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Best Practices for Issuing Subpoenas

Depositions of Georgia Residents in Cases Pending Out of State

by Rebecca B. Phalen

Today's litigation, in which the facts of a case see no geographical boundaries, requires a more expansive subpoena power to properly cross those boundary lines to reach certain witnesses and evidence. While this subpoena power has been easily extended in federal court,¹ it remains a lumbering process in state courts.

This article will set forth the best practices for issuing a subpoena in Georgia for a case pending in another state (the "foreign state"). Although this process has not been fleshed out in Georgia cases and remains driven by the clerk of court for each county, there are certain steps that will remain relatively constant. Because it is not settled law that only Georgia procedure would apply to a subpoena issued in Georgia, it is recommended that attorneys err on the side of caution and follow the more restrictive procedure as between Georgia and the foreign state. The degree to which an attorney follows this more conservative approach will vary depending on cost, anticipated cooperation of the deponent and opposing parties, and strategy in the underlying case.

Georgia has adopted the Uniform Foreign Depositions Act (the "Act"),² which allows Georgia courts to issue subpoenas for cases pending out of state. Although the Act was meant to simplify the process of deposing a Georgia resident for an out-of-state case, the courts have developed their own and varied procedures for issuing subpoenas. The courts are within their rights to do so because the Act is "a statute of empowerment, not requirement."³

Preparing to Issue the Subpoena

Before the court issues the subpoena, the Georgia attorney and out-of-state counsel need to lay some groundwork as follows.

Run a conflict check.

Run a conflict check on all parties to the case and the non-party deponent. Because the issuance of a subpoena has the potential to result in a motion to quash or motion to compel, the Georgia attorney must be fully informed of who the parties are, particularly if the attorney may be called upon to defend the issuance of the subpoena in court.

Determine whether out-of-state counsel is seeking testimony, documents, or both.

The Georgia Civil Practice Act, unlike the Federal Rules of Civil Procedure, only provides for subpoenas to issue for deposition, and not for documents alone.⁴ A

subpoena for deposition can, however, command the deponent to produce and permit inspection of documents.⁵ If out-of-state counsel is only seeking documents, those documents may be obtained with signed authorizations or through the parties' cooperation. Otherwise, the documents need to be obtained through a subpoena for deposition with a request for documents. The deposition can always be cancelled if the documents are obtained before the deposition.

Review the specific information sought in the subpoena to determine whether any privileged, confidential, or irrelevant information is sought.

The goal is to serve a subpoena that will be able to withstand scrutiny if enforcement is sought in a Georgia court. However, the level of scrutiny that courts give to subpoenas issued for out-of-state cases varies; courts take different positions on both the scope of their power to review substantive issues (such as privilege and relevancy) and which state's law applies to any review.⁶ A court may apply its own substantive law and quash a subpoena that it determines is overbroad or seeks privileged material.⁷

A court may also apply the foreign state's law in limiting the scope of discovery sought by the subpoena. In *Barnes v. A Confidential Party*,⁸ the deponent's state court allowed the deponent to invoke a privilege of the foreign state in refusing to answer certain questions at a deposition finding that "the foreign state's substantive law of privilege, as well as its procedural rules should be applied to depositions taken under commission in another state."⁹ A deponent's state court may even be willing to issue a ruling on the relevancy of the information sought by the subpoena if the party seeking discovery can establish the relevancy of the information.¹⁰

