

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SPB 7006

INTRODUCER: For consideration by the Judiciary Committee

SUBJECT: Uniform Interstate Depositions and Discovery Act

DATE: January 18, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Tulloch</u>	<u>Cibula</u>		Pre-meeting

I. Summary:

SPB 7006 amends the Uniform Foreign Depositions Law and enacts the Uniform Interstate Depositions and Discovery Act (UIDDA). The UIDDA will replace and supersede the Uniform Foreign Depositions Law in Florida.

Essentially, the UIDDA provides a streamlined, administrative process among the United States and U.S. territories by which a clerk of court can “domesticate” a “foreign subpoena” issued by another state court. Rather than requiring the appointment of a commissioner in Florida or obtaining Florida counsel to issue a subpoena, the UIDDA permits an out-of-state attorney or party to file a foreign subpoena with the clerk of court in the county where discovery is sought. Upon filing the foreign subpoena, the clerk of court must promptly issue a Florida subpoena as a ministerial act. The out-of-state attorney or party is not subject to the jurisdiction of the Florida courts based on the issuance of the domesticated subpoena. However, if the subpoena is challenged or is in need of either modification or enforcement, a Florida court proceeding must be opened and Florida law will apply.

II. Present Situation:

Discovery Generally

Generally, discovery is a toolbox used by the parties in a lawsuit to “discover” the other side’s evidence, whether the evidence is a witness’s testimony or a physical object, like documents or photos.¹ For example, in a case involving an auto collision, a party will likely want to “discover”

¹ Henry P. Trawick, Jr., *Trawick’s Fla. Prac. & Proc.* § 16:2 (2018-2019 ed.) (“Discovery may be obtained by depositions on oral examination or by written questions, interrogatories to a party, production and inspection of documents, tangible things and entry on land, and mental and physical examination of persons. This is a comprehensive set of tools with which to discover matters needed in litigation.”); BLACK’S LAW DICTIONARY (10th ed. 2014) (defining discovery, “2. Compulsory disclosure, at a party’s request, of information that relates to the litigation <the plaintiff filed a motion to compel discovery>. See Fed. R. Civ. P. 26–37; Fed. R. Crim. P. 16. • The primary discovery devices are interrogatories, depositions, requests for admissions, and requests for production. Although discovery typically comes from parties, courts also allow

the testimony of the drivers, the testimony of any by-standers, copies of insurance policies, photos of damages to the vehicles or the ability to inspect the damaged vehicles, copies of quotes or receipts for repairs, and so forth.

In a civil lawsuit, discovering the evidence of the other party is useful in determining the scope of a trial or whether a trial is even necessary. If one or both of the parties determine through discovery that there are no material facts in dispute, one or both of the parties may move for summary judgment, negating the need for an expensive trial. Additionally, the discovery process often aids the parties in reaching a settlement, thereby alleviating the need for a costly trial.²

One tool in the discovery toolbox, and perhaps the most widely used discovery tool in the United States, is the deposition.³ Depositions are used to “discover” what a witness knows by taking the testimony of that witness (also known as “deposing” a witness).⁴

A subpoena is a method for carrying out discovery. It is essentially a summons to a party or other witnesses requiring that certain evidence (documents, things, testimony, places to be inspected) be made available to the party conducting discovery.⁵ Generally, there are two types of subpoenas: (1) *subpoena ad testificandum* which directs a witness to appear and give testimony; and (2) *subpoena duces tecum* which directs a witness to appear and bring or produce “specified documents, records, or things.”⁶

limited discovery from nonparties. . . . 4. The pretrial phase of a lawsuit during which depositions, interrogatories, and other forms of discovery are conducted.”)

² *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 893 (Fla. 4th DCA 2006) (“Revelation through discovery procedures of the strength and weakness of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.”) (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970)).

³ Mullin, Timothy L. Jr. (1981) "Interstate Deposition Statutes: Survey and Analysis," *University of Baltimore Law Review*: Vol. 11: Iss. 1, Article 2, p. 3. Available at: <http://scholarworks.law.ubalt.edu/ubl/vol11/iss1/2> (“The most widely employed discovery method is the deposition.”).

