When Is It Criminal to Issue a Subpoena?

The Intersection of Subpoena Practice and the Unauthorized Practice of Law

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Do subpoena service providers engage in the unauthorized practice of law—a crime—by engaging in activities traditionally restricted to licensed attorneys?

A subpoena is a powerful tool that is available to a limited few. Attorneys, as officers of courts, can engage in certain subpoena practices that others cannot. At the state level, the strict limitations of subpoena practice are particularly prevalent given that a subpoena is only enforceable in the issuing state and may only be enforced by an attorney licensed to practice law in that state. Yet litigation support and document procurement services, which do not retain attorneys with legal licenses, routinely become involved in the subpoena process, presumably based upon the premise that they have implicit authority to act on behalf of an attorney. This creates a potential collision between subpoena practice and the unauthorized practice of law.

When executed and served properly, a subpoena may compel the production of materials or participation in sworn testimony. As mentioned, however, a subpoena issued by a state court is only enforceable within the borders of that state. When the intended recipient is located out-of-state, the subpoena does not have binding effect. Occasionally, an individual may agree to forego the rules and will voluntarily testify or will agree to release documents without an enforceable subpoena. But given the "disruptive," "burdensome," "oppressive" or otherwise objectionable nature of many subpoenas, recipients frequently search for a means to avoid complying or to ignore a subpoena altogether. This leaves a lawyer at the mercy of a foreign jurisdiction.

These obstacles do not exist in the federal courts, which have a simplified, uniform standard for issuing out-of-state subpoenas. Under Federal Rule of Civil Procedure 45 an attorney of record in the underlying action can sign a subpoena, serve it and enforce it in other federal

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district courts nationwide. Moreover, in an effort to further streamline this process, the U.S. Supreme Court has recently approved amendments to Federal Rule 45, which will take effect in December 2013 that will provide additional instruction on enforcing subpoenas in foreign federal districts. If only state practitioners were so fortunate.

In stark contrast to federal practice, a litigant in a state court targeting records or testimony from a foreign state source must comply with strict and often cumbersome procedures that vary by jurisdiction. While recently states have tended to adopt uniform statutes that help clarify the process, not all states have adopted these rules, and procedures vary among those that have. As a result, the rules for procuring a witness or materials from out-of-state are often sidestepped and an attorney has no means to compel compliance.

One resource for practitioners seeking to avoid out-of-state subpoena headaches is to hire a litigation support services company that assists with researching state requirements, identifying correct form and executing the final service in a recipient's jurisdiction. Generally unlicensed to practice the law, these providers prepare and issue subpoenas to individuals or entities nationwide. This practice raises a perplexing question: Do subpoena service providers engage in the unauthorized practice of law—a crime—by engaging in activities traditionally restricted to licensed attorneys? This article will investigate this quandary and explain the proper method to engage in out-of-state discovery.

Varying Processes for Issuing Out-of-State Subpoenas

Each state has its own procedure for issuing and enforcing subpoenas in cases pending in state courts beyond its borders. Some states apply rules modeled after the Uniform Foreign Depositions Act. Adopted by the National Conference of Commission on Uniform State Laws in 1920, the Uniform Foreign Depositions Act was the first attempt to create a standard interstate subpoena practice. *See* Rebecca B. Phalen, *Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?*, 17 Ga. Bar. J. 2 (2011). The Uniform Foreign Depositions Act establishes the following general procedure:

> Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.

If a lawyer seeks to subpoena a witness in a state that has adopted the Uniform Foreign Depositions Act or has adopted similar statutory provisions, he or she must contact the clerk of court in the county where the witness is located to request that the clerk issue a subpoena. To issue a subpoena, the clerk may require a notice of deposition, commission or even a miscellaneous action. Phalen, *supra*, at 19.

The current trend among states has been to enact the Uniform Interstate Depositions and Discovery Act, which the National Council of Commissioners on Uniform State Laws approved in 2007. The Uniform Interstate Depositions and Discovery Act establishes minimal judicial oversight and eliminates many preliminary steps before an attorney may obtain a foreign subpoena. *See* Uniform Interstate Depositions and Discovery Act, *Prefatory Note,* at part 3. Instead, the Uniform Interstate Depositions and Discovery Act allows an attorney to submit a "foreign subpoena"—the subpoena issued in the jurisdiction of the trial state—to the clerk of court of the state from which the attorney seeks discovery together with a completed subpoena form in the that state containing the same terms. *See* Uniform Interstate Depositions and Discovery Act §3(a). When a party submits a foreign subpoena and unexecuted subpoena form to the clerk of court, the clerk, in accordance with the clerk's court's procedure, must execute and issue a subpoena for service to the subpoena recipient.

