

The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

February 21, 1996

The Honorable Greg Gregory  
Senator, District No. 16  
513 Gressette Building  
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Gregory:

You have written on behalf of a constituent of yours who "was the victim of a robbery two years ago while living in Alaska." You state the following:

[s]ince then Mrs. Hunter has moved with her family back to Kershaw, South Carolina. Recently, the Fourth Judicial Circuit of Alaska contacted her and demanded that she return to testify at the upcoming trial. It would be a tremendous hardship for Mrs. Hunter to return to Alaska. She has a three month old baby, and her husband is working on swing shifts.

Mrs. Hunter would like a clarification on whether she must go to Alaska to testify. I would think that there must be some other way her testimony could be submitted.

Law / Analysis

The following general rule is well-recognized:

[a] state court cannot, as a general rule compel the attendance of a witness who is outside the state, or who resides out of the state, unless he became a nonresident after being summoned.

However, a statute authorizing a court in the state to compel a witness in the state to appear and testify in a criminal trial in an adjoining state has been held constitutional.

The State of South Carolina has adopted the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings", which constitutes such a statute. This Act is found at S. C. Code Ann. Sec. 19-9-10 et seq. The Act defines a "witness" as any person whose testimony is desired in "any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding." Section 19-9-20. Sections 19-9-30 and -40 provide the procedure for procuring a witness in a criminal proceeding pending in another state if such witness is in South Carolina. Section 19-9-30 provides:

[i]f a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution or grand jury investigation and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

Thus, the other state (in this case, Alaska) must also have adopted the Uniform Act. If so, the court in that state must certify that the criminal proceeding is pending there and the person sought is a "material witness" in that proceeding, and must specify the number of days that person's presence will be required. This certificate must be made to a "court of record" [thus not a magistrate or municipal court] in the county in South Carolina where the witness is located and the court then directs the witness to appear "at a time and place certain ... ."<sup>1</sup>

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<sup>1</sup> It appears that Alaska has adopted the Uniform Act. See, Alaska Statutes, § 12.50.020.

Section 19-9-40 provides for the procedure at this point. Such section specifies the finding a South Carolina court must make, as follows:

[i]f at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state and that the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court in which the prosecution is pending or in which a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

Thus, before the South Carolina judge can order the witness to appear and testify in the other state, the judge must find that the witness is:

- (1) material and necessary;
- (2) such will not cause undue hardship to the witness to attend and testify;
- (3) the laws of the other state protect the witness from arrest and the service of civil and criminal process.

Section 19-9-50 permits the South Carolina court an alternate procedure where immediacy is needed. Such Section provides:

[i]f said certificate [from the demanding state] recommends that the witness be taken into immediate custody and delivered to an officer of the requesting [or demanding] State to assure his attendance in the requesting State, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for such hearing. And the judge

at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing a subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting State.

Once the South Carolina court orders the witness to appear and testify, such order must be obeyed. Section 19-9-60 provides that if after the witness is paid or tendered the standard mileage and witness fee, refuses to attend and testify, "he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State."

A number of courts have interpreted the Uniform Act. The object of the Act is to promote the enforcement of the criminal laws and the administration of justice in the several states. People of State of N.Y. v. Parker, 16 N.J. Misc. 471, 1 A.2d 54 (1936). The proceedings to compel attendance are not criminal in nature, but deal only with the question of whether a State will cooperate with a sister state in an effort to investigate crimes in the sister state. Epstein v. People of State of N.Y., 157 So.2d 705 (Fla. 1963). In the Epstein case, the Court said that

[t]he real question involved is whether or not one citizen will be inconvenienced in order to give testimony in a sister state. We think that the provision for a hearing before a judge of a court of record of this State and a full opportunity to present evidence upon the question of undue hardship is a sufficient guarantee to the citizen against unwarranted compulsory attendance.

157 So.2d at 708. The Court in In re Grothe, 59 Ill. App.2d 1, 708 N.E.2d 581 (1965) concluded that the Act must be construed strictly to protect against impingement upon the personal affairs and liberties of individuals. In State v. Smith, 87 N.J. Sup. 98, 208 A.2d 171 (1965), the Court stated that unless there is a sufficient showing of materiality, the request should be denied by the court. And in Wright v. State, 500 P.2d 582, (Okl. 1972), the Court emphasized that the good faith of the demanding State is "always at issue." These proceedings, said the Court, cannot be used for any other purpose than the procurement of the testimony of the witness; the procedure cannot be used merely as a pretense to get the witness back into that state, in other words. That is why there is a hearing held in the witness' home county. Such hearing provides

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further protection against summary delivery to the officials of another State; and the demanding State must establish that the testimony of the witness is material to a pending criminal proceeding and that the trip will not cause undue hardship.

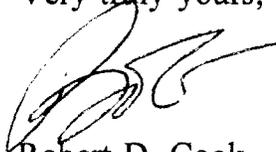
Id.

In short, before your constituent is required to go to Alaska and testify in this proceeding, pursuant to Section 19-9-10 et seq., it will be the burden of the State of Alaska (assuming that the Alaska court certifies to our court under the Uniform Act) to show that her testimony is material and necessary. Your constituent, however, should be given ample opportunity to show why such a trip would impose an undue hardship upon her if that is the case. The South Carolina court would hear all of the facts and decide the issue before any order is made for her to appear and testify.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/an