⁴ See n. 1, *supra*.

⁵ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining subpoena).

⁶ *Id.*

Florida Law on Depositions and Discovery

In Florida, discovery in civil cases is primarily governed by the Florida Rules of Civil Procedure,⁷ which are largely patterned after the Federal Rules of Civil Procedure.⁸ In particular, Florida Rule of Civil Procedure 1.280 provides for the methods (or tools) and scope of conducting discovery. In pertinent part, the methods⁹ include depositions¹⁰ and the production of documents or things or permission to enter land or property for inspection.¹¹ As to scope, Rule 1.280 “broadly allow[s] parties to obtain discovery of ‘any matter, not privileged, that is relevant to the subject matter of the pending action,’ whether the discovery would be admissible at trial, or is merely ‘reasonably calculated to lead to the discovery of admissible evidence.’”¹²

Florida Rule of Civil Procedure 1.410 also governs the use of subpoenas in conducting discovery. In pertinent part, Rule 1.410 provides as follows:

⁷ See Fla. R. Civ. P. 1.280. Initially, however, in 1947, “the Legislature adopted the discovery rules used by federal district courts” and codified those rules under Chapter 91, entitled “Depositions.” Henry P. Trawick, *Trawick’s Fla. Prac. & Proc.* § 16:1 (2018-2019 ed.) (citing “former s. 91.30, F.S., repealed 1955”). In 1955, however, the Legislature repealed Chapter 91, deeming it to have been superseded by the Florida Rules of Civil Procedure promulgated by the Florida Supreme Court. See Laws 1955, c. 29737, s. 1, (“AN ACT relating to the revision of the Florida Statutes to conform with the Florida rules of civil procedure by repealing . . . Chapter 91 . . . WHEREAS, the Supreme Court of Florida adopted on March 1, 1954, and promulgated the Florida Rules of Civil Procedure to govern litigants in suites of a civil nature and all special statutory proceedings in the courts therein named, to supercede [sic.] existing statutes in conflict therewith, and WHEREAS, the adoption of the Florida Rules of Civil Procedure necessitates the integration of many existing Florida Statutes with these rules, and WHEREAS, the Committee of Civil Procedure for the Florida Bar and the Statutory Revision Department of the Attorney General’s office have diligently and constructively utilized all efforts to accomplish such integration to aid dispatch in litigation, simplify procedure and aid in the dispensation of justice, and WHEREAS, a comprehensive report for such integration has been prepared to accomplish these ends, and is recommended by the Board of Governors of the Florida Bar, to repeal sections completely superseded or obsolete, to amend sections requiring change in language or content, which report has been widely published in the Florida Bar Journal, and circulated to the practicing attorneys, the members of the courts, and to the public at large, without a single objection or voice of dissent, NOW THEREFORE, Be It Enacted by the Legislature of the State of Florida: Section 1. The following sections of the Florida Statutes, relating to civil procedure, as superseded by the Florida rules of civil procedure; are repealed: . . . chapter 91. . .”), available at <http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1955/LOF1955V1Pt1Ch29615-29833.pdf>, p. 262.

⁸ See *Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963) (“In substantial measure the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure. Admittedly, there are some differences occasioned primarily by our continued recognition of certain procedural distinctions between law and equity. However, the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules to the extent possible.”). See, e.g., *Savage v. Rowell Distrib. Corp.*, 95 So. 2d 415, 417 (Fla. 1957) (“Our Rule 1.17(b) is almost identical with Rule 17(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. and was patterned thereafter, so the decisions of the federal courts construing their rule are pertinent here.”); *Delta Rent-A-Car, Inc. v. Rihl*, 218 So. 2d 467, 468 (Fla. 4th DCA 1969) (“However, federal rule 30(g)(1) is identical [to Florida Rule 1.310(g)(1)] and any federal cases under such rule would be pertinent and highly persuasive.”) In 1973, the Florida Rules of Civil Procedure were renumbered to the rule numbers currently used, and amended to substantially follow “the 1970 changes in the equivalent federal rules.” See n. 6, *supra*. See also Fla. R. Civ. P. 1.280, COMMITTEE NOTES (“1972 Amendment. The rule is derived from Federal Rule of Civil Procedure 26 as amended in 1970. Subdivisions (a), (b)(2), and (b)(3) are new. Subdivision (c) contains material from former rule 1.310(b). Subdivisions (d) and (e) are new, but the latter is similar to former rule 1.340(d). Significant changes are made in discovery from experts. The general rearrangement of the discovery rule is more logical and is the result of 35 years of experience under the federal rules.”).

