

Columbia Law School

From the Selected Works of Hon. Gerald Lebovits

February, 2014

Drafting NY Civil-Litigation Documents: Part 30—Subpoenas

Gerald Lebovits



Available at: https://works.bepress.com/gerald_lebovits/245/

FEBRUARY 2014
VOL. 86 | NO. 2



NEW YORK STATE BAR ASSOCIATION Journal



Appellate Brief Writing: What Not to Do

by Tamala Boyd

Also in this Issue

Medicaid Expansion in
New York

ADR: A Smart Solution

Technology-Assisted
Review

An Overview of Fair Use

Fletcher v. The Dakota

CONTENTS

FEBRUARY 2014

APPELLATE BRIEF WRITING: WHAT NOT TO DO

BY TAMALA BOYD

10



DEPARTMENTS

5 President's Message

8 CLE Seminar Schedule

15 Burden of Proof

BY DAVID PAUL HOROWITZ

51 Contracts

BY PETER SIVIGLIA

53 Attorney Professionalism Forum

56 New Members Welcomed

60 Classified Notices

60 Index to Advertisers

61 Language Tips

BY GERTRUDE BLOCK

63 2013–2014 Officers

64 The Legal Writer

BY GERALD LEBOVITS

18 Medicaid Expansion in New York

BY CHARLES SMITH

23 ADR: A Smart Solution for Crowded
Court Dockets

BY ROBERT D. LANG

31 Technology-Assisted Review Disputes
*New York Pilot Rule Provides National
Guidance*

BY KARL SCHIENEMAN AND MARK A. BERMAN

40 Fair Use: An Overview

BY GENAN ZILKHA

46 Individual Liability of Board Members
After Fletcher v. The Dakota

BY VINCENT DI LORENZO

CARTOONS © CARTOONRESOURCE.COM

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2014 by the New York State Bar Association. The *Journal* (ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies \$30. Library subscription rate is \$200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edit to: One Elk Street, Albany, NY 12207.



Drafting New York Civil-Litigation Documents: Part XXX — Subpoenas

In the last issue, the *Legal Writer* discussed conditional disclosure orders, spoliation of evidence, and disclosure in special proceedings. In this issue and the next we'll discuss subpoenas: how to comply with them, what you can do when someone doesn't comply with them, and how to move to quash, modify, or fix their conditions.

Subpoenas: The Basics

A subpoena is a paper that requires a witness to give testimony or produce materials¹ in both judicial and quasi-judicial proceedings.² A subpoena subjects the witness to penalties, including contempt, if the witness fails to comply.³

CPLR Article 23 governs subpoenas. Subpoenas aren't disclosure devices. They're not covered by Article 31 of the CPLR, which governs disclosure and disclosure devices. Although not disclosure devices, subpoenas are useful tools to obtain documents and testimony from nonparties to the litigation. Nonparties are individuals or entities not part of the action or proceeding. Nonparties might have information that can help your case. The information might come from documents that the nonparty has or information that the nonparty might testify to during trial, or both.

Practitioners must know about three kinds of subpoenas: (1) subpoena ad testificandum; (2) subpoena duces tecum; and (3) information subpoena.

You might come across such terms as a pre-trial subpoena, trial subpoena, judicial subpoena, and non-judicial subpoena. They're all variations of

a subpoena ad testificandum and a subpoena duces tecum. Pre-trial and trial subpoenas are issued, respectively, before trial or for trial; subpoenas duces tecum and subpoenas ad testificandum can be used pre-trial and for trial. A court, court clerk, or officer of the court may issue judicial subpoenas. Many persons, explained below, may issue non-judicial subpoenas;⁴ judicial and non-judicial persons may issue subpoenas duces tecum and subpoenas ad testificandum.

Practitioners should also know about deposition subpoenas, discussed below.

Unless otherwise noted, the *Legal Writer* will use the word "subpoena" to refer interchangeably to both a subpoena ad testificandum and a subpoena duces tecum.

