

STATE OF WISCONSIN

SUPREME COURT

In re:

No. 13-16
PROPOSED AMENDMENT TO
WISCONSIN STATUTE § 887.24

**AMENDED PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING WIS. STAT. § 887.24**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 24, 2015

In response to the court's non-final order, filed March 12, 2015, the Wisconsin Judicial Council respectfully files this amended petition requesting the Wisconsin Supreme Court to amend WIS. STAT. § 887.24. This amended petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

AMENDED PETITION

The Judicial Council respectfully requests that the Supreme Court adopt the following rule:

SECTION 1. 887.24 is repealed and recreated as follows:

887.24. Depositions and discovery; for use in other states.

(1) **SHORT TITLE.** This section may be cited as the Uniform Interstate Depositions and Discovery Act.

(2) **DEFINITIONS.** In this section:

(a) "Foreign jurisdiction" means a state other than Wisconsin.

(b) "Foreign subpoena" means a subpoena issued in a civil action under authority of a court of record of a foreign jurisdiction.

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

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

(e) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

1. Attend and give testimony at a deposition, either oral or upon written questions.
2. Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
3. Permit inspection of premises under the control of the person.

Judicial Council Committee Note:

The definition of "Foreign subpoena" was modified to add the phrase "in a civil action." This language was added to clarify that this act only applies to civil cases.

The definition of "Subpoena" was modified to make it expressly applicable to subpoenas not only for oral depositions, but those upon written questions as permitted by s. 804.06.

Uniform Comment:

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories [or insular possessions] of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises) [*sic*]. Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

(3) REQUEST FOR ISSUANCE OF SUBPOENA. (a) *Submission of foreign subpoena to clerk.* To request issuance of a subpoena under this section by a clerk of circuit court, a party must submit the foreign subpoena to the clerk for the county in which discovery is sought to be conducted in this state, accompanied by the appropriate Wisconsin subpoena form which shall:

1. List the Wisconsin county in which discovery is to be conducted as the court from which the subpoena is issued. Discovery is to be conducted in the county in which the witness resides. If the witness is not a natural person, discovery is to be conducted in a county in which the witness does substantial business. The subpoena shall list the address, including county of residence, for the witness.
2. Use the title of the action and its docket number from the foreign jurisdiction.
3. Incorporate the terms used in the foreign subpoena and include a copy of the foreign subpoena as an attachment.
4. 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.

5. Advise the person to whom the subpoena is directed as follows: “You have a right to petition the Wisconsin circuit court for a protective order to quash or modify the subpoena or provide other relief under s. 805.07 (3).”

(b) *Duties of clerk of court.* When a party submits a foreign subpoena to a clerk of circuit court in this state in compliance with par. (a), the clerk shall promptly sign and issue the Wisconsin subpoena for service upon the person to which the foreign subpoena is directed.

(c) *Issuance by an attorney.* Alternatively, a party may retain an attorney who is licensed or otherwise authorized to practice law in Wisconsin to sign and issue the Wisconsin subpoena as an officer of the court pursuant to s. 805.07. The subpoena must comply with par. (a)(1)-(5) of this subsection.

(d) *Appearance.* Requesting issuance of a subpoena under this subsection does not constitute an appearance in the courts of this state.

Judicial Council Committee Note:

The committee added the term “circuit” to subsections (a) and (b) to clarify that the circuit court has jurisdiction of issuing subpoenas under this act.

Paragraph (a) (1)-(5) was added to clarify the procedure for obtaining a Wisconsin subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious. It is also the intent of the committee to minimize the burden on the clerk of circuit court. It also includes a requirement that the subpoena include notice that a receiving person has the right to object to the subpoena. This protection is contained in s. 805.07 (3). If there is insufficient space on the subpoena form, the subpoena can be supplemented with additional material.

Paragraph (c) contains an important addition to the Uniform Rule. It provides that if a party to the out-of-state proceeding retains an attorney licensed to practice in Wisconsin, and that attorney receives the original or a true copy of the out-of-state subpoena, the attorney may issue the subpoena. This is consistent with s. 805.07 (1) which permits a subpoena to be issued by, among others, an attorney of record of any party in a civil action or special proceeding.

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 Wisconsin (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 may then check with the clerk's office, in the Wisconsin county in which the witness to be deposed lives, to obtain a copy of its subpoena form. The lawyer will then prepare a Wisconsin subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then submit the completed and executed Kansas subpoena and the completed but not yet executed Wisconsin subpoena to the clerk's office in Wisconsin. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Wisconsin subpoena is being sought pursuant to s. 887.24 (3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Wisconsin subpoena ("issue" means confirm that the subpoena, on its face, complies with s. 887.24 (3) (a) and sign it).

