the Issuance of a New Jersey Subpoena Under New Jersey Rule 4:11-4 (b)” and shall be filed in accordance with R. 1:5-6(b).³
- The request for the issuance of a subpoena does not constitute an appearance in the New Jersey courts and said request creates the necessary jurisdiction in New Jersey to:
 - enforce the subpoena;
 - quash or modify the subpoena;
 - issue any protective order or resolve any other dispute relating to the subpoena;
 - impose sanctions on the attorney or party requesting the issuance of the subpoena for any action which would constitute a violation of the Rules Governing the Courts of the State of New Jersey, including the Rules of Professional Conduct; and
 - to take such other action as may be appropriate.
 - The subpoena under this Rule must:
 - state the name of the New Jersey court issuing it and comply with the requirements of R. 4:14-7;
 - 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;
 - 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; R.

³ (b) What Constitutes Filing With the Court. Except as otherwise provided by R. 1:6-4 (motion papers), R. 1:6-5 (briefs), R. 4:42-1(e) (orders and judgments), and R. 5:5-4 (motions in Family actions), a paper is filed with the trial court if the original is filed as follows: (1) In civil actions in the Superior Court, Law Division, and in actions in the Superior Court, Chancery Division, General Equity, except mortgage and tax foreclosure actions, with the deputy clerk of the Superior Court in the county of venue; (2) In criminal actions in the Superior Court, Law Division, with the Criminal Division Manager in the county of venue, as designee of the deputy clerk of the Superior Court; (3) In mortgage and tax foreclosure actions, with the Clerk of the Superior Court, unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue, in which event subsequent papers shall be filed with the deputy clerk of the Superior Court in the county of venue; (4) In actions in the Chancery Division, Family Part, with the deputy clerk of the Superior Court in the county of venue if the action is a dissolution action, with the Surrogate of the county of venue if the action is for adoption, and in all other actions, with the Family Division Manager in the county of venue, as designee of the deputy clerk of the Superior Court; (5) In probate matters in the Surrogate’s Court, with the Surrogate, and in actions in the Chancery Division, Probate Part, with the Surrogate of the county of venue as deputy clerk of the Superior Court; (6) In actions of the Special Civil Part, as provided by Part VI of these rules; (7) In actions in the Tax Court, as provided by Part VIII of these rules. (8) In actions in the Municipal Courts, as provided by Part VII of these rules. The foregoing notwithstanding, in any case the judge or, at the judge's chambers, a member of the staff may accept papers for filing if they show the filing date and the judge's name and office. The filed papers shall be forwarded forthwith to the appropriate office.

- 4:14-4, R. 4:23-1 or any other Rules Governing the Courts of the State of New Jersey that are applicable to discovery;
 - contain or be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel; and
 - bear the caption and case number of the foreign case to which it relates, identifying the foreign jurisdiction and the court where the case is pending.
- Service of such a subpoena must occur in compliance with Rules 1:9-3 and 1:9-4 by an attorney authorized to practice law in New Jersey or by a clerk of the Court.⁴
 - Depositions and document production.
 - The provisions of Rule 1:9-2 apply to subpoenas issued under this Rule.
 - Per Rule 4:14-7(c), a subpoena commanding the production of evidence for discovery purposes “may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled.:
 - As with subpoenas generally issued under Rule 4:14-7(c), the subpoena shall state that “the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action.”

⁴ Rule 1:9-2. For Production of Documentary Evidence and Electronically Stored Information; Notice in Lieu of Subpoena A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9- 1 may require production of books, papers, documents, electronically stored information, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. The court may direct that the objects designated in the subpoena or notice be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys and, in matrimonial actions and juvenile proceedings, by a probation officer or other person designated by the court. Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).

Rule 1:9-3. Service A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof. A subpoena which seeks only the production of documents or records may be served by registered, certified or ordinary mail and, if served in that manner, shall be enforceable only upon receipt of a signed acknowledgment and waiver of personal service.

Rule 1:9-4. Place of service A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey.

- Similarly, the subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties.
- Depositions and other discovery taken pursuant to the rule shall be conducted consistent with and subject to the limitations in the Rules Governing the Courts of the State of New Jersey, including the Rules of Professional Conduct, and all other applicable laws of this State.
- A motion for a protective order, or to enforce, quash or modify the subpoena issued pursuant to subsection (b) must comply with New Jersey rules/statute “and be submitted to the court in the county in which discovery is to be conducted or the deponent resides, is employed or transacts business.”
 - The motion has to be filed as a miscellaneous matter containing the caption as it appears on the subpoena and under the case number the phrase “Motion or Application Related to a Subpoena Issue Under R. 4: 11-4(b)” must be delineated.

Depositions Outside of New Jersey for use in a New Jersey matter

New Jersey Court Rule 4:11-5 goes together with Rule 4:11-4, particularly as to subsection (c), which acknowledges the UIDDA’s enactment in almost every other foreign state. This Rule provides, in pertinent part that a deposition for use in a New Jersey matter may be taken outside of New Jersey:

- On notice or pursuant to R. 4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; or
- In accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice – in other words, the required step prior to enactment of the UIDDA, likely for those states who have not adopted its language; or
- **Consistent with the UIDDA, pursuant to a subpoena issued to the person to be deposed in accordance with R. 4:14-7 and in accordance with the procedures authorized by the foreign state; or**
- In any manner stipulated by the parties.

When reviewing the contents of Rules 4:11-4 and 4:11-5, the streamlined way in which the UIDDA allows attorneys to conduct discovery more easily beyond New Jersey State lines is invaluable to our practice and procedure. Analyzing and correctly applying the above-detailed rules in your daily practice will ideally avoid the obstacles we often face as practitioners in addressing third-party discovery.