• **Leave of Court.** Many persons may issue a subpoena: arbitrators, clerks of the courts, judges, referees, and members of a board or a commission "empowered to hear or determine a matter requiring the taking of proof."⁵ An attorney of record to any party to any action, a special or an administrative proceeding, or arbitration may also issue a subpoena.⁶

The attorney general may issue a subpoena without a court order.⁷

If a person disobeys a subpoena, the contempt remedy exists irrespective of who issued the subpoena.⁸

Most of the time, you won't need a court order to issue a subpoena. But if you need a prisoner to testify, you'll need to obtain leave of court.⁹ You'll also need a court order if you're subpoenaing a patient's clinical records under Mental Hygiene Law § 33.13.¹⁰

You'll further need a court order to subpoena an original record or document for which a certified transcript or copy is admissible in evidence.¹¹ If you're seeking personal information in a public agency's possession, you'll need a court order for that, too.¹²

You'll need to move on notice if you're seeking to subpoena documents — a subpoena duces tecum — from

A subpoena need not say why you're seeking the items or documents.

a library, department, or bureau of a municipal corporation or from a state or an officer of the state.¹³ Serve your motion on at least one day's notice on the library, department, bureau, state, or officer having custody of the documents.¹⁴

A pro se litigant, often called a self- or unrepresented litigant, may not issue a subpoena.¹⁵ Pro se litigants must obtain a court order.

Parties to a case don't need a court order if they're seeking documents or other things (including films, photographs, tapes, and physical property) from one another. Sending a notice to produce (also known as a document request) to your adversary will suffice.¹⁶

• **Subpoena ad Testificandum.** Use a subpoena ad testificandum to secure testimony from a witness, including a hostile witness. Most witnesses will

CONTINUED ON PAGE 57

appear voluntarily; no need exists for you to serve a subpoena on them.¹⁷ But some witnesses, like government employees, will ask you to serve a subpoena to ensure that their employers will give them time off from work to testify. Serving a subpoena will also protect these witnesses from accusations of favoritism.

- **Subpoena Duces Tecum.** Use a subpoena duces tecum to obtain “a paper or thing rather than testimony” from a witness.¹⁸ A subpoena duces tecum will allow you to inspect, copy, test, and photograph the items you seek.¹⁹

If you want a witness to testify and to produce documents in court, serve a subpoena ad testificandum and a subpoena duces tecum. Or serve one subpoena that contains both clauses — testimonial and duces tecum clauses.²⁰ CPLR 2305(b) provides that you may join a subpoena duces tecum with a subpoena to testify “at a trial, hearing or examination or [the subpoenas] may be issued separately.”

- **Information Subpoena.** Use an information subpoena to enforce a money judgment you’ve obtained after a trial or an inquest. CPLR 5224(a)(3) discusses information subpoenas.

As a judgment creditor, you may seek disclosure by serving an information subpoena on a judgment debtor: the person or entity against whom you’ve obtained a money judgment.²¹ In the subpoena, identify the parties to the action, the judgment date, the court in which you entered the judgment, the judgment amount, and the amount due on the judgment.²² Also state that “false swearing or failure to comply with the subpoena is punishable as a contempt of court.”²³

Prepare a set of interrogatories — questions — to get financial information about the judgment debtor to collect on the money judgment. You may serve the subpoena and interrogatories by registered or certified mail, return receipt requested, on the person or entity you’ve obtained a judgment from.²⁴ Along with the information subpoena, mail to the judgment debtor

an original and one copy of the written questions and a self-addressed, stamped envelope.²⁵

The legislature amended CPLR 5224(a)(3) to require a certification in an information subpoena.²⁶ When judgment creditors or their attorneys sign the certification, they “certify” that, to the best of . . . [their] knowledge, information and belief, formed after an inquiry reasonable under the

the designated agent for service of the person being subpoenaed.³³

Under CPLR 3102(c), you’ll need a court order if you want to serve a deposition subpoena on a nonparty before an action is commenced.³⁴

Give at least 10 days’ notice of the deposition, unless you’ve obtained a court order giving less notice to a deponent.³⁵ An authorized person conducts the EBT deposition during busi-

You’ll need a court order to subpoena an original record or document for which a certified transcript or copy is admissible in evidence.

ness hours.³⁶ On consent, the deposition may take place anywhere in the state before any officer authorized to administer oaths.³⁷

The judgment debtor responds to the interrogatories in writing and under oath. The judgment debtor must return its responses together with the interrogatories within seven days after receipt.²⁸ The judgment debtor may mail the interrogatories and responses back to you.

