

**THE LEGAL AID SOCIETY  
JUVENILE RIGHTS PRACTICE  
MANUAL FOR CHILDREN'S LAWYERS**

**Volume Four: Subpoena Practice  
Desk Guide**

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# JRP SUBPOENA PRACTICE DESK GUIDE

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## Types Of Subpoenas

### **Trial Subpoena: Subpoena Ad Testificandum**

A subpoena (or subpoena ad testificandum) requires the attendance of a person to give testimony. CPLR § 2301.

The subpoena may be issued by an attorney, CPLR § 2302(a), except that a subpoena to compel attendance of any person confined in a penitentiary or jail shall be issued by the court (unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the person having custody of the person confined). CPLR § 2302(b).

The subpoena may provide that the person subpoenaed shall appear on the date stated and any recessed or adjourned date. If the witness is given reasonable notice of subsequent dates, no additional subpoena is needed. CPLR § 2305(a).

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### **Trial Subpoena: Subpoena Duces Tecum**

A subpoena duces tecum requires production of books, papers and other things. The subpoena shall state on its face that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of the subpoena. CPLR § 2301.

The subpoena may be joined with a subpoena ad testificandum. CPLR § 2305(b)(1). If it is not so joined, any person may comply with a subpoena duces tecum by having the requisite books, documents or things produced by a person able to identify them and testify respecting their origin, purpose and custody. CPLR § 2305(b)(2).

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### **What Is A "Judicial" Subpoena?**

Any subpoena ad testificandum or subpoena duces tecum issued in connection with a court proceeding by a judge, a court clerk, or an attorney, is called a judicial subpoena. CPLR § 2308(a).

"Non-judicial" subpoenas are those issued in connection with administrative and other out-of-court proceedings. CPLR § 2308(b).

To distinguish a court-issued subpoena from an attorney-issued subpoena, you should use the phrase “so-ordered” subpoena.

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### **Discovery (As Opposed To Trial) Subpoenas**

After commencement of an action, any party may serve on any person (including non-parties) a subpoena duces tecum:

to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the person served; or  
to permit entry upon designated land or other property in the possession, custody or control of the person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon. CPLR Rule 3120(1)(i), (ii).

The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity. Rule 3120(2).

The party issuing a subpoena duces tecum shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance with the subpoena, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof. Rule 3120(3).

Rule 3120 does not change the requirement in CPLR § 2307 that a motion be made for a subpoena duces tecum directed at a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof. Rule 3120(4).

Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are usually maintained, it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery. CPLR Rule 3122(d).

A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient’s medical records need not respond or object to the subpoena if it is not accompanied by a written authorization by the patient. Such a subpoena shall state in conspicuous bold-faced type that the

records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents. CPLR Rule 3122(a)(2).

Business records produced pursuant to a subpoena duces tecum under Rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following: (1) The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification; (2) To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena; (3) To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and (4) The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records. CPLR Rule 3122-a(a).

The Rule 3122-a(a) certification is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made. CPLR Rule 3122-a(b).

A party intending to offer the Rule 3122-a(a)-certified business records shall give notice at least thirty days before a trial or hearing of such intent and specify the place where such records may be inspected at reasonable times. Then, no later than ten days before the trial or hearing, a party may object to the offer, stating the grounds for the objection. If no such objection is made, and no objection is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for pretrial objection, the records shall be deemed admissible as business records under CPLR Rule 4518(a). CPLR Rule 3122-a(c).

The CPLR 3122-a(a) certification may be used as to business records produced by non-parties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in 3122-a(a), paragraphs (1), (2), and (4). CPLR Rule 3122-a(d).

Objections to a subpoenas duces tecum may be raised as per CPLR Rule 3122(a)(1).

Whenever a person is required to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld.

This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum. CPLR Rule 3122(b).

