LAW AND THE FAMILY

"Observations on Abuses of the Subpoena"

Joel R. Brandes

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A SUBPOENA is a process of the court, issued in conjunction with a trial or hearing. Its purpose is to foster a party's ability to prove his case by compelling the attendance of witnesses or the production of documentary evidence. It is a process of the courts, not of the parties. Although it may be issued by an attorney, it is a mandate of the court, issued for the court. [FN1]

The subpoena power of a New York court does not extend beyond the State of New York. Judiciary Law s2-b (1) provides that "[a] court of record has power to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court." [FN2] In Matter of Stephen [FN3] a private placement adoption proceeding, the Appellate Division held that the Family Court erred in issuing a judicial subpoena directing the birth mother, an Ohio resident, to appear at a hearing in Rochester. It held that a New York court may not direct the service of a New York subpoena outside the State.

A subpoena duces tecum is not a disclosure device, nor may it be used as a substitute for pretrial disclosure. Its purpose is "to compel the production of specific documents that [are] relevant and material to the facts in issue in a pending judicial proceeding." [FN4] Nevertheless, it appears that some attorneys use subpoenas as a disclosure device, prior to and during trial.

Compelling Attendance

A subpoena may only be used to compel the attendance of witnesses or documents at a trial or hearing. In Matter of Terry D., [FN5] a Juvenile Delinquency proceeding, at respondents' request, a Family Court judge issued a subpoena duces tecum directing a Brandeis' High School assistant principal to produce in court "the names, addresses and telephone numbers of each student and nonstudent who [was] in the classroom" at the time of the incident. The subpoena was duly served, and, when the assistant principal did not comply, respondent moved to have her held in contempt. The witness and Board of Education cross-moved to quash the subpoena. In support of the contempt motion, respondents' attorney averred that "the names, addresses and telephone numbers requested are the potential witnesses to the offenses," and in opposition to the motion to quash, he stated that the information was sought "for only one purpose, to wit, to locate each [witness] and subpoena him or her to appear in court to testify as to the incident in question and what each saw."

The Court of Appeals pointed out that like other statewide courts of record, the Family Court may subpoena a witness to testify and is also authorized to issue a subpoena duces tecum in accordance with the applicable provisions of the CPLR. Because the statutory subpoena authority is so broad, and the recipient may be subject to contempt sanctions for failure to comply, courts have imposed limitations on the use of subpoena power. The Court stated that generally, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence. "Rather, its purpose is 'to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.' " The Court of Appeals concluded that the purpose of this subpoena duces tecum was to obtain otherwise unavailable discovery. It held that respondent could not use the procedural mechanism of a subpoena duces tecum to expand the discovery available under existing law [FN6] yet in view of his motion papers it was evident that this is precisely what respondent sought to do. Thus, Family Court abused its discretion in denying appellants' motion to quash.

Article 31 of the Civil Practice Law and Rules (CPLR) deals with disclosure. CPLR 3111 permits a deposition upon oral examination to be noticed by serving upon the nonparty witness a subpoena and notice "stating the circumstances or reasons such disclosure is sought or required." [FN7] The notice may also provide for the production of books, records and documents to be marked as exhibits and used on the examination. Adverse parties must be afforded notice. CPLR 3107 provides that "A party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise."

Where a deposition is not sought and the sole purpose is to compel the production of documents from a nonparty witness, pursuant to CPLR 3120(a), CPLR 3120(b) directs that a motion must be made, on notice to all parties, with service of the notice of motion to be made upon the nonparty in the same manner as service of a summons. Proper service of the motion, is a jurisdictional requirement. [FN8]

Any information that is improperly obtained and which prejudices a substantial right of a party, will be suppressed. CPLR 3103 (c) provides that if "any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed."

The First Department has criticized counsel severely for the practice of serving a subpoena duces tecum upon a nonparty, without a prior motion on notice pursuant to CPLR 3120(b). [FN9]

Without Notice to All Parties

In Matter of Beiny, a law firm served a subpoena to secure the production of privileged documents, without notice to all parties. It did so by resort to what the court referred to as "covertly issued attorneys' subpoenas," which required appearance for an examination before trial at counsel's office. The examination was cancelled when the documents to be produced in conjunction with the examination were delivered one week before. The First Department, suppressed the improperly obtained materials, referring to counsel's conduct as "* * * a deliberate and thoroughly unprincipled effort to obtain a litigational advantage by whatever means seemed useful, including deceit." As a result of the "blatant abuse * * * involving willful disregard of procedural rules, deceit, and the covert acquisition of otherwise unobtainable privileged material," the court disqualified counsel, concluding that suppression alone was an inadequate remedy in that case.

In Beiny the court suppressed the wrongfully obtained information pursuant to CPLR 3103 (c) finding that counsel failed to comply with CPLR 3107 when it served a combined notice of deposition and subpoena duces tecum upon the nonparty witness without notice to the trustee. Referring to CPLR 3103, the court held that it did "not think that this provision, designed to assure that nonparties will not be unduly burdened with discovery demands and that discovery from nonparties is conducted

in a fair and open manner, can be avoided by resorting to the use of covertly issued attorneys' subpoenas." The court noted that the CPLR provisions "governing the conduct of discovery and dictating that parties be notified of deposition and disclosure demands made upon nonparties, are well known," and that they "are not trivial or seldom invoked provisions; they are fundamental to the orderly and fair conduct of pretrial litigation and are daily put to use by litigants and the courts." It held that on the basis of the foregoing alone, suppression of the improperly obtained materials would have been warranted pursuant to CPLR 3103 (c). It stated:

> There is no reason why a civil litigant should receive any benefit from information acquired in a manner both deliberate and wrongful. We perceive no harshness to the affected parties, or disservice to the truth-seeking process, in preventing such benefit by means of suppression, particularly where, as here, the order of suppression ultimately permits the use of the information suppressed provided it is regularly obtained from proper and independently developed sources. Manifestly, it is not unduly harsh to expect and indeed to require that civil litigants gather the information needed to prosecute or defend their actions in conformity with the applicable CPLR provisions.