- **Deposition Subpoena.** A deposition subpoena requires a nonparty to appear for an examination before trial (EBT) at a designated time and place. Practitioners use the term “deposition” in federal court and the acronym “EBT” in state court, but they use “deposition subpoena,” consistent with the CPLR, to refer to an examination conducted before trial of a witness subject to a subpoena.

The examination may be “on oral or written questions.”²⁹ Serve the deposition subpoena using the same methods as serving a summons.³⁰ Consult CPLR 308(2) and 308(4) for exceptions.³¹ Serve a deposition subpoena at least 20 days before the examination, unless a court orders otherwise.³²

Serve a deposition subpoena on (1) the person you’re subpoenaing; (2) a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person you’re subpoenaing; or (3)

ness hours.³⁶ On consent, the deposition may take place anywhere in the state before any officer authorized to administer oaths.³⁷

Before the legislature amended CPLR 3120 on September 1, 2003, a distinction existed between obtaining documents from parties and nonparties.³⁸ A party had to obtain a court order to obtain documents from nonparties.³⁹ Since the amendment, a party may request any document from a nonparty — in a subpoena duces tecum — that would be discoverable from a party.⁴⁰

Before the amendment, practitioners used a deposition subpoena to obtain documents from a nonparty.⁴¹ A party that sought only documents would have requested the nonparty to provide the documents without sitting for the deposition.⁴² Since CPLR 3120 was amended, practitioners rely less on deposition subpoenas to obtain documents from nonparties. The procedure for obtaining documents from nonparties by using a deposition subpoena is the same as the procedure for taking a nonparty’s EBT: Serve on a nonparty a disclosure request along with a “notice stating the circumstances or reasons such disclosure is sought or required.”⁴³ Serve copies of the request on all parties to the action or proceeding.⁴⁴ Likewise, if you’re seeking a nonparty’s deposition, serve a

CONTINUED ON PAGE 58

deposition subpoena on the nonparty;⁴⁵ serve copies of a notice of deposition on all parties to give notice of the nonparty's deposition.⁴⁶

You'll need to pay a witness fee, including travel expenses. See the section on "Fees," below.

Sometimes a nonparty will be under the "de facto control of one of the parties to the action."⁴⁷ You're better off if you arrange with the party to have the nonparty witness respond to a CPLR 3120 demand voluntarily.⁴⁸ If the nonparty cooperates, you'll avoid the effort and expense of serving the nonparty.⁴⁹

- **Form.** The subpoena should have the case's caption. Include in the caption the names of the parties, the designation of the parties (plaintiff or defendant; petitioner or respondent), the index number, the court, and the court's location.

In the subpoena duces tecum, specify the following: (1) the time to produce the items or documents, "which shall not be less than 20 days after serv[ing]" the subpoena;⁵⁰ (2) the place to produce or inspect the items or documents; (3) the manner in producing or inspecting the items or documents; and (4) the list of items by item or category. Describe each item and category with "reasonable particularity."⁵¹ In the subpoena, specify the person who possesses or controls the item you're seeking.⁵² Specify the time and place the person must produce the item.⁵³ The person served or some other person familiar with the item must produce the item.⁵⁴ In preparing the subpoena, you decide when and where the witness must produce records.⁵⁵ For a judicial subpoena duces tecum, the documents must be dropped off with the court or clerk of the court. Many courts and individual judges have specific rules about where subpoenaed documents must be submitted. A court might quash a judicial subpoena duces tecum when an attorney gives a deponent the impression that no court appearance is necessary or makes the subpoena returnable to the attorney's

office instead of the court.⁵⁶ A court might also sanction,⁵⁷ disqualify,⁵⁸ and discipline⁵⁹ attorneys for misconduct in issuing subpoenas.

