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## Drafting NY Civil-Ligation Documents: Part 31—Subpoenas Cont'd

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## Government Law and Policy and the Indian Child Welfare Act

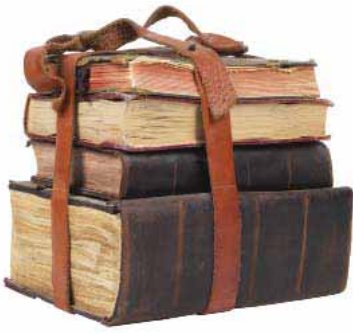
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## Drafting New York Civil-Litigation Documents: Part XXXI — Subpoenas Continued

In the last issue, the *Legal Writer* discussed the basics of subpoenas, including the form and substance of subpoenas ad testificandum, subpoenas duces tecum, information subpoenas, deposition subpoenas, and the fees associated with subpoenas. We continue our discussion of subpoenas.

### Subpoenas: The Basics, Continued

- **Service.** Serve a subpoena the same way you'd serve a summons.<sup>1</sup> Exceptions: Use (1) substituted service to serve a subpoena under CPLR 308(2) — delivery and mail — or (2) conspicuous-place service — nail and mail — to serve a subpoena under CPLR 308(4).<sup>2</sup> Consult CPLR 308 — personal service on a person — for service options. Choose the appropriate service method depending on when you need the witness to testify or produce documents or records.

When you serve a subpoena “on an entity or government unit of some kind, the person to be served may ordinarily be any person upon whom a summons could be served in an action brought against the entity or unit.”<sup>3</sup>

Any person over 18 who isn't a party to the action or proceeding may serve a subpoena.<sup>4</sup> A court may allow a party to the action or proceeding to serve a subpoena.

You may serve a nonparty subpoena any time after the action has commenced.<sup>5</sup> When serving a subpoena duces tecum or a deposition subpoena, give the nonparty 20 days' notice.<sup>6</sup>

After you've served a subpoena duces tecum, you must “promptly” serve a copy of the subpoena on the other parties to the action.<sup>7</sup> The other

parties must receive the subpoena “before the time scheduled for the [witness to] produc[e] . . . the papers or others things sought.”<sup>8</sup> Within five days after you've received all or some of the items sought in the subpoena, give notice to the other parties that the items are available for inspection and copying. Specify the time and place for inspection.<sup>9</sup>

When you serve a subpoena duces tecum on a large entity that has a central office and multiple branch offices, you may serve the subpoena either at the central office or at a branch office.<sup>10</sup>

If you're seeking testimony from a corporate entity's employee, serving a subpoena ad testificandum on a corporation, instead of the specific employee, permits the corporation to produce the employee to testify; no “independent basis for jurisdiction of the witness is . . . needed.”<sup>11</sup>

You may serve a subpoena ad testificandum on a witness's attorney if an attorney represents that witness.<sup>12</sup> Give the attorney enough time to produce the witness to testify in court.

- **In-State and Out-of-State Subpoenas.** You may not serve a New York subpoena outside New York “regardless of the court involved.”<sup>13</sup> Subpoena service is available statewide in the Supreme, County, Surrogate's, and Family Courts as well as in the Court of Claims.<sup>14</sup> The lower courts — Civil, District, City, and Justice Courts — have territorial restrictions on subpoenas.<sup>15</sup>

A New Yorker need not respond to a subpoena issued in “an action or proceeding [that's] pending in a sister state.” An out-of-state subpoena

isn't covered by the long-arm statute and has “no legal effect.”<sup>16</sup> The New Yorker's contacts with the sibling state might, however, require the New Yorker to respond to the out-of-state subpoena.<sup>17</sup>

If you serve a New York subpoena on an out-of-state witness and the wit-

Any person over 18 who isn't a party to the action or proceeding may serve a subpoena.

ness appears voluntarily, a court might “direct the witness to return for further testimony on future days under penalty of contempt,”<sup>18</sup> even if the court never had jurisdiction over the person.

A corporation might be required to produce in court its officers and employees, even those “stationed outside the state.”<sup>19</sup>

Consult CPLR 3119 if you're seeking to depose a person in New York or to obtain documents located in New York for an out-of-state case or proceeding.<sup>20</sup>

CPLR 3119 provides that out-of-state judicial subpoenas may be submitted either to the county clerk where the discovery is to take place or to a New York-licensed attorney who represents the subpoenaed party.