Even if a state has adopted the Uniform Interstate Depositions and Discovery Act, "foreign" lawyers must still consult the particular version of the act to ensure that a court clerk issues the subpoena properly. For instance, some states have enacted special reciprocity requirements that limit application of the Uniform Interstate Depositions and Discovery Act. In Utah, the Uniform Interstate Depositions and Discovery Act only applies if the jurisdiction from which an attorney seeks the subpoena has adopted "provisions substantially similar to [Utah's] uniform act." Utah Code Ann. §78B-17-103 (2013). On the other hand, Virginia's reciprocity provision requires only a "predecessor uniform act," such as the Uniform Foreign Depositions Act or UIIPA, for the Uniform Interstate Depositions and Discovery Act to apply. Va. Code Ann. §8.01-412.14 (2013).

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In states that have not adopted the Uniform Interstate Depositions and Discovery Act or a predecessor act, the amount of court involvement necessary before a subpoena will issue varies. Some states, such as Connecticut and Massachusetts, allow the issuance of a subpoena without court intervention or may only require a commission signed by the judge familiar with the litigation to accompany the subpoena request. Phalen, *supra*, at 20. In these states, a subpoena may be issued without filing a separate action, and local counsel may only be needed to enforce a subpoena if the witness or subpoena recipient does not comply.

Other states, however, require significant court oversight before issuing a subpoena. In these states, the party from the foreign state seeking the subpoena may be required to file an application or a motion in the recipient's state court before the subpoena can issue. For instance, if a litigant seeks to issue a subpoena to a witness in New Jersey, he or she must retain an attorney licensed in New Jersey to file an *ex parte* petition with the Superior Court of New Jersey for an order authorizing the issuance of a subpoena to the New Jersey resident. N.J. R. Civ. Proc. 4:11-4. Upon receipt of the signed order and subpoena,

the New Jersey attorney may then serve the subpoena, or a notice in lieu of the subpoena. If the New Jersey resident resists, the New Jersey attorney may apply to the superior court for sanctions. Similarly, in Vermont, obtaining the deposition of a Vermont resident for use in a foreign jurisdiction requires a petition to the civil division of the superior court in the court unit where the deponent resides or conducts business. Vt. R. Civ. Proc. 28(d). A judge of that court unit may then issue an order directing the issuance of a subpoena and commanding the deponent to attend. *Id.*

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In other jurisdictions, the procedures require court involvement but do not explicitly state that a foreign litigant must file an application or a petition. For example, Wisconsin Statute §887.5 states that any judge of a court of record in Wisconsin shall issue a subpoena commanding a witness to appear in the foreign court adjudicating the action upon presentation of a certificate of the judge in the jurisdiction of the pending litigation stating that the person is a necessary witness. Wis. Stat. Ann. §887.25 (2013). In these states, a lawyer must research local rules and confirm the specific requirements with the clerk of court. If there is any doubt about the specific requirements, a lawyer should seek advice from local counsel.

How Litigation Support Services Can Help

Given the complexity and the variation among the states' foreign subpoena procedures, many attorneys rely on litigation support services to issue and to execute subpoenas out of state. Employing vendors to assist with subpoena service has several advantages. Vendors bring to the table professionals with experience in specialized areas of subpoena practice, such as obtaining medical records and familiarity with the complex and varying procedural and regulatory requirements of each state and they can efficiently and effectively procure the requested documents. Further, many vendors have a national presence with offices in various states that lawyers can use when serving subpoenas to foreign witnesses and filing documents with foreign courts. Vendors can also take over the legwork of researching local subpoena procedures and preparing the necessary court documents, freeing up valuable time and resources for the attorney and helping to ensure compliance with local rules.

Often, when a lawyer engages a vendor to issue a subpoena to secure a witness or documents in another jurisdiction, the vendor will initially eschew the formal, enforceable process and either issue the foreign (unenforceable) subpoena directly or request that an individual consent to provide the requested documents or testimony voluntarily. If a recipient complies with an informal request, a vendor can avoid the costs of compelling discovery or testimony through an enforceable subpoena. If a recipient resists, however, a vendor will have to follow the recognized out-of-state subpoena process and the formal rules of the recipient's jurisdiction.