⁹ Fla. R. Civ. P. 1.280(a).

¹⁰ Fla. R. Civ. P. 1.310.

¹¹ Fla. R. Civ. P. 1.350 (“Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes”). *But see* Fla. R. Civ. P. 1.351 (“Production of Documents and Things Without Deposition,” providing that procedure set out is the exclusive procedure for obtaining documents or things by subpoena from non-parties).

¹² *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (quoting Fla. R. Civ. P. 1.280(b)(1)).

(a) Subpoena Generally. Subpoenas for testimony before the court, subpoenas for production of tangible evidence, and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action.

....

(d) Service. A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena on a person named within must be made as provided by law. Proof of such service must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so.

(e) Subpoena for Taking Depositions.

(1) Filing a notice to take a deposition as provided in rule 1.310(b) or 1.320(a) with a certificate of service on it showing service on all parties to the action constitutes an authorization for the issuance of subpoenas for the persons named or described in the notice by the clerk of the court in which the action is pending or by an attorney of record in the action. The subpoena must state the method for recording the testimony. The subpoena may command the person to whom it is directed to produce designated books, documents, or tangible things that constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 1.280(b), but in that event the subpoena will be subject to the provisions of rule 1.280(c) and subdivision (c) of this rule. Within 10 days after its service, or on or before the time specified in the subpoena for compliance if the time is less than 10 days after service, the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. If objection has been made, the party serving the subpoena may move for an order at any time before or during the taking of the deposition on notice to the deponent.

(2) A person may be required to attend an examination only in the county wherein the person resides or is employed or transacts business in person or at such other convenient place as may be fixed by an order of court.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued.

(g) Depositions before Commissioners Appointed in this State by Courts of Other States; Subpoena Powers; etc. When any person authorized by the laws of Florida to administer oaths is appointed by a court of record of any other state, jurisdiction, or government as commissioner to take the testimony of any named witness within this state, that witness may be compelled to attend and testify before that commissioner by witness subpoena issued by the clerk of any

circuit court at the instance of that commissioner or by other process or proceedings in the same manner as if that commissioner had been appointed by a court of this state; provided that no document shall be compulsorily annexed as an exhibit to such deposition or otherwise permanently removed from the possession of the witness producing it, but in lieu thereof a photostatic copy may be annexed to and transmitted with such executed commission to the court of issuance.

Additionally, there are costs associated with the discovery process which are authorized by statute. Section 92.142, F.S. provides that witnesses who are summoned to give testimony must be paid for their time. Section 28.24 sets out the service charges a clerk of court is permitted to charge for writing, preparing, signing, and sealing a subpoena (\$7) or signing and sealing a subpoena only (\$2).¹³

Out-of-State Discovery

Each state in the United States has its own laws and rules governing discovery. When out-of-state discovery becomes necessary to a lawsuit, navigating the various state laws can be tricky. As one Louisiana Bar Article explained,¹⁴

Litigants often seek discovery across state lines. In federal court, Federal Rule of Civil Procedure 45 authorizes an attorney to simply sign a subpoena to be served in the district where the witness or evidence is located. In state court, however, each state has a particular procedure for issuing and enforcing subpoenas directed to a nonparty, out-of-state witness. The trial and error associated with navigating these state court procedures are often vexing and, in some cases, prohibitively expensive.¹⁵

A Massachusetts Bar Article similarly praised the federal discovery rule while lamenting the lack of uniformity among states:

In federal court, attorneys have essentially nationwide subpoena power pursuant to Federal Rule of Civil Procedure 45, under which a subpoena may be issued from U.S. District Court in the foreign jurisdiction where discovery is sought.