If you're serving a subpoena duces tecum on a medical provider to obtain a patient's medical records, you must state in "conspicuous bold-faced type" that the records need not be provided unless the patient's written authorization accompanies the subpoena.⁶⁰ If a patient's authorization is absent, a court may nevertheless issue a trial subpoena duces tecum for the patient's medical records.⁶¹

A trial subpoena duces tecum must state "that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena."⁶²

For a subpoena ad testificandum, specify the date, time, and place a witness must appear to testify. Name the person who must testify. The deponent must appear in court on the specified date, time, and location to give testimony. Make sure you comply with any court rules or judges' individual rules about when and where witnesses must appear to testify. Ensure that the witness will reappear after a recess or at an adjourned date by writing on the subpoena that the witness must appear on the date specified "and any recessed or adjourned date."⁶³ Ask the judge to instruct a witness to come back after the lunch recess or to appear for every adjourned date to ensure that the witness finishes testifying at the hearing or trial.⁶⁴ You might need to issue a new subpoena if the witness needs to show proof to an employer for taking time off from work, as is often the case with government employees.

A subpoena need not say why you're seeking the items or documents. Likewise, a subpoena need not say why you need a person to testify. If the objecting person or entity moves to quash the subpoena, you may give the reasons in your opposition papers.

For a deposition subpoena, the deponent may be summoned to appear to testify at the office of the attorney who issued the subpoena. The deponent may also be summoned to appear

for an EBT in the courthouse where the case is pending or at a different location that's convenient for the deponent and the attorneys.

Give the witness "reasonable time" to comply with a subpoena.⁶⁵

- **Fees.** Be prepared to pay the witness you're subpoenaing. You'll need to pay a witness fee. The statutory fee for nonparty deponents — person giving testimony — is \$18 a day.⁶⁶ The statutory fee for party deponents is \$15 a day.⁶⁷

Although not required under the CPLR, be prepared to pay a witness's actual expenses in attending the trial or hearing, such as transportation and lodging costs, as well as lost earnings.⁶⁸

You don't need to pay a mileage fee if a deponent traveling from a location where the deponent was served within the same city as the court where the deponent will testify. If the deponent travels from outside the city to testify in court, you'll need to pay 23 cents a mile each way that the deponent traveled.⁶⁹

You'll need to pay fees for each day the witness testifies.⁷⁰

You must tender these fees either in cash or by check when you serve the subpoena.

You'll also need to pay the reasonable expenses, such as photocopying costs, for a nonparty to produce documents.⁷¹ Unless you're seeking to inspect documents, a nonparty may mail "complete and accurate copies" of the subpoenaed records to you; you're responsible for paying for the mailing.⁷²

Exceptions: A judge may waive these fees for pro se litigants, government agencies, and other agencies that provide services to indigent clients, like The New York City Legal Aid Society.

Some witnesses will demand a substantial amount for preparing, appearing, and testifying in court. Beware: Your adversary might cross-examine your witness about the compensation the witness received for testifying and then comment on the compensation during summation. The court might also charge the jury about the witness's

bias or influence in light of the compensation received.

A judgment debtor isn't entitled to any fees, such as a witness fee or reimbursement for travel expenses.⁷³

In the next issue of the *Journal*, the *Legal Writer* will continue with subpoenas. ■

GERALD LEBOVITS (GLEBOVITS@aol.com), a New York City Civil Court judge, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for her research.

1. David D. Siegel, New York Practice § 382, at 671 (5th ed. 2011).
2. 1 Byer's Civil Motions § 76:01, at 851 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).
3. Siegel, *supra* note 1, at § 382, at 671.
4. Byer's Civil Motions, *supra* note 2, at § 76:02, at 851-52.
5. Siegel, *supra* note 1, at § 382, at 672.
6. *Id.*
7. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 26:381, at 26-45 (2006; Dec. 2009 Supp.).
8. Siegel, *supra* note 1, at § 382, at 672.
9. CPLR 2302(b).
10. Barr et al., *supra* note 7, § 26:382, at 26-45.
11. *Id.*
12. Barr et al., *supra* note 7, § 76:101, at 27-20.
13. David Paul Horowitz, New York Civil Disclosure § 16.05, at 16-11 (2014 ed.) (citing CPLR 2307).
14. *Id.* § 16.05[2], at 16-12.
15. Byer's Civil Motions, *supra* note 2, at § 76:02, at 852.
16. Barr et al., *supra* note 7, § 26:05, at 26-9.