### **Service Of Subpoenas**

#### **Service On Natural Person**

The subpoena shall be served in the same manner as a summons. CPLR § 2303(a). Thus, there are a number of alternative methods:

##### **CPLR § 308(1)**

By delivery within the state to the person to be served; or

##### **CPLR § 308(2)**

By delivery within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; service shall be deemed complete upon the later of delivery or mailing; or

##### **CPLR § 308(3)**

By delivery within the state to the agent for service of the person to be served as designated under Rule 318; or

##### **CPLR § 308(4)**

Where service under (1) and (2) cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; service shall be deemed complete upon the later of affixing or mailing; or

##### **CPLR § 308(5)**

In such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs (1), (2) and (4).

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### **Service On State Or State Agency**

CPLR § 307(1) (State)

By delivery to assistant attorney-general at office of attorney-general or to attorney-general within state;

CPLR § 307(2) (State agency)

By delivery to chief executive officer of agency or to person designated by chief executive officer to receive service, or by mailing by certified mail, return receipt requested, to chief executive officer of such agency and personal service upon state in manner provided by § 307(1). Chief executive officer shall designate at least one other person to accept personal service.

Service by certified mail shall not be complete until receipt in principal office of agency and completion of personal service upon state in manner provided by § 307(1).

Service by certified mail shall not be effective unless front of envelope bears legend "URGENT LEGAL MAIL" in capital letters.

State agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which constitutes the state for purposes of service under § 307(1).

"Principal office of the agency" shall mean location at which office of the chief executive officer is generally located.

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### **Service On Attorney For Party**

Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with CPLR Rule 2103(b) to the party's attorney of record. CPLR § 2303-a.

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### **Service On Infant**

Personal service upon an infant shall be made by personally serving the summons within the state upon a parent or any guardian or any person having legal custody or, if the infant is married, upon an adult spouse with whom the infant resides; or, if none of the aforementioned individuals are within the state, upon any other person with whom the infant resides or by whom he is employed. If the infant is fourteen years of age or over, the summons shall also be personally served upon the infant within the state. CPLR § 309(a).

## Authority To Issue Trial Subpoenas And Service On Parties

### **Subpoena Duces Tecum For Non-Government Records: Generally**

When there is no law requiring that disclosure be ordered by a court, or that an authorized individual's consent/release be obtained, an attorney has authority to issue a subpoena duces tecum for non-government records. CPLR § 2302(a).

However, the court must issue a subpoena to compel production of an original record or document where a certified transcript or copy is admissible. CPLR § 2302(b).

The attorney must serve a copy of the subpoena on any party who has appeared in the proceeding so that it is received promptly after service on the witness and before the production of books, papers or other things. CPLR § 2303(a). This ensures that other parties can move to quash before disclosure is actually made.

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### **Subpoena Duces Tecum For Non-Government Records: Returnable To Counsel**

The traditional rule is that a trial subpoena must direct production of records at the court where the case is pending. In other contexts, courts have held that a judicial subpoena duces tecum, whether issued by a court or by an attorney, is a mandate of the court and must be made returnable in a court. *People v. Natal*, 75 N.Y.2d 379 (1990) (ADA improperly made subpoena returnable to himself); *People v. Currier*, 221 A.D.2d 805 (3rd Dept. 1995) (preclusion was appropriate penalty where DA improperly subpoenaed defendant's hospital records to DA's office); see also FCA § 1038(a) (requires that the subpoenaed records be sent to the court).

However, a trial subpoena may direct service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, in which case a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith. CPLR § 2305(d).

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### **Subpoena Duces Tecum For Government Records: Generally**

CPLR § 2307 requires that a subpoena for “[b]ooks, papers and other things of a library, department or bureau of a municipal corporation or of the state” be issued by the court.

This requirement applies, e.g., when an attorney wants to obtain police records, or school records (which are also governed by Federal Educational Rights and Privacy Act disclosure limitations).

*Unless the court orders otherwise*, a motion for the subpoena shall be made on at least one day's notice to the agency or officer having custody of the book, document or other thing, and the adverse party. CPLR § 2307.

