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NEW CHANGES TO OBTAINING DISCOVERY IN WISCONSIN FOR USE IN OTHER STATES

Obtaining discovery in Wisconsin for cases pending outside the State will soon become a lot easier. Until the end of 2015, a party in out-of-state litigation will still need to obtain the appropriate commissions from the court handling the underlying litigation and then file those commissions along with the necessary petition materials in a Wisconsin court to have a subpoena issued for testimony or documentary evidence to be given or produced here. However, effective January 1, 2016, this process will become much more streamlined as Wisconsin finally adopted the provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA).

The UIDDA is a uniform act that is patterned after Rule 45 of the Federal Rules of Civil Procedure. It sets forth an efficient and inexpensive procedure through which litigants can seek and obtain discovery from witnesses located outside the jurisdiction of the trial court. The UIDDA was promulgated in 2007 and has since, at the time of this writing, been enacted in 35 states plus the District of Columbia and the U.S. Virgin Islands.

Specific provisions of the proposed rule change and their interplay with current Wisconsin law were discussed at an open administrative rules conference on December 5, 2014, at which the court voted to return the petition to the Judicial Council for editing and refinements consistent with the court's discussions. On March 24, 2015, the Judicial Council filed an amended petition containing such changes. The matter was discussed further at an open rules conference on June 10, 2015, at which the court voted unanimously to adopt the amended petition, with certain changes to the language and comment regarding the issuance of a subpoena.

By an order dated July 7, 2015, the court ordered that, effective January 1, 2016, Wis. Stat. § 887.24 be repealed and recreated to incorporate the provisions of the UIDDA as modified to comport with Wisconsin law. A copy of the court's July 7th order can be found here.

As recreated, the new Wis. Stat. § 887.24 will allow for subpoenas to be issued for discovery in Wisconsin by two methods:

- First, a party may have a subpoena issued by a clerk of circuit court by submitting a foreign subpoena to the clerk in the county in which the discovery is sought. When

submitted, the foreign subpoena must be accompanied by an appropriate Wisconsin subpoena form that includes certain information that is specified in the statute. No filing fee will be required, and the clerk will not open a case file; however, the clerk may keep a record of the subpoenas issued.
- Second, a party may elect to retain an attorney authorized to practice law in Wisconsin to sign and issue a subpoena in his or her capacity as an officer of the court. Any subpoenas issued by Wisconsin attorneys must contain the same statutorily required information as that required for subpoena forms submitted to a clerk of circuit court.

To avoid any conflicts with the rules relating to the unauthorized practice of law, Wis. Stat. § 887.24(3)(d), as recreated, specifically provides that requesting the issuance of a subpoena through either of the prescribed methods in § 887.24(3) will not constitute an appearance in Wisconsin courts. However, should the need for a protective order arise related to the subpoena or should there be a need to enforce, quash, or modify the subpoena, then a special proceeding will need to be started in the circuit court in the county in which the discovery is sought.

The full text of Wis. Stat. § 887.24, as repealed and recreated, can be found here.

In closing, while Wisconsin lawyers will no longer be needed to serve as local counsel to petition a Wisconsin court to secure discovery for out-of-state parties, they should still understand the rule change to not only effectively counsel out-of-state lawyers and parties on how to obtain discovery in Wisconsin, but also because they may be called on directly to issue subpoenas for discovery from witnesses located in Wisconsin for use in litigation pending elsewhere.