Conversely, in state court, attorneys needing to obtain discovery in a foreign state must navigate the specific procedures and requirements for issuing and enforcing a subpoena in the foreign state. This cumbersome process, which

¹³ Section 28.24(18), F.S.

¹⁴Christopher D. Cazenave and Graham H. Ryan, *Interstate Discovery Simplified: Louisiana Passes the Uniform Interstate Depositions and Discovery Act*, Louisiana Bar Journal Vol. 62, No. 6, pp. 427, <http://files.lsba.org/documents/publications/BarJournal/Journal-Feature1-Cazenave-AprilMay-2015.pdf>.

¹⁵ *Id.* at 427.

often requires obtaining two court orders and hiring local counsel, is inefficient, costly and wasteful of judicial resources (sometimes in multiple jurisdictions).¹⁶

Uniform Foreign Depositions Act

In an attempt to implement a uniform rule across state jurisdictions that provides a streamlined discovery process similar to the federal rules, the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)¹⁷ drafted the Uniform Foreign Depositions Act (UFDA) in 1920. UFDA was enacted in Florida in 1959 as the Uniform Foreign Depositions Law, and Florida became one of only 14 states to enact the law.¹⁸ The Uniform Foreign Depositions Law provides, in pertinent part, as follows:

Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.¹⁹

Florida's Uniform Foreign Depositions Law is limited to the taking of depositions and testimony of persons residing in Florida. It does not include the production of documents or things. If "the deposition is arranged between the parties and the witness" and testimony is taken voluntarily, then Florida court proceedings are not necessary.²⁰ However, when a "witness is reluctant or the party taking the deposition needs subpoenas for any other reason, the clerk can issue subpoenas for the deposition in the same manner as though the deposition were being taken in a Florida action" under the Uniform Foreign Depositions Law.²¹ And the "process and proceeding" for taking testimony will be governed by the Florida Rules of Civil Procedure discussed above. However, the clerk can only issue a subpoena "when an authenticated copy of the order appointing a commissioner or of the notice of taking the deposition or of other authority to take the deposition is exhibited to the clerk."²²

¹⁶ Nathaniel W. Rice, *The UIDDA streamlines the process of obtaining out-of-state discovery*, Massachusetts Academy of Trial Attorneys Journal, Vol. 6, No. 3, Feb. 2016, pp. 1, 10, https://masslawyersweekly.com/files/2013/11/MATA_020816.pdf.

¹⁷ The Uniform Law Commission is a non-profit organization comprised of state commissions on uniform laws from each state and certain U.S. territories. The purpose of the Uniform Law Commission is to "study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable." Uniform Law Comm'n, Nat'l Conference of Comm'rs on Uniform State Laws, *Organization*, <https://www.uniformlaws.org/aboutulc/overview> (last visited Jan. 15, 2019).

¹⁸ Section 90.25, F.S. (1959); renumbered as s. 92.251, F.S. by Ch. 76-237, s. 3, Laws of Fla. (1976). *See also* Mullin, Timothy L. Jr. (1981) "Interstate Deposition Statutes: Survey and Analysis," University of Baltimore Law Review: Vol. 11: Iss. 1, Article 2, p. 4, n. 15 (available at: <http://scholarworks.law.ubalt.edu/ublrvol11/iss1/2>).

¹⁹ Section 92.251(2), F.S.

²⁰ Henry P. Trawick, Trawick's Fla. Prac. & Proc. § 16:16 (2018-2019 ed.).

