

## Practice Pointer



“Practice Pointer,” a regular feature in *The Journal*, offers brief tips from your colleagues to improve your practice. The areas of expertise will vary as will the approaches.

### Out of state subpoenas – are they unethical and unenforceable?

Most of us have been in this situation before. There are documents which are potentially relevant to the client’s case but they are located outside of the Commonwealth of Virginia and the custodian of the documents has no contacts with the Commonwealth that would allow for a Virginia subpoena *duces tecum*. The client inevitably asks, “why can’t we subpoena those records from [enter name of state here]?”

We have all probably given the same answer as well. My answer used to consist of two parts: citing Legal Ethics Opinion (LEO) #1495 regarding attorney misconduct due to requesting the issuance of an unenforceable subpoena to an out-of-state individual and citing the Uniform Foreign Deposition Act found in Virginia Code Ann. §8.01-411 *et seq.*

In LEO 1495, the “hypothetical situation” involved an attorney requesting the issuance of a subpoena *duces tecum* from a Virginia court which was addressed to a resident of the State of North Carolina. The attorney mails the subpoena *duces tecum* to the non-resident. The LEO boils down to this: it is “improper and violative of DR:1-102(A)(4) for a Virginia attorney to request a Virginia court to issue a subpoena *duces tecum* to obtain documents from an out-of-state individual, knowing that such subpoena is *not enforceable*, unless the subject of the subpoena has agreed to accept service [emphasis added].” The hypothetical situation contained in the LEO also describes a situation where the attorney pursued the subpoena *duces tecum* with vigor, requesting a show cause summons against the nonresidents for failure to comply. This is also violative of the disciplinary rules.

Regarding the Act, what I used to explain to my clients is that it is possible to contact the state in which the documents are located, follow their procedures for filing in that state, request a deposition of the custodian of the records and issue a subpoena *duces tecum* for the custodian to bring the records to the deposition for review. Of course, I also used to explain to my client that this is rather expensive and that we should be certain the requested documents are vital before going that route.

After some research into the LEO, the proper use of the Act and a subsequent conversation with Bar Counsel, it is now clear that a deposition, coupled with a subpoena *duces tecum*, is not the practitioner’s only avenue. While I will not quote the Act

here due to space limitations, a careful reading of it demonstrates that Virginia’s Act is directed to parties and their counsel that are located *outside* the Commonwealth of Virginia. Frankly, it is not written for the Virginia practitioner at all. This is clear in Virginia Code Ann. §8.01-412 which states, in part, as follows: “the privilege extended to persons in other states by §8.01-411 shall only apply to those states which extended the same privileges to persons in this Commonwealth.” Therefore, the Act is designed to allow attorneys, in states which have enacted a similar statute, to proceed in this Commonwealth with subpoenas *duces tecum*, depositions, etc. It is reciprocal in nature.

Where does this leave the Virginia practitioner? The case of *America Online, Inc. v. Nam Tai Electronics, Inc.*, 264 Va. 583, 571 SE 2<sup>nd</sup> 128 (2002), provides guidance on the proper procedure to be used. In that case, America Online (“AOL”) was involved in litigation in the State of California. AOL obtained a commission from the California court which authorized discovery from a Virginia internet service provider. The key to this case was the fact that the Virginia court then issued a subpoena *duces tecum* for the information identified in the California commission, which was therefore an *enforceable* subpoena. The Supreme Court of Virginia found that California “is a reciprocal state for the purpose of applying the Uniform Foreign Depositions Act in Virginia to a commission for out-of-state discovery from a court of that state.” AOL used the correct process and had the Virginia court issue a subpoena *duces tecum* which was enforceable by the Virginia court. This skirts the issue raised in LEO 1495 regarding the issuance of an *unenforceable* subpoena *duces tecum*.

If the records sought by the Virginia practitioner are located in a state which is deemed to be a reciprocal state pursuant to Virginia’s Uniform Foreign Depositions Act, then the Virginia practitioner may have a subpoena *duces tecum* issued by the Virginia court and then forward it to the state in question, which state will then issue its own subpoena *duces tecum*. This subsequent subpoena *duces tecum* is enforceable and therefore is not a violation of the Disciplinary Rules, since the custodian of the records must comply. There are states in which the Virginia practitioner may simply forward the Virginia subpoena to the clerk of the relevant court; however, as a practical matter, the Virginia practitioner should contact an attorney in that state in order to

insure the Virginia subpoena complies with that state's Act, to assist with the filing and to argue any motions to quash which may be filed.

So long as the subpoena *duces tecum* issued by the Virginia attorney is enforceable, conforms to the Act and is directed to a reciprocal state, we no longer have to advise the client that a subpoena cannot be issued because it is unethical and unenforceable or that we must go through the cumbersome process of a deposition. This greatly simplifies the process and I encourage the practitioner to closely read LEO 1495, *AOL v. Nam Tai*, and the Act itself for further reference.

— submitted by William S. Scott IV

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