On the other hand, some courts have held that their review of a

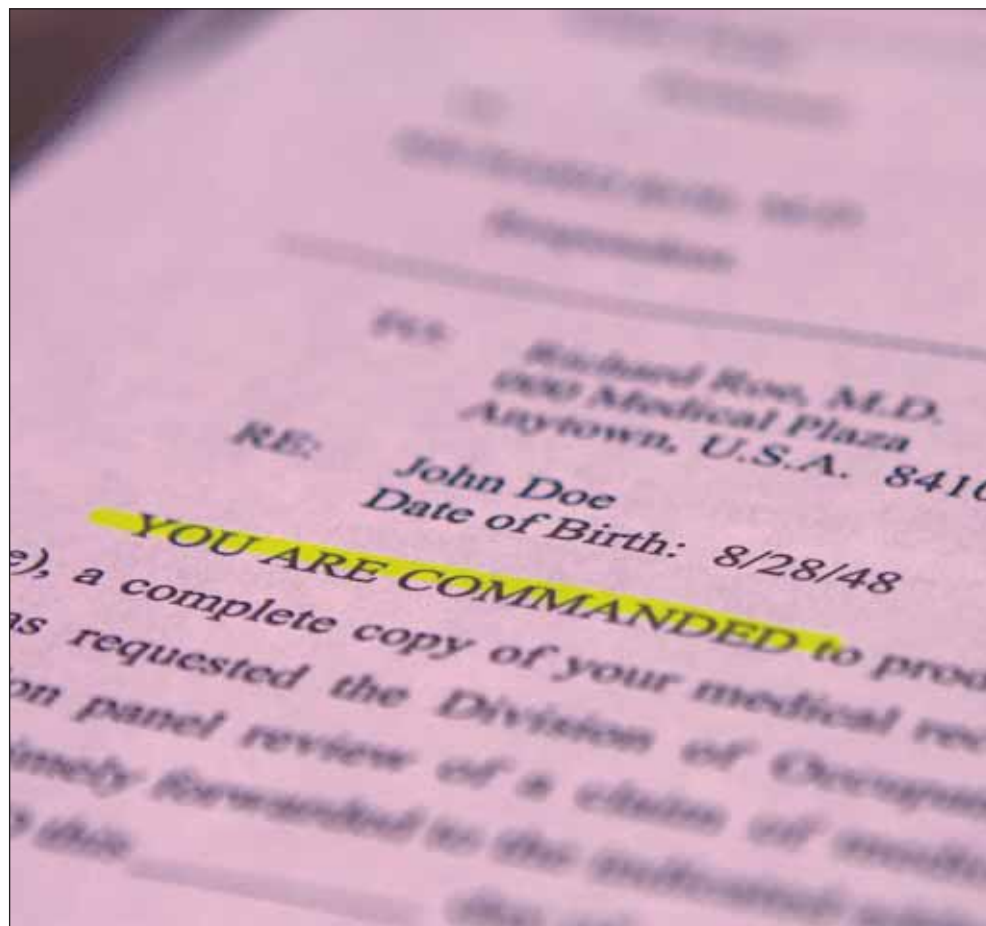
challenged subpoena issued for an out-of-state case is limited to compelling the deponent to attend and imposing sanctions for failure to attend. This position suggests that these courts do not think that they have the power to rule on issues that go to the heart of the subpoena.¹¹ In playing such a limited role, the deponent's state court may defer to the ruling of the foreign court on substantive issues.¹²

With this background, because there is the possibility that the Georgia court will examine the substance of the subpoena for privilege and relevancy issues, the substance and breadth of information sought in the subpoena should be examined by Georgia counsel. The Georgia counsel should advise the out-of-state counsel if there is any information sought that could be considered privileged, confidential or irrelevant under Georgia law. This analysis will allow the out-of-state attorney to either modify the subpoena to comply with Georgia

substantive law or to modify the commission to reflect that the foreign state's law should apply. Although a statement to that effect in the commission may not be binding, it can be persuasive to a court should the subpoena be challenged.¹³

Comply with the more restrictive notice requirement governing service of subpoenas.

Although Georgia law does not mandate a particular time period in which a subpoena may be served, it does allow a deponent to object to discovery for "good cause shown," including asking the court to allow the discovery only "on specified terms and conditions, including a designation of the time or place."¹⁴ When giving notice of a deposition under O.C.G.A. § 9-11-30, the party requesting the deposition "shall give reasonable notice in writing to every other party to the action."



Once the deposition location is established, the appropriate Georgia clerk of court should be contacted regarding that court's procedures for issuing an out-of-state subpoena. The importance of this communication cannot be overstated.

While not expressly applicable to serving subpoenas, "reasonable notice" is the guiding principle. Additionally, "the person to whom a subpoena is directed may, within 10 days after the service" serve a written objection to the subpoena.¹⁵ While this statute does not mandate a time period for service of the subpoena, but rather a time for the objection,¹⁶ this 10-day period serves as partial time-frame. Finally, if the foreign state requires a subpoena to be served a certain number of days before the deposition, that requirement should be observed since it is not clear which state's procedure would prevail on a motion to quash or motion to compel.