Covert Discovery

In Matter of Kochovos, [FN10] a law firm representing the contestants, served 15 separate judicial subpoenas duces tecum during the conduct of discovery on nonparty witnesses without notifying the proponent. These subpoenas commanded attendance at a deposition and production of certain records. At the later deposition of the proponent, Penelope Danias, information that had been obtained through the service of these subpoenas was used by the law firm during the examination of the witness.

The First Department held that "the deceptive practice of counsel in engaging in this type of covert discovery warrants severe criticism. The service of subpoenas on these nonparty witnesses, requiring production of documents and attendance at a deposition, without notice to the other parties to the action violates the express provisions of CPLR 3107 and 3120 (b), which require notice to all adverse parties when such discovery devices are served on nonparties. The conduct here involved evinces an unprincipled approach to the practice of litigation and is deplored."

In Safchik v. Board of Education [FN11] the First Department pointed out that it appeared that "defendant engaged in some highly questionable discovery tactics which should have resulted in suppression of testimony." Approximately one year prior to the trial, plaintiff's chiropractor received a subpoena duces tecum together with the three-dollar fee. Upon his arrival at the courthouse, the witness was directed to the Corporation Counsel, which maintains an office in the building. He was interviewed by an investigator and his records examined. No notice of the subpoena was given to plaintiffs and, therefore, no attorney for plaintiffs was present. It held that the records and testimony presented by the witness should have been suppressed. The records and testimony were employed at trial to surprise plaintiffs, which was sufficiently prejudicial to warrant suppression. There was "no excuse for defendant's failure to comply with the requirements for discovery of a nonparty witness set forth in CPLR 3120, which mandates that a court order be obtained on notice to all adverse parties."

Sworn Officer of Court

In John C. v. Martha A., [FN12] petitioner's counsel served a trial subpoena on respondent's hospital, returnable in the calendar part when a prior motion for use and occupation was first noticed. The court held that aside from the privileged nature of the materials, the subpoena was improper. The return date was not the date set for trial and the subpoenaed materials lacked relevance to the motion. The closing paragraph, "witness ... one of the judges of said court" was whited out and replaced by "witness ... [petitioners' attorney's name], one of the attorneys of said court," deceptively conveying that he was a court employee or official, in addition to the "attorney for petitioner," as noted at the subpoena's foot. The court noted that New York law permits an attorney to issue such process only because the attorney is a sworn officer of the court. It found that petitioner used the subpoena as a substitute for pretrial disclosure. It held that "... this requirement is not just a bothersome formality. It permits the court to screen for relevance and assess any assertion of privilege." The court found that petitioner surreptitiously served the subpoena on the hospital without either leave of court or notice to respondent, thereby denying him the opportunity to timely assert privilege. Petitioners' use of these medical records on the motion demonstrated that they were not properly subpoenaed for legitimate use at trial, where their introduction could be opposed by objection. Their method of presentation supported the inference that they were included to embarrass respondents and prejudice their rights. The court held that the

abuse of a subpoena as a subterfuge to breach a privilege and embarrass a party is sanctionable and should result in suppression of the wrongfully obtained material.

Conclusion

We believe that it is ethically and legally improper for an attorney to use a judicial subpoena duces tecum to secure production of documents from a nonparty witness, without an application pursuant to CPLR 3120(b) upon notice to the witness and all parties to the proceeding.

FN(1) Peo. v. Natal, 75 NY2d 379, 384-85; Newsday, Inc. v. Empire State Development Corp., 2001 WL 462970 (NYAD 1 Dept).

FN(2) See also, N.Y. Const., Art. VI, s1[c].

FN(3) 239 A.D.2d 963, 659 N.Y.S.2d 588 (N.Y.A.D. 4 Dept.).

FN(4) Barrett v. Barrett, AD2d , 722 NYS2d 270 (3d Dept., 2001).

FN(5) 81 N.Y.2d 1042, 619 N.E.2d 389, 601 N.Y.S.2d 452.

FN(6) Citing People v. Gissendanner, 48 NY2d, at 551.

FN(7) See CPLR 3101[a][4]; 3106[b]; 3107.

FN(8) Ruiz v. City of New York, 125 A.D.2d 661, 510 N.Y.S.2d 16.

FN(9) The Second Department has held that suppression, sanctions, costs and counsel fees were not warranted where documents were improperly obtained without notice, where there was no prejudice. Gutierrez v. Dudock, 276 Ad2d 746, 715 NYS2d 333 (2d Dept, 2000). The Fourth Department has overlooked the impropriety of such procedure where there was no prejudice. DiMarco v. Sparks, 212 A.D.2d 965, 624 N.Y.S.2d 692; State of New York v. Mastracci, 77 A.D.2d 473, 433 N.Y.S.2d 946.

FN(10) 140 A.D.2d 180, 528 N.Y.S.2d 37.

FN(11) 158 A.D.2d 277, 550 N.Y.S.2d 679.

FN(12) 156 Misc.2d 222, 592 N.Y.S.2d 229.

Joel R. Brandes has law offices in Garden City and New York City. He co-authored the nine-volume Law and the Family New York 2nd Ed. and Law and the Family New York Forms (both published by West Group).

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