Arguably, a court, which is presumed to know the law, “orders otherwise” when it signs a subpoena presented *ex parte* in the absence of a motion. In that event, however, the attorney must serve a copy of the subpoena on any party who has appeared in the proceeding so that it is received promptly after service on the witness and before the production of books, papers or other things. CPLR § 2303(a).

Note: In delinquency cases, an attorney who wishes to submit a subpoena *ex parte* for the court to sign also can rely on CPL § 610.20(3) (“An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof, unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period.”).

The subpoena must be served upon the agency or officer having custody of the book, document or other thing, and the adverse party, at least twenty-four hours before the time fixed for the production of the records unless, in the case of an emergency, the court shall by order dispense with such notice. CPLR § 2307.

Compliance with the subpoena may be made by producing a full-sized legible reproduction of the item or items required to be produced, certified as complete and accurate by the person in charge of the agency, or his/her designee. No personal appearance to certify shall be required, unless the court shall order otherwise. CPLR § 2307.

The records are admissible in evidence and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the agency, or by an employee delegated for that purpose, establishing that the record was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. CPLR Rule 4518(a), (c).

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### **Subpoena Duces Tecum For Hospital Records, And Government Medical Records**

In the absence of an authorization by a patient, a trial subpoena duces tecum for a patient's medical records may only be issued by a court. CPLR § 2302(b). As noted in the Practice Commentaries, this “is consistent with the Health Insurance Portability and



Accountability Act ... which provides that 'protected health information' may be released without an authorization in response to an order of the court. 45 C.P.R. 164.512 (introductory paragraph) and 164.512(e)(1)(i)."

Subpoenas for government medical records presumably are subject to the motion requirement in CPLR § 2307.

The subpoena shall be served at least three days before the time fixed for production of the records relating to the condition or treatment of a patient unless otherwise ordered by a court. CPLR § 2306(a).

A transcript or a full-sized legible reproduction, certified as correct by the superintendent or head of the hospital, department or bureau or his/her assistant, or the officer, may be produced unless otherwise ordered by a court. CPLR § 2306(a).

Where a court has designated a clerk to receive the records, delivery may be made to him/her at or before the time fixed for their production. The clerk shall give a receipt for the records and notify the person subpoenaed when they are no longer required. The records shall be delivered in a sealed envelope indicating the title of the action, the date fixed for production and the name and address of the attorney appearing on the subpoena. They shall be available for inspection pursuant to the rules or order of the court. CPLR § 2306(b).

The records are admissible in evidence and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital or agency, or by an employee delegated for that purpose or by a qualified physician, establishing that the record was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. This includes hospital records located in a jurisdiction other than New York State. CPLR Rule 4518(a), (c).

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### **Subpoenas Duces Tecum For Clinical Records**

A subpoena to compel production of a patient's clinical record maintained pursuant to Mental Hygiene Law § 33.13 shall be accompanied by a court order. CPLR § 2302(a). See also MHL § 33.13(c) (information about patients or clients, including, *inter alia*, identification of patients or clients, clinical records or clinical information tending to identify patients or clients, shall not be public record and shall not be released except (1) pursuant to order of court of record requiring disclosure upon finding by court that interests of justice significantly outweigh need for confidentiality); *Matter of Evan E.*, 114 A.D.3d 149 (3d Dept. 2013) (court alludes to finding upon *in camera* review of records and hearing).

Disclosure of records of identity, diagnosis, prognosis, treatment, care coordination or any other information shall be limited to that information necessary and required in light of the reason for disclosure, and information disclosed shall be kept confidential by the party receiving the information and limitations on disclosure in § 33.13 shall apply. MHL § 33.13(f).

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**Subpoenas Duces Tecum For Records “Relating To Abuse Or Neglect” (FCA § 1038[a])**

“Each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, county attorney, district attorney, counsel for the child, or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article.”

Notwithstanding any other provision of law to the contrary, service of any such subpoena on a hospital may be made by certified mail, return receipt requested, to the director of the hospital.