Provide notice of the deposition in accordance with the Georgia ethical requirements.

The Georgia State Disciplinary Board has advised that a subpoena should only be issued "for depositions which have been actually scheduled by agreement between parties or where a notice of deposition has been filed and served upon all parties, and should not be issued when no deposition has been scheduled."¹⁷ This requirement is to prevent the misuse of subpoenas by misleading non-party witnesses into releasing confidential or privileged information without the non-party's having an opportunity to object to the production of that material.¹⁸ To comply with this requirement, the out-of-state counsel should either schedule the deposition by agreement or serve the notice of deposition before having the subpoena issued in Georgia.

Determine where the deponent can be compelled to attend a deposition.

For a deposition in an out-of-state case, the Georgia clerk of any court of record where the deposition is to be taken can issue the subpoena.¹⁹ However, there are only certain places where a deponent can be compelled to attend a deposition: 1) in the county where he resides or is employed, 2) in the county in which he was served with the subpoena, and 3) at any place not more than 30 miles from the county seat of the county where the deponent resides or is employed.²⁰ The deposition should be arranged in a county where the deponent can be compelled to attend.²¹

Once the deposition location is established, the appropriate Georgia clerk of court should be contacted regarding that court's procedures for issuing an out-of-state subpoena. The importance of this communication cannot be overstated. While some counties' clerks are very familiar with this request, others may at first refuse the request to issue an out-of-state subpoena. To the extent that the clerk's information differs from this article, follow the clerk's suggestions. If the clerk is unfamiliar with the procedure, the approach in this article can be suggested. If the clerk's requirements are impractical, the location of the deposition can be changed to a different county – assuming there is another county where the deponent can be compelled to attend the deposition.

Issuing the Subpoena

In order to issue the subpoena, the clerk of court generally requires

the subpoena and a certified copy of a commission (also called a letter rogatory).²² The commission is a request from the out-of-state court, signed by the foreign judge, requesting that the Georgia court issue the subpoena. The clerk of court may require that the commission include certain specifics about the deposition (*e.g.*, name of deponent or time, date, and location of deposition).²³

The commission should not request the Georgia court to issue an *order* compelling the production of documents or the appearance of the deponent. One Georgia court has held that such a request from a foreign court is not entitled to full faith and credit because the foreign court did not have personal jurisdiction over the Georgia non-party.²⁴ The commission should simply request that the Georgia court issue the subpoena. As discussed above, out-of-state counsel may also wish to modify the commission to reflect that the foreign state's law should apply. A sample commission and subpoena are included at the end of this article.

The out-of-state counsel should determine the best method for obtaining a commission. The parties may submit a joint motion to the foreign court or, if the opposing party will not consent, a motion to request the commission could be submitted.

Serving the Subpoena

Georgia law permits a variety of methods to serve a subpoena; however, the foreign state's law may be more restrictive. The parties should follow the more restrictive rule to avoid any complaints of improper service that the deponent may

raise. For example, if the foreign state only allows personal service of a subpoena, then the subpoena should be personally served, even though Georgia law allows other methods of service.

Under Georgia law, once the subpoena is issued, it may be served anywhere in the state.²⁵ Subpoenas can be served by personal service, registered or certified mail or statutory overnight delivery.²⁶


Witness and mileage fees are also required in certain circumstances. If the deponent lives outside the county where the deposition is to be taken, service of the subpoena must include the statutory witness fee of \$25 per day and the mileage fee of 20 cents per mile (calculated from the deponent's residence and back).²⁷ If counsel does not know where the deponent lives, it is better to err on the side of including the statutory witness fee and mileage fee (or any higher witness or mileage fees required by the foreign state).

Taking the Deposition

Depending on your involvement in the out-of-state case, you may be asked to take the deposition. If you do so, inquire of the out-of-state attorney whether the foreign state requires you to be admitted *pro hac vice*. If out-of-state counsel will be taking the deposition, there is no requirement under Georgia law that he be admitted *pro hac vice*.²⁸ The out-of-state attorney should also be informed that the Georgia rules impose a time limit on depositions—"one day of seven hours."²⁹ Again, if the foreign state allows less time, then, unless the deponent agrees otherwise, it is recommended that the parties follow the more restrictive rule.