When obtaining an enforceable out-of-state subpoena becomes necessary, vendors offer various resources to assist attorneys. Vendors can research a state's foreign subpoena procedures and contact the clerk of the court of the recipient to confirm the requirements. Next, vendors may prepare necessary forms for an attorney and file them with a foreign court. Finally, some vendors will assist an attorney to serve a subpoena.

Arguably, some of these tasks stray close to the practice of law. But what exactly constitutes the practice of law? The question is not is clear as you may think.

Defining the Practice of Law

Each state has rules that restrict the practice of law to attorneys duly licensed to practice in that jurisdiction. *See* Model Rules of Prof'l Conduct R. 5.5 cmt. 2 (1983). By limiting the practice to members of the bar, states can protect the public better from unreliable legal advice. Although this basic premise seems straightforward, the case law has not precisely defined the "practice of law." Lawyers engage in myriad activities on behalf of clients that cannot be reduced to a comprehensive list. *See Unauthorized Practice of Law Com'n. v. Parsons*, 1999 U.S. Dist. Lexis 813 (N.D. Tex. Jan. 22, 1999), *vacated on other grounds*,179 F.3d 956 (5th Cir. 1999). Furthermore, many activities that may constitute the practice of law by an attorney often overlap with activities performed by other professionals. *See Gmerek v. State Ethics Comm'n*, 751 A.2d 1241, 1256 (Pa. Commw. Ct. 2000). For instance, real estate professionals, accountants and bankers routinely prepare materials that licensed attorneys sometimes will prepare, which could be considered practicing law.

Many jurisdictions approach the issue of the unauthorized practice of law by applying general principles that prohibit persons not trained in the law from holding themselves out to the public as having the requisite technical competence to address a particular legal issue. The Model Code of Professional Responsibility embraced this method, adopting a nonexclusive definition that stated that

> the practice of law includes, but is not limited to, representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding.

Model Code of Prof'l Responsibility EC 3-5 (1980).

The Model Code definition reflects the approach of the majority of states, which

have defined the practice of law to include three primary domains: (1) appearing in a representative capacity before a public tribunal charged with determining rights; (2) instructing and advising clients in regard to the law; and (3) preparing legal instruments requiring familiarity with legal principles. *See generally*, A.B.A. Task Force on the Model Definition of the Practice of Law, Appendix A: State Definitions of the Practice of Law. Thus, the practice of law is not limited to litigation or court-related legal activities. To the contrary, someone practices law when he or she holds himself or herself out to the public as competent to exercise legal judgment or as having the qualifications to act in a representative capacity. *See, e.g.*, *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229 (Pa. 1976).

Given this hazy distinction, how might a court view out-of-state subpoena practice by a lay party? A look at some relevant case law shows that whether a court will view such activity as unauthorized depends upon the relationship between the alleged violator and the client, the specific activity performed and the particular public policy of the state in which the activity took place.

Take, for example, the decision in *In re Mid-America Living Trust Associates*, 927 S.W.2d 855 (Mo. 1996), in which the Missouri Chief Disciplinary Counsel filed an unauthorized practice of law proceeding against a trust advisory company over its practice of having paralegals recommend appropriate forms of trusts and then prepare the initial trust documents. The Missouri Supreme Court held that the trust company's paralegals provided "legal advice to the clients about choices to be made and the legal effects of those choices." *Id.* at 865. The court added that the company's practices of having attorneys review the trust documents did not "cure" the unauthorized practice of law because the paralegals usually chose the trust instrument, not the reviewing attorneys. *Id.* at 866–67. Accordingly, the court enjoined the company from conducting any further business in the state.

Conversely, in *New York Lawyer's Association v. Dacey*, the New York Court of Appeals determined that a defendant who wrote a book on probate law was not engaged in the unauthorized practice of law because he did not directly interact with clients. 28 A.D.2d 161 (N.Y. App. Div. 1967), *rev'd*, 234 N.E.2d 459 (N.Y. Ct. App. 1967). The unlicensed lay defendant had previously been enjoined in the State of Connecticut from drafting wills, trusts and similar documents and advising persons concerning estate law. Following the injunction, the defendant offered a booklet in New York State entitled "How to Avoid Probate!" consisting of 55 pages of text and 310 pages of forms and instructions. The New York County Lawyer's Association sought to enjoin the publication and distribution of the book, alleging that it constituted the unauthorized practice of law. The New York Appellate Division determined that publishing these instructions met the standard for the unauthorized practice of law. *Id.* at 165. However, the New York Court of Appeals reversed and held that the activity was *not* the practice of law because the unlicensed defendant never provided direct advice to any client or prepared instruments tailored to the particular needs of customers. *See Dacey*, 234 N.E.2d at 161 (citing *Id.* at 174 (Stevens, J., dissenting)). The court reasoned that the booklet amounted only to general advice, and that there was no evidence of any imminent harm to the public by allowing its publication. *Id.* at 175.