17. Siegel, *supra* note 1, at § 382, at 673.
18. *Id.* § 382, at 671.
19. Horowitz, *supra* note 13, § 16.04, at 16-10.
20. Siegel, *supra* note 1, at § 382, at 671.
21. David L. Ferstendig, New York Civil Litigation § 12.13[1], at 12-33 (2014.)
22. *Id.* (citing CPLR 5223).
23. CPLR 5223.
24. Ferstendig, *supra* note 21, § 12.13[4], at 12-34 (citing CPLR 5224(a)(3)).
25. *Id.* (citing CPLR 5224(a)(3)).
26. Siegel, *supra* note 1, at § 509, at 893.
27. CPLR 5224(a)(3)(i).
28. Ferstendig, *supra* note 21, § 12.13[4], at 12-35 (citing CPLR 5224(a)(3)).
29. Siegel, *supra* note 1, at § 509, at 892.
30. *Id.*
31. Barr et al., *supra* note 7, § 27:100, at 27-20.
32. *Id.* § 27:102, at 27-20.1 (citing CPLR 3106(b)).
33. *Id.* § 27:103, at 27-20.1 (citing CPLR 308).
34. *Id.* § 27:100, at 27-20 (citing CPLR 3102(c)).
35. Ferstendig, *supra* note 21, § 12.13[2], at 12-33 (citing CPLR 5224(c)).
36. *Id.* (citing CPLR 3113(a)).
37. *Id.* (citing CPLR 5224(c)).
38. Barr et al., *supra* note 7, § 26:370, at 26-44.
39. Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 15.03[d], at 631 (6th ed. 2013).
40. Barr et al., *supra* note 7, § 26:370, at 26-44.
41. *Id.* § 26:371, at 26-44 (citing CPLR 3111)).
42. *Id.* § 26:371, at 26-44.
43. *Id.* (citing CPLR 3101(a)(4)).
44. *Id.* § 26:371, at 26-44.
45. *Id.* § 26:393, at 26-46.
46. *Id.* § 26:390, at 26-45.
47. Horowitz, *supra* note 13, § 16.05, at 16-11 (2014).
48. *Id.*
49. *Id.*
50. *Id.* § 16.05[3], at 16-12 (citing CPLR 3120(2)).
51. *Id.*
52. Siegel, *supra* note 1, at § 382, at 671 (citing CPLR 2305(b)).
53. *Id.* (citing CPLR 2305).
54. *Id.* § 382, at 671.
55. *Id.* § 382, at 672 (noting exceptions: some special subpoena provisions have time minimums) (citing Connors, McKinney Commentary CPLR 2305).
56. *Bldg Mgmt. Co., Inc. v. Schwartz*, 3 Misc. 3d 351, 355, 773 N.Y.S.2d 242, 246 (Civ. Ct. Hous. Part N.Y. County 2004).
57. *Id.* (citing *Henriques v. Boitano*, Oct. 27, 1999, at 27, col. 3 (Civ. Ct. N.Y. County), *aff'd*, 6 Misc. 3d 129(A), *1, 2000 N.Y. Slip Op. 50004(U), *1, 800 N.Y.S.2d 347, at *1, 2000 WL 34492223, at *1 (App. Term 1st Dep't 2000)).
58. *Nagel v. Grayson*, 24 Misc. 3d 476, 480, 877 N.Y.S.2d 666, 669 (Civ. Ct. Hous. Part N.Y. County 2009).
59. *See In re Winiarsky*, 104 A.D.3d 1, 7-8, 957 N.Y.S.2d 102, 107-08 (1st Dep't 2012) (censuring attorney who conducted depositions in a special proceeding without leave of court).
60. Barr et al., *supra* note 7, § 26:391, at 26-45 (quoting CPLR 3122(a)(2)).
61. CPLR 2302(b).
62. CPLR 2301.
63. Siegel, *supra* note 1, at § 382, at 672.
64. *Id.*
65. *Id.*
66. CPLR 8001(b).
67. CPLR 8001(a).
68. Siegel, *supra* note 1, at § 382, at 672 (citing CPLR 8001) & § 383, at 673 (citing CPLR 2303)).
69. CPLR 8001(a),(b).
70. *Id.* § 382, at 672 (citing CPLR 2305(a)).
71. CPLR 3111.
72. CPLR 3122(d).
73. Ferstendig, *supra* note 21, § 12.13[1], at 12-33 (citing CPLR 5224(b)).