Conclusion

As discussed above, when assisting out-of-state counsel with serving a subpoena on a Georgia witness for an action pending out of state, there are many issues to consider. After evaluating the issues raised in this article, and any case-

specific considerations with which you are confronted, you should be ready to send the subpoena to the clerk to issue it, to serve the subpoena, and then—finally—to take the deposition. 



Rebecca B. Phalen is an associate of Nelson Mullins Riley & Scarborough LLP who practices in Atlanta in the areas of product liability and business litigation. Admitted to practice in Georgia, she earned a B.A. from the University of Virginia in 1996 and her J.D., *magna cum laude*, from Georgia State University College of Law in 2002, where she was a member of the *Georgia State University Law Review*. Phalen is also a board member of Caminar Latino, Inc.

Endnotes

1. FED. R. CIV. PROC. 45(a)(3).
2. O.C.G.A. § 24-10-111 states:

- 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.
3. *In re Deposition of Turvey*, 2002 WL 31455155 at *2 (Ohio Ct. App. Nov. 5, 2002). There may also be additional legislative attempts on the horizon to formulate a more detailed uniform approach to interstate depositions. Currently the National Conference of Commissioners on Uniform State Laws is drafting the Uniform Interstate Depositions and Discovery of Documents Act. For more information on the Drafting Committee and the latest versions of the draft, see



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Sample Commission

[CASE CAPTION]

COMMISSION TO TAKE OUT OF STATE DEPOSITION

TO: THE CLERK OF THE SUPERIOR COURT OF [county name] COUNTY, STATE OF GEORGIA

WHEREAS, there is an action in this, the [foreign court name and location], entitled as above, and this Court is of the opinion that complete justice in the action cannot be done without a subpoena issuing and being served on [deponent], within your jurisdiction, requiring the witness to produce certain documents, and

WHEREAS, this Court has determined that good cause exists for the oral deposition of [deponent's name] and for the production of certain documents in this case;

THEREFORE, we request that, in the interest of justice, you issue a subpoena by your proper and usual process summoning the following witness:

[deponent name and address]

to appear before a duly appointed court reporter to give testimony and answer questions pertaining to documents to be produced in discovery of this case under oath.

Dated: _____

Judge [foreign state]

Sample Subpoena

IN THE SUPERIOR COURT OF [] COUNTY
STATE OF GEORGIA

[CASE CAPTION FROM FOREIGN CASE]

)
)
) Pending in [FULL NAME OF COURT AND
) CIVIL ACTION NUMBER]
)
)
)
)

SUBPOENA DUCES TECUM FOR DEPOSITION

TO: [DEPONENT NAME AND ADDRESS]

GREETINGS:

YOU ARE HEREBY COMMANDED that you be and appear at [LOCATION OF DEPOSITION] on [DATE AND TIME OF DEPOSITION], then and there to be examined on deposition for the purpose of discovery and for the preservation of testimony by the Defendant [NAME OF DEFENDANT]. in the above-referenced action, and to bring with you to said deposition the documents, objects, and things as detailed in Exhibit A attached hereto.

FAIL NOT UNDER PENALTY OF THE LAW.

This _____ day of _____, 2007.

Clerk, Superior Court of [] County, Georgia

<http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=246>.