²¹ *Id.*

²² *Id.* *See also* Fla. R. Civ. P. 1.140(g) ("Depositions before Commissioners Appointed in this State by Courts of Other States; Subpoena Powers; etc."), *supra*. *See also* Extraterritorial Depositions: Foreign States—By Formal Process, 4 Fla. Prac., Civil Procedure § 1.300:10 ("The formal process for securing out-of-state depositions requires two steps: first, the issuance of a commission in the Florida court, authorizing an officer in the jurisdiction where the deposition is to be taken; and second, the

Unless enforcement of the subpoena becomes necessary, a Florida court proceeding does not need to be opened. However, “[i]f enforcement becomes necessary, “an action to enforce the subpoena must be filed. It is begun by a complaint and proceeds in the same manner as other civil actions.”²³ It should also be noted that when “a Florida attorney is taking the deposition in Florida for a foreign proceeding, he [or she] can issue the subpoena.”²⁴

Uniform Interstate Depositions and Discovery Act

Given some of the limits of UFDA and its lackluster reception by the states, the Uniform Law Commissioners made two more attempts to promulgate a uniform discovery law, the most recent of which is the Uniform Interstate Depositions and Discovery Act (UIDDA). The UIDDA is modeled after the simpler, streamlined procedure set forth in Federal Rule of Civil Procedure 45 and has been described as follows:

The UIDDA allows a party seeking discovery to present the clerk of court in the jurisdiction where the discovery is sought with a subpoena issued under the authority of the trial court, and then the clerk is to issue a subpoena under the authority of the discovery court for service on the witness. There is no need to file a motion with the court or to open a miscellaneous proceeding, and requesting a subpoena in this manner is not considered an entrance of appearance in the courts of the discovery state, which eliminates the need to obtain local counsel simply in order to obtain a subpoena. The only local judicial involvement contemplated by the UIDDA occurs if there is a dispute over enforcement, in which case any application for a protective order or to enforce the subpoena must be made to the local court.²⁵

The prefatory comments to the UIDDA describe the clerk of court’s role as ministerial and the process as administrative.²⁶ To date, 41 states and U.S. territories have adopted the UIDDA as either a statute or court rule.²⁷ Some states, may have a reciprocity requirement, meaning the UIDDA procedure is only available to states that have also enacted the UIDDA.²⁸

III. Effect of Proposed Changes:

SPB 7006 replaces the 1920 Uniform Foreign Depositions Law in s. 92.251, F.S., with the 2007 Uniform Interstate Depositions and Discovery Act (UIDDA), recommended by the Uniform Law

issuance of a subpoena (or subpoena duces tecum) by the appropriate court in the other state to require that the deponent appear and testify.”).

²³ Henry P. Trawick, *Trawick’s Fla. Prac. & Proc.* § 16:16 (2018-2019 ed.).

²⁴ *Id.*

²⁵ Brenda M. Johnson, *An Introduction to Obtaining Out-of-State Discovery in State and Federal Court Litigation*, CATA News, Spring 2014, p. 27, <https://www.nphm.com/wp-content/uploads/2014/10/Out-of-state-depo-article.pdf>.

²⁶ See Nat’l Conference of Comm’rs on Uniform State Laws, *Uniform Interstate Deposition and Discovery Act*, 4 (2007) available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f67a712b-0585-c0be-3e71-0523c8de4089&forceDialog=0>.

²⁷ See Uniform Law Commission, *Uniform Interstate Deposition and Discover Act, Enactment Map*, <https://www.uniformlaws.org/committees/community-home?communitykey=181202a2-172d-46a1-8dcc-cdb495621d35&tab=groupdetails> (last visited Jan. 17, 2019).

²⁸ See n. 25, *supra* (cautioning that, as of 2014, Georgia, Alabama, and Utah had reciprocity requirements).

Commission. If adopted, Florida will join the other 41 states or U.S. territories that have enacted the UIDDA.

The UIDDA is “patterned” after (but not identical to) Federal Rule of Civil Procedure 45, a rule which, according to the prefatory note, “appears to be universally admired by civil litigators for its simplicity and efficiency.”²⁹ Essentially, the UIDDA provides a streamlined, administrative process among the United States and U.S. territories by which a clerk of court can “domesticate” a “subpoena” issued by a “foreign jurisdiction.”