We can draw several conclusions from these decisions. First, courts consider whether an alleged violator maintains a direct relationship with clients or merely offers general advice. Second, courts consider whether an individual offers clients specific advice about particular situations. Third, courts consider whether any legal materials prepared by an unlicensed individual were detailed, how detailed, and how much the client relied on them. When an individual or a company does maintain a direct relationship with and offer specific legal advice about particular situations to a client, prepares greatly detailed documents, and a client had relied on them significantly for legal advice, a court probably would deem offering the advice as engaging in the unauthorized practice of law.

Does Interstate Subpoena Practice Implicate the Unauthorized Practice of Law?

Litigation support companies assist attorneys in the complicated and time-consuming process of out-of-state subpoena practice. However, this practice forces vendors to engage in quasi-legal functions that may implicate the practice of law. Even in states that have adopted the Uniform Interstate Depositions and Discovery Act, vendors seeking enforcement of a foreign subpoena may research the foreign state's particular subpoena procedures, advise clients directly regarding the specific requirements, prepare necessary legal documents and file the documents with the foreign court—activities traditionally reserved for licensed attorneys. At the same time, attorneys who retain these vendors may also be exposed for assisting, facilitating or encouraging lay persons to engage in the unauthorized practice of law. These concerns become more significant in states that have not yet enacted the Uniform Interstate Depositions and Discovery Act and that require greater court involvement for a subpoena to issue.

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The findings of the New Jersey Committee on the Unauthorized Practice of Law highlight the potential consequences of out-of-state subpoena practice by lay persons. Following several complaints and grievances, the committee issued an advisory opinion concerning the execution of subpoenas by persons other than attorneys or parties for the production of medical documents. Comm. on the Unauthorized Practice of Law, Op. 29 (1997) (Subpoenas Issued in the Name of the Clerk of the Court by Lay Entities on Behalf of a Party or Attorney for a Party). The opinion described a typical scenario in which an attorney would provide a vendor with a records request by providing the name and

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perhaps the address of the subpoena recipient. Importantly, the automated request included a signature line purportedly granting the vendor authority to sign on behalf of the issuing attorney and to serve the subpoena bearing the attorney's electronic signature. *Id.* at 1.

The committee considered whether the subpoena service could issue the subpoena as an agent of the attorney and noted that under the New Jersey Rules of Civil Procedure, only the clerk of the court or an attorney or party in the name of the clerk can issue a subpoena. *See* N.J. R. Civ. P. 1:9-1. Further, the committee sought guidance from the clerk of the superior court, who objected to the practice of subpoena services that issue subpoenas since they are not parties to the litigation and are neither licensed nor regulated. Opinion 29, at 2.

Accordingly, the committee announced two significant conclusions. First, it stated that "any person acting as an agent and executing subpoenas on behalf of an attorney or party to a case is engaged in the unauthorized practice of law." *Id.* at 3. Second, the committee advised that

> any attorney who retains and authorizes a third-party non-attorney to execute subpoenas or deposition notices on the attorney's behalf may be in violation of RPC 5.5(b), which provides that a lawyer shall not 'assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.'

Id.

Risk Management Lesson

To ensure proper service of an out-of-state subpoena, a lawyer must comply with the local procedure of the jurisdiction from which the lawyer wants to procure a witness or documents. While a lawyer may rely on a third-party service to assist with this task, the ultimate responsibility to comply with local procedure and obtain an enforceable subpoena rests with the attorney. Therefore, when in doubt, it is incumbent upon an attorney to contact the local clerk of court and research the applicable law to determine the local procedures for issuing a subpoena. Hiring local counsel before seeking a subpoena can further protect an out-of state-lawyer from making procedural errors or inadvertently engaging in the unlicensed practice of law. Even if not necessarily required by the foreign jurisdiction, hiring local counsel will help clarify the procedural logistics of issuing a subpoena from out of state and also alert a deponent or document holder that the subpoena will be enforced.FD