4. O.C.G.A. § 9-11-45(a)(1)(A) (2006). Although the Evidence Code allows subpoenas to issue for documents, *see id.* § 24-10-20(b), the context of that code section indicates that it should be used for purposes of a hearing or trial. *Id.* § 24-10-21. The Uniform Foreign Deposition Act would not authorize the use of O.C.G.A. § 9-11-34(c) to request documents from a nonparty in Georgia for use in a case pending out of state without a subpoena.
5. *Id.* § 9-11-45(a)(1)(C).
6. Although it is unclear what level of review a court in Georgia might apply when faced with a challenge to a subpoena for an out-of-state case, one case suggests that a Georgia court is willing to look at the underlying proceedings in the foreign court to determine the appropriateness of the subpoena. *See Carr v. Farmer*, 213 Ga. App. 568, 445 S.E.2d 350 (1994) (stating that the trial court erred in issuing a subpoena to a Georgia healthcare facility when the underlying proceedings in the out-of-state case did not comply with federal law regarding the procedure to obtain records from the Georgia healthcare facility).
7. *See, e.g., Kirkland & Ellis v. Chadbourne & Parke LLP*, 670 N.Y.S.2d 753, 756 (Sup. Ct. 1998) (deponent's state court applied its law in quashing subpoena that sought attorney work product).
8. 628 So. 2d 283 (Miss. 1993).
9. *Id.* at 288. In reaching this conclusion, the deponent's state court also relied on 1) language in the subpoena stating that the foreign state's civil practice act applied and 2) its own choice of law principles that dictated applying the law of the foreign state. *Id.* at 289.
10. *See Chatinsky v. Dubrow Elec. Indus.*, 27 Pa. D. & C.2d 486, 488 (1962) (ruling that before certain documents are produced, the proponent of the discovery has the burden to establish the relevancy of the documents in the underlying action).
11. *See, e.g., Fischer Brewing Co. v. Flax*, 740 N.E.2d 351, 355 (Ohio Ct. App. 2000) (deponent's state court upheld finding that lower court

did not have the authority to quash the foreign subpoena or grant protective orders on the issues of attorney-client privilege, particularly when foreign court had already ruled on the issues).

12. *See In re Ayliffe & Cos.*, 564 N.Y.S.2d 297 (App. Div. 1990) (deponent's state court upheld lower court's refusal to quash a subpoena based on deponent's argument that the subpoenas sought unnecessary and duplicative testimony, stating that those arguments should be addressed to the foreign court).
13. *See Barnes*, 628 So. 2d at 287 (in applying foreign state's law, noted language in the commission that stated that the deposition was taken in accordance with the foreign state's civil practice act).
14. O.C.G.A. § 9-11-26(c)(2) (2006).
15. *Id.* § 9-11-45(a)(2).
16. An objection may still be made if the subpoena is served with less than 10 days for compliance. *Id.*
17. Ga. State Disciplinary Bd., Advisory Op. 40 (Sept. 21, 1984).
18. *Id.*
19. O.C.G.A. § 9-11-45(a)(1).
20. *Id.* § 9-11-45(b).
21. The United States Postal Service has a useful website for determining a county by the address: <http://zip4.usps.com/zip4/welcome.jsp>.
22. Communication with the clerk is necessary because certain courts may require additional information to be submitted, including multiple copies of the commission, the order from the foreign court permitting the commission to issue, the notice of deposition, or a motion to the court requesting the subpoena to be issued.
23. If the clerk requires the specifics of the deposition logistics to be

included in the commission, use language such as "or at such other date and time as shown in a notice of deposition." That additional phrase may serve to prevent the out-of-state counsel from having to obtain a new commission if the deposition is rescheduled.

24. *Carr v. Farmer*, 213 Ga. App. 568, 569, 445 S.E.2d 350, 352 (1994). In *Carr*, the order from the foreign court requested that the Georgia court "issue an order to [the nonparty] compelling production of said documents." *Id.* at 352.
25. O.C.G.A. § 9-11-45(a)(1)(C) (referring to procedure found in O.C.G.A. § 24-10-21). O.C.G.A. § 9-10-12(b) defines "statutory overnight delivery."
26. *See id.* (referring to procedure found in O.C.G.A. § 24-10-23).
27. *Id.* (referring to procedure found in O.C.G.A. § 24-10-24).
28. *See GA. UNIF. SUPER. CT. R. 4.4*. Rule 4.4 only speaks to an out-of-state attorney "seeking to appear in a proceeding pending in this state" and directs the attorney to "file a verified application with the court where the litigation is filed." Therefore, because there is no pending case in Georgia, this Rule does not apply. However, if the out-of-state attorney wishes to argue in a subsequent motion to compel or motion to quash filed in the Georgia court, this Rule would then apply. *See also GA. R. PROF'L CONDUCT 5.5(c)* (describing certain legal services that may be provided by a "Domestic Lawyer" (defined generally as a lawyer from another United States jurisdiction but not authorized to practice law in Georgia) on a temporary basis).
29. *GA. UNIF. SUPER. CT. R. 5.3*.



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