- **Order to Show Cause.** If you believe that a nonparty will destroy evidence, move by order to show cause

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under CPLR 2214(d), instead of serving a subpoena, for the nonparty to produce the items. The *Legal Writer* discussed spoliation of evidence in part XXIX of this series.<sup>21</sup>

### Responding to a Subpoena

You have several options to respond to a subpoena: comply with the subpoena; appear for the examination

not all are produced, the person must describe the missing documents and explain their absence); and (4) that the documents produced were made in the regular course of business.<sup>24</sup>

- **Objecting.** If you're reluctant to comply with a subpoena, you don't need to move to quash the subpoena; you "need only serve written objections."<sup>25</sup> Under CPLR 3122(a), you may, within 20 days of being served a subpoena duces tecum,<sup>26</sup> object to the

in a third party's possession has no standing to challenge the subpoena.<sup>31</sup>

For a judicial subpoena, file your motion to quash in the court in which the subpoena is returnable.<sup>32</sup>

Move to quash a subpoena "promptly" — before the subpoena's return date.<sup>33</sup> If the subpoena's return date is approaching and you don't have enough time to move on notice, move by order to show cause for the court to hear your motion sooner.

A court may command a sheriff to produce a witness in court and to commit the witness to jail until the witness complies with the subpoena.

before trial (EBT) or trial (subpoena ad testificandum); produce the records or items sought (subpoena duces tecum); or respond to the questions (information subpoena). You may also object to the subpoena. And you may move to quash, fix conditions, or modify a subpoena. But you may never ignore a subpoena.

- **Complying.** To comply with a subpoena duces tecum, nonparties must "sign a sworn certificate attesting that the documents are correct copies of documents prepared in accord with the business records requirements of CPLR 4518."<sup>22</sup> To comply with a subpoena ad testificandum, appear to testify on the date, time, and location specified.

All business records produced pursuant to a subpoena duces tecum under CPLR 3120 "must be accompanied by a certification, sworn in the form of an affidavit signed by the custodian or some other qualified witness responsible for maintaining the records."<sup>23</sup>

The custodian or qualified person must certify (1) that the person certifying the records is an appropriate person to certify; (2) that the person made a reasonable inquiry that the records produced are accurate versions of the documents sought in the subpoena; (3) that the documents produced represent all the documents demanded (if

subpoena by serving a response, stating with reasonable particularity your reasons for objecting. No need to file your objections with the court.

Object in writing to the issuer of the subpoena, typically your adversary, about any irregularities in a subpoena. Point out the defects in the subpoena, either substantive or procedural. Depending on the procedural or substantive defects, you might have leverage over your adversary in putting limits on the scope of the subpoena, the time or the place for the appearance of a witness, or the production of documents.<sup>27</sup> If you and your adversary can't work it out, consider moving to quash the subpoena.

Serve written notice of errors or irregularities in a notice of deposition three days before the deposition. If you fail to point out those errors, they're deemed waived.<sup>28</sup>

- **Moving to Quash, Fix Conditions, or Modify a Judicial Subpoena.** You may also object to a subpoena by moving to quash, fix conditions, or modify the subpoena.<sup>29</sup>

You must have standing to move to quash a subpoena: "[T]he moving party must either be the person who is the object of the subpoena or whose property rights or privileges may be in jeopardy."<sup>30</sup> A party that doesn't have a proprietary interest in documents its adversary subpoenaed and which are

In your motion to quash, you may challenge the validity of a subpoena on procedural and substantive grounds. You may move to quash the subpoena on the basis that (1) service of the subpoena was improper; (2) the subpoena seeks documents or information irrelevant to the action or proceeding; (3) the person or court that issued the subpoena didn't have the jurisdiction (or authority) to issue the subpoena; (4) a privilege prevents you from turning over documents or testifying; (5) the subpoena is vague or overbroad; (6) complying with the subpoena is unduly burdensome; or (7) the party seeking the subpoenaed records is using the subpoena to harass you.