Definitions: The UIDDA does not use the term “domesticate,” which is often used to describe how a subpoena from one state becomes enforceable in another. However, the UIDDA addresses the concept of domestication by defining and using the terms “foreign jurisdiction” and “state.” (s. 92.251(2), F.S.). A foreign jurisdiction is a “state” outside this state, and a “state” is any state of the United States and certain other U.S. territories. As a result, the UIDDA does not apply to subpoenas from other countries.

Additionally, the term “subpoena” is defined broadly in the UIDDA as a document issued under the authority of a court to require that a “person,” which is also defined as including legal entities, give deposition testimony, produce documents or other items for inspection, or permit inspection of a place. A “foreign subpoena” is defined as one issued by a court in another state or territory of the United States.

Issuance of Subpoenas: The streamlined administrative procedures of the UIDDA require that a clerk of court in this state “promptly issue” a subpoena when an out-of-state party files a “foreign subpoena” issued by the court of another state. The UIDDA specifically provides that, by filing a foreign subpoena with the clerk of court, the out-of-state party is *not* submitting to the jurisdiction of the Florida courts. Rather, the clerk of court is performing a ministerial, administrative function, meaning the out-of-state party does not have to hire Florida counsel or make a motion to appear in Florida. Likewise, a judge will not have to be involved in the issuance of the subpoena.

The UIDDA requires that the out-of-state party file the foreign subpoena with the clerk of court in the *county* where discovery is sought. This means the foreign subpoena must be filed where the person to be deposed is living, where the records sought are kept, or where the place to be inspected is located.

If the foreign subpoena is valid (issued by a foreign court) and properly filed (in the correct county), the clerk of court is required to issue a Florida subpoena. The Florida subpoena must, however, incorporate the terms of the foreign subpoena and contain the contact information for the counsel of record or for non-represented parties.

Service of Subpoena: Once the Florida subpoena is issued, it will be served on the party from whom discovery is sought in the same manner as any other Florida subpoena, in accordance with the Florida law and Florida Rules of Civil Procedure.

²⁹ See note 26, *supra*.

Deposition, Production, and Inspection: Once the Florida subpoena is issued, Florida law applies to all parties, including the out-of-state party, in conducting discovery (deposing a witness, producing documents or things, inspecting property).

Application to Court: Similarly, the subpoena recipient who wishes to challenge the subpoena or the out-of-state party who wishes to modify or enforce the subpoena must submit an application to the court in the county where discovery is sought. The application must comply with Florida rules and statutes. This means that the out-of-state party must then submit to the jurisdiction of Florida courts. Thus, at this point, an out-of-state party may have to retain Florida counsel, or an out-of-state attorney may associate with Florida counsel and file a “Verified Motion for Admission to Appear Pro Hac Vice Pursuant to Florida Rule of Judicial Administration 2.510.”³⁰

Uniformity of Application and Construction: The primary goal of the UIDDA is to promote uniform procedures among the states in essentially domesticating foreign subpoenas, and the courts are encouraged to consider this aim when applying or construing the UIDDA.

Inapplicability to Criminal Proceedings: Although the model UIDDA does not exclude criminal proceedings, the proposed bill contains this exclusion. In criminal proceedings in Florida, limited discovery is permitted by the Florida Rules of Criminal Procedure, but only *if* the defendant elects to participate. There is no reciprocal right to discovery because of the presumption of innocence and the constitutional right against self-incrimination; that is, a criminal defendant cannot be compelled by the state to participate in discovery. Because of these constitutional concerns and need for additional safeguards, the Florida statutes and Florida Rules of Criminal Procedure set forth a distinct process for discovery in criminal cases, including extradition of necessary witnesses from other states.³¹

Effective Date and Application: The bill takes effect on July 1, 2019, and specifically applies to cases pending on that date.³²

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁰ FL ST J ADMIN Rule 2.510(a) (“Upon filing a verified motion with the court, an attorney who is an active member in good standing of the bar of another state and currently eligible to practice law in a state other than Florida may be permitted to appear in particular cases in a Florida court upon such conditions as the court may deem appropriate, provided that a member of The Florida Bar in good standing is associated as an attorney of record.”).

