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Advocate's VIEW

Facing the issuance of out of state trial subpoenas

Two times during my career, I have witnessed opposing counsel issue traditional judicial trial subpoenas in a New York State Supreme Court proceeding outside New York state. The opposing attorneys did not avail themselves of the possible procedural avenues available for issuing a valid out-of-state subpoena. The presiding justices in the cases where I was involved handled the objections to such subpoenas differently and leave the question of what a practitioner should do when facing such a situation.

In the first instance, opposing counsel issued a subpoena to the past employer of an expert witness seeking the witness's employment file. The trial subpoena was served without notice to my office and counsel mistakenly had the subpoena returnable before a justice that was not assigned to the case. Thus, when reviewing records at the clerk's office for the trial, my office was unaware that the subpoenaed records went to a different judge. It was on the stand, during cross-examination, that counsel sought the records from the other justice's courtroom and tried to impeach the witness with the lack of responsive records — contending that the lack of records demonstrated that the witness never worked at the educational facility 20 years before that date.

Objections ensued and, among other things, the court determined that the subpoena was issued outside the state without authority. Additionally, the court admonished the seasoned attorney for knowingly issuing a subpoena under the court's power with the legend that the failure to comply was punishable as a contempt of court. It was also determined through telephone calls to the subpoenaed facility that the lack of records was simply because the institution did not retain records beyond

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10 years. Further, the court concluded that subpoenaing non-party employment records without notice was improper.

In the second, more recent instance, experienced opposing counsel issued a subpoena to an out-of-state party for his attendance at trial. The party was not represented by counsel and did not actively participate in the litigation other than to have his deposition taken during discovery. The trial subpoena had the same legend of it being punishable by contempt of court for failure to comply, but unlike my prior case it was served with notice to all parties in the litigation.

As in the first action, objections ensued, including a motion seeking to quash the subpoena and that counsel be directed to advise the person that the subpoena was not enforceable. During motion practice, opposing counsel averred to the court that he was able to get the party to voluntarily appear at trial. During the ruling on the motion, the court denied the motion to quash on grounds of lack of standing and determined that opposing counsel did not have to contact the party about the lack of effect of the subpoena — noting that the party indicated that he would now voluntarily appear at trial.

The common thread to both decisions was the acknowledgement that such subpoenas were issued without authority. New York CPLR §2303 (a) provides that a subpoena requiring attendance or production of documents or things

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shall be served in the same manner as a summons. This has been interpreted to mean that a New York subpoena has no effect outside the state because it is not authorized by the Judiciary Law or otherwise. *See Du Pont v. Bronston*, 46 AD2d 369, 371 (1st Dept. 1974) (there is "no authorization for service of a subpoena *ad testificandum* outside the state."). *See also In re Stephen*, 239 AD2d 963, 963 (4th Dept. 1997) (a New York court may not direct service of a New York subpoena outside of the state); *Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.L,* 2009 N.Y. Misc. LEXIS 6726, *7 (Sup. Ct. New York Cty. 2009) (service of a subpoena outside the state has been held void because courts have reasoned that such service is not expressly authorized). Furthermore, CPLR §2303 (a) provides that all subpoenas *duces tecum* be served on notice to each party to the action so that it is received before the production of books, papers

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or things.

What is a practitioner to do in this circumstance? As one proceeds to trial, it is important to be vigilant about what subpoenas have been issued and if proper procedures have been followed. If the rules have been violated, determine if an objection is beneficial to your client. If so, object and if standing is an issue, ask the court to utilize its own inherent power, *sua sponte*, to prohibit the improper issuance of an unauthorized subpoena to secure information outside that permitted by New York law.

Of final note, as noted above, there are various procedures for issuance of valid out-of-state subpoenas. Therefore, one should avail herself or himself to rules in place in the relevant jurisdictions. This article was limited to judicial subpoenas issued out-of-state without authority.

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