You may ask the court to fix conditions or modify the subpoena. If the demands in the subpoena are too costly for you to honor them, the court might impose the reasonable, actual cost of honoring the subpoena.<sup>34</sup> You might agree to produce the documents sought in a subpoena, but you may ask the court to modify the subpoena for you to produce the documents only at some designated time or place different from the time or place specified in the subpoena.<sup>35</sup> You may also ask the court to limit the scope of the documents you must produce.<sup>36</sup> You're not expected to "'cull the good from the bad'" items in the subpoena.<sup>37</sup> And, in any event, the court won't cull the

good from the bad items in the subpoena, either.<sup>38</sup>

A court will grant the moving party's motion to quash or modify a subpoena "[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' or where the information sought is 'utterly irrelevant to any proper inquiry.'"<sup>39</sup>

Like other civil-litigation motions, your motion to quash must include a notice of motion. Depending on the complexity of your arguments in the motion to quash, you might need to submit an affidavit and exhibits. If the legal issue is complex, consider submitting a memorandum of law. Serve copies of your motion on all the parties. Serve your motion in the same way you'd serve other civil motions.

In your opposition papers, address the moving party's substantive and procedural grounds for quashing, modifying, or conditioning the subpoena. Submit any affidavit and exhibit that support your position.

• **Moving to Quash, Fix Conditions, or Modify a Non-Judicial Subpoena.** Before you move to quash a non-judicial subpoena, you must request the issuer of the subpoena to withdraw or modify the subpoena.<sup>40</sup> If the issuer refuses to comply, you may move to quash the subpoena. But you don't need to move to quash the subpoena. You can wait until the issuer of the subpoena moves to compel you to comply with the subpoena.

If the subpoena is issued out of an administrative proceeding, move to quash or modify the subpoena in New York State Supreme Court. A motion to quash a non-judicial subpoena is similar to a CPLR Article 78 proceeding: The purpose is to review administrative action.<sup>41</sup> The proper venue is "a county in which an Article 78 proceeding could be brought against the agency."<sup>42</sup>

## Disobeying a Subpoena: The Consequences

• **Disobeying a Judicial Subpoena.** Don't ignore a subpoena. If you disobey a judicial subpoena — issued by a court, clerk, or officer of the court "in

conjunction with a court proceeding" — you'll be subject to contempt.<sup>43</sup> The disobeyer, whether a party or a non-party witness, is also subject to paying the actual damages it causes the issuer of the subpoena and a penalty of up to \$150.<sup>44</sup> If the disobeyer is a party to the action or proceeding, the court may also strike the disobeyer's pleadings.<sup>45</sup>

A court may also command a sheriff to produce a witness in court and to commit the witness to jail until the witness complies with the subpoena.<sup>46</sup>

• **Disobeying a Non-Judicial Subpoena.** If you've disobeyed a non-judicial subpoena, contempt isn't automatically the penalty.<sup>47</sup> The issuer of the subpoena must move in Supreme Court to compel you to comply; this is called a motion to compel compliance. If the court orders you to comply, violating the court's order will then subject you to the court's contempt powers.<sup>48</sup> In addition to contempt, the court may also impose a penalty up to \$150, award damages, and incarcerate you.<sup>49</sup>

In the next issue of the *Journal*, the *Legal Writer* will discuss contempt motions, specifically civil and criminal contempt. ■

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2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 26:392, at 26-45 (2006; Dec. 2009 Supp.).
3. Siegel, *supra* note 1, at § 383, at 674.
4. *Id.* § 383, at 673 (citing CPLR 2103(a)).
5. Barr et al., *supra* note 2, § 26:393, at 26-46.
6. *Id.* § 26:393, at 26-46 (citing CPLR 3106(b), 3120(2)).
7. Siegel, *supra* note 1, at § 382, at 672 (citing CPLR 2303(a)).
8. *Id.* § 382, at 672 (citing CPLR 2303(a)).
9. David Paul Horowitz, New York Civil Disclosure § 16.05[2], at 16-12, 16-13 (2014 ed.) (citing CPLR 3120(3)).
10. Siegel, *supra* note 1, at § 383, at 674.
11. *Id.* § 383, at 674 (citing 23/23 *Comm'n's Corp. v. GM Corp.*, 172 Misc. 2d 821, 824, 660 N.Y.S.2d 296, 298 (Sup. Ct. N.Y. County 1997)).
12. *Id.* § 383, at 675 (citing CPLR 2303(a), 2103(b)).
13. *Id.* § 383, at 673.
14. *Id.*