The process server (or other agent of the party) will then serve the Wisconsin subpoena on the deponent in accordance with Wisconsin law.

Uniform Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented"¹ to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

¹ Note that neither the Uniform Interstate Deposition and Discovery Act nor proposed Wis. Stat. § 887.24 use the term "presented." Both rules use the term "submit," but the Judicial Council drafting committee considers the terms synonymous in this context.

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This 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. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

(4) SERVICE AND ENFORCEMENT OF SUBPOENA. A subpoena issued under sub. (3) must be served and enforced in compliance with ch. 885. In issuing the subpoena, the clerk may not collect a fee and should not create a case file, but the clerk may keep a record of the subpoenas issued. The individual responsible for service shall deliver a certificate of

service or affidavit to the party that requested the subpoena. The party must retain the certificate of service or affidavit and furnish a copy to any party or to the deponent upon request.

Judicial Council Committee Note:

Subsection 4 is similar to the Uniform Act; however it clarifies that it applies not only to a subpoena issued by a clerk of circuit court, but also to a subpoena issued by local counsel.

The Wisconsin clerk of circuit court will not create a case file when discovery is initiated nor collect a fee. This rule places the obligation of retaining the original subpoena and the proof of service on the lawyer initiating the discovery. A case file will be created if a special proceeding is commenced to enforce, quash, or modify the subpoena.

Subsection 4 was also modified to substitute the term “party” in place of the term “attorney” to extend the rule to pro se parties.

(5) DEPOSITION, PRODUCTION, AND INSPECTION. When a subpoena issued under this section commands a person to attend and give testimony at a deposition, produce designated books, documents, records, electronically stored information, or tangible items, or permit inspection of premises, the time and place and the manner of the taking of the deposition, the production, or the inspection must comply with Wisconsin's rules and statutes relating to discovery, including ch. 804.

Uniform Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

(6) APPLICATION TO COURT. (a) *Special proceedings.* An application to the circuit court for a protective order or to enforce, quash, or modify a subpoena issued under this section will commence a special proceeding. Applications and all other filings in the special proceeding must comply with the applicable rules or statutes of this state, including service under s. 801.14 (2), and must be filed with the circuit court in the county in which discovery is to be conducted. Applications to enforce a subpoena must include proof of service of the subpoena.

(b) *Fees; assignment of case number.* 1. On filing an application under this section, a petitioner shall pay a fee as specified in ch. 814.

2. The circuit court in which the application is filed shall assign it a case number.

(c) *Reasonable attorney fees and expenses.* The court in its discretion may award any prevailing party its reasonable attorney fees and expenses.

(d) *Appeals.* A final order granting, denying, or otherwise resolving an application under this subsection is a final order for purposes of filing an appeal in accordance with s. 808.03 (1).

Judicial Council Committee Note:

Paragraph (a) was modified to clarify that every filing in the special proceeding must also be served on all parties to the special proceeding, including the witness. A summons is unnecessary to initiate the action and service by mail or facsimile is permitted pursuant to s. 801.14 (2). Applications to enforce a subpoena must include proof of service of the subpoena on the witness.

Paragraph (b) is added to clarify procedural details for resolution of a dispute relating to discovery under this section.

Paragraph (c) is added to address the award of fees and expenses in a dispute relating to discovery under this section. This is consistent with motions to compel and for protective orders in discovery disputes under ss. 804.12(1)(c) and 804.01(3)(b).

Paragraph (d) is added to clarify the procedure for reviewing a decision of a circuit court on a dispute arising in connection with discovery under this article.

Uniform Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications

to the court that directly affect the deponent must be made in the discovery state.

The term “modify” a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state’s rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

(7) UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

(8) APPLICATION TO PENDING ACTIONS. This section applies to requests for discovery in cases pending on or filed after July 1, 2015.

Judicial Council Committee Note:

This subsection is the same as Section 8 of the Uniform Act, except “or filed after” is inserted to improve clarity.

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Committee Notes and Uniform Notes to proposed WIS. STAT. § 887.24.

CONCLUSION

The recommended rule is a slightly modified version of the Uniform Interstate Depositions and Discovery Act (UIDDA) drafted by the Uniform Law Commission and adopted in 2007.

For the reasons set forth in the supporting memorandum accompanying this petition, the Wisconsin Judicial Council respectfully urges this Court to amend Wis. STAT. § 887.24.

Dated March 24, 2015.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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