³¹ See Fla. R. Crim. P. 3.220; Ch. 942, F.S.

³² In Florida, newly enacted statutes that impose a new obligation or duty that interferes with vested rights will not be applied retroactively to pending cases. On the other hand, statutes that relate to procedure only or are remedial in nature are generally applied retroactively to pending cases. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985). See also *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986)); *Palm Beach County Sheriff's Office v. Sun-Sentinel Co., LLC*, 226 So. 3d 969, 975–76 (Fla. 4th DCA 2017) (following *City of Orlando v. Desjardins* in holding that newly enacted public records exemption was remedial and applied retroactively). While the UIDDA imposes new duties and obligations upon the clerks of court to domesticate and issue subpoenas for production or inspection, the UIDDA is largely procedural and does not appear to interfere with any vested rights.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Court rule-making: Article V, section 2(a), of the Florida Constitution provides, in relevant part:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Article II, section 3 of the Florida Constitution, reads:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

These provisions have been interpreted to give the Florida Supreme Court exclusive jurisdiction over procedural matters while the Legislature has exclusive jurisdiction over substantive law.

One concern raised by the bill is whether the Legislature has the constitutional power to adopt a procedural act concerning discovery when discovery procedures fall within the purview of the Florida Rules of Civil Procedure. On the other hand, the bill at issue is amending the current Uniform Foreign Depositions Act, which has been in place since 1955. If the UIDDA is deemed more substantive and viewed as a policy choice determining how Florida treats foreign subpoenas, then the Legislature may pass the UIDDA as a general law. However, if the UIDDA is deemed purely procedural, then the Florida Supreme Court has exclusive jurisdiction to determine how the clerks of court will domesticate and issue foreign subpoenas. Notably, some of the jurisdictions that have passed the UIDDA have done so through court rule.

If the bill is passed and the resulting statute were to be challenged, the court would have a number of options. The court could recognize that the “legislative action” here is “a

statement of the public desire.”³³ For instance, in *Timmons v. Coombs*,³⁴ the court found that s. 768.79, F.S., contained procedural portions and adopted those as rules of court without explaining which portions of the law were procedural and which portions were substantive. On the other hand, if the court were to find the UIDDA is procedural, it could strike down the statute and either adopt the UIDDA as a court rule or require the parties to follow the Florida Rules of Civil Procedure.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For private legal practitioners, the more streamlined process may translate into saving time and money for their clients. On the other hand, more Florida residents may be subject to domesticated foreign subpoenas given the simplified procedures.

The simplicity of the UIDDA procedures also gives rise to the potential for abuse of Florida residents by out-of-state parties. However, given that subpoenas issued under the UIDDA are challengeable in Florida and the out-of-state party will be required then to obtain and pay Florida counsel to address any such challenge, abusive discovery practices may be cost prohibitive.

C. Government Sector Impact:

The Florida Association of Court Clerks and Comptrollers (FACC) have commented that the primary distinction between the current Uniform Foreign Depositions Act and the UIDDA is the UIDDA expands discovery beyond depositions to production of documents and things and to inspection of places. The FACC believes the procedures currently used and filing fees charged by the clerks of court under the Uniform Foreign Depositions Act will remain the same but predict that the clerks of court will receive more filings given the expansion to subpoenas for production and inspection. While this will result in additional workload to the clerks’ offices, it should also result in additional revenue. Whether these revenues sufficiently reflect the potential increased workload is not known at this time.

³³ *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992) (rejecting district court’s conclusion that s. 45.061, F.S., is unconstitutional merely because it contains procedural aspects).

³⁴ 608 So. 2d 1 (1992). *See* n. 56, *supra* (“We have consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. . . . This is particularly so in areas of the judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal’s objective. To strictly apply the nonseverance principle . . . would make it increasingly difficult to adopt new judicial process proposals that have both substantive and procedural aspects. The judiciary and the legislature must work to solve these types of separation-of-powers problems without encroaching upon each other’s functions and recognizing each other’s constitutional functions and duties. One example is The Florida Evidence Code[.]”).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 92.251, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.