15. *Id.* (citing New York City Civil, Uniform District, Uniform City, and Uniform Justice Court Acts §§ 1101 & 1201).
16. 1 Byer's Civil Motions § 76:03, at 852 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).
17. Siegel, *supra* note 1, at § 383, at 675.
18. *Id.* § 383, at 674 (citing *Cherfas v. Wolf*, N.Y.L.J., July 22, 2008, at 29, col. 1 (Sup. Ct. Kings County)).
19. *Id.*
20. David L. Ferstendig, New York Civil Litigation § 6.27[11], at 6-66 (2014).
21. See Gerald Lebovits, The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XXIX — Disclosure Motions Continued*, 86 N.Y. St. B.J. 64, 56 (Jan. 2014).
22. Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 15.03[d], at 631 (6th ed. 2013).
23. Barr et al., *supra* note 2, § 26:414, at 26-47 (citing CPLR 3122-a).
24. Horowitz, *supra* note 9, § 16.13, at 16-25 (citing CPLR 3122-a(a)).
25. Chase & Barker, *supra* note 22, § 15.03[d], at 631.
26. See CPLR 3120, 3121.
27. Barr et al., *supra* note 2, § 26:400, at 26-46.
28. *Id.* § 26:401, at 26-47.
29. *Id.* § 26:410, at 26-47 (citing CPLR 2304); Siegel, *supra* note 1, at § 384, at 675.
30. Byer's Civil Motions, *supra* note 16, at § 76:04, at 853.
31. *Id.* § 76:04, at 854 (citing *Echel Gasoline Corp. v. N.Y.C. Dep't of Consumer Affairs*, 108 A.D.2d 717, 718, 484 N.Y.S.2d 284, 285 (2d Dep't 1985)).
32. Siegel, *supra* note 1, at § 384, at 675.
33. Barr et al., *supra* note 2, § 26:410, at 26-47 (citing CPLR 2304; *In re Brunswick Hosp. Ctr. Inc. v. Hynes*, 52 N.Y.2d 333, 339, 438 N.Y.S.2d 253, 256, 420 N.E.2d 51, 54 (1981)).
34. Siegel, *supra* note 1, at § 384, at 675-76.
35. Barr et al., *supra* note 2, § 26:410, at 26-47.
36. *Id.* § 26:410, at 26-47 (citing CPLR 2304).
37. Byer's Civil Motions, *supra* note 16, at § 76:10, at 857 (quoting *Grotallio v. Soft Drink Leasing Corp.*, 97 A.D.2d 383, 383, 468 N.Y.S.2d 4, 5 (1st Dep't 1983)).
38. *Grotallio*, 97 A.D.2d at 383, 468 N.Y.S.2d at 5.
39. Byer's Civil Motions, *supra* note 16, at § 76:06, at 855 (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32, 525 N.Y.S.2d 816, 818, 520 N.E.2d 535, 537 (1988) (quoting *In re Edge Ho Holding Corp.*, 256 N.Y. 374, 382, 176 N.E. 537, 539 (1931); *In re La Belle Creole Int'l, S.A. v. Attorney-General of State of N.Y.*, 10 N.Y.2d 192, 196, 219 N.Y.S.2d 1, 5, 176 N.E.2d 705, 707 (1961))).
40. CPLR 2304; *Rubino v. 330 Madison Co., LLC*, 39 Misc. 3d 450, 452-53, 958 N.Y.S.2d 587, 589 (Sup. Ct. N.Y. County 2013) ("[I]n support of the within motion, movant non-party . . . has not supplied the court with a copy of such detailed response [stating the objections with reasonable particularity], nor has it alleged that such a response was supplied; therefore, the motion is denied as the correct procedure for objecting to a subpoena duces tecum has not been complied with.").
41. Siegel, *supra* note 1, at § 384, at 675.
42. *Id.*
43. *Id.* § 385, at 676.
44. Barr et al., *supra* note 2, § 26:431, at 26-48; Byer's Civil Motions, *supra* note 16, at § 76:13, at 858.
45. Siegel, *supra* note 1, at § 385, at 676 (citing CPLR 2308(a)).
46. *Id.* § 385, at 676.
47. Barr et al., *supra* note 2, § 26:420, at 26-48.
48. Siegel, *supra* note 1, at § 385, at 676 (citing CPLR 2308(b)); Barr et al., *supra* note 2, § 26:420, at 26-48.
49. Byer's Civil Motions, *supra* note 16, at § 76:13, at 858.