The court shall establish procedures for the receipt and safeguarding of such records.

Although § 1038(a) generally allows attorneys to subpoena government agency records containing evidence “relating to abuse or neglect” without making a CPLR § 2307 motion for a court order, such an order must be obtained when required by a privacy statute such as Mental Hygiene Law § 33.13, the Federal Educational Rights and Privacy Act, or the Health Insurance Portability and Accountability Act.

**Witness Fees**

Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee. CPLR § 2303(a).

At the end of each day's attendance, the person subpoenaed may demand his fee for the next day on which he is to attend. If the fee is not then paid, he shall be deemed discharged. CPLR § 2305(a).

Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city. CPLR § 8001(a).

Wherever the preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall receive an additional fee of ten cents per folio upon demand. CPLR § 8001(c).

**Statutes supporting relief from fee payment requirements:**

CPLR § 1101(e) (“Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion ... provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court”);

CPLR § 1102(d) (person proceeding as “poor person” under CPLR § 1101 “shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor”);

FCA § 165(a) (CPLR provisions apply to extent they are “appropriate” to proceeding);

CPL § 610.50(2) (witness subpoenaed by defendant has no right to witness and mileage fees, but may, in discretion of court, be reimbursed out of county treasury);

CPL § 610.25(2) (cost of reproduction and transportation shall be borne by person or party issuing subpoena unless court determines otherwise in interest of justice).

**Attempts To Limit Adversaries’ Access To Subpoenaed Records**

In some instances, a party does not know whether subpoenaed materials will support the client’s case. Ideally, the party would subpoena materials to his/her attorney’s office, and the attorney would have no obligation to disclose. However, records generally must be subpoenaed to the court. Although CPLR § 2305(d) authorizes delivery directly to an attorney or self-represented party, the party must serve a copy of the subpoena upon all parties, and then deliver a complete copy of the records in the same format to all opposing counsel and self-represented parties forthwith.

But there are lawful mechanisms the attorney for the child could at least attempt to use to shield subpoenaed records from other parties.

Criminal Procedure Law § 610.20(3) allows defense counsel to obtain a so-ordered subpoena, including a subpoena for government records, without making a motion. There is no express requirement that the People be placed on notice. If the attorney for the child makes an ex parte application for a so-ordered subpoena, he/she could ask the court to direct that the records go directly to counsel, or that the clerk of court allow only the attorney for the child access to the records, while citing the cases referenced below. Although a CPL-based argument might seem to be most persuasive in a juvenile delinquency proceeding, the respondent and the child in an abuse/neglect or termination of parental rights proceeding all enjoy the rights to due process and the

effective assistance of counsel under the New York State Constitution. Thus, it can be argued in all these proceedings that a non-governmental party has the right to freely subpoena non-confidential records without assuming the risk that another party will benefit from disclosure. At the very least, the court should have discretion to provide such protection. Of course, a party would have to concede that disclosure to other parties would have to be made if and when it is determined that any portion of the records will be offered into evidence at a hearing.

Caselaw: *Facebook, Inc. v. Superior Court of San Diego County*, 471 P.3d 383 (Cal. 2020) (in case involving subpoena served on Facebook seeking restricted posts and private messages of complainant, which was issued without adequate notice to complainant or People, court highlights factors courts should consider when balancing People's right to due process and meaningful opportunity to effectively challenge discovery request against defendant's constitutional rights and need to protect defense counsel's work product); *Kling v. Superior Court*, 239 P.3d 670 (2010) (court's role when presented with materials produced under defense subpoena duces tecum to third party is to balance People's right to due process and meaningful opportunity to effectively challenge discovery request against defendant's constitutional rights and need to protect defense counsel's work product; defendant's constitutional rights usually can be protected by redacting materials that disclose privileged information or attorney work product, by conducting portions of in camera hearing ex parte, and by withholding disclosure to prosecution of records until defense has determined it intends to offer them in evidence at trial); *People v. Van Dyne*, 175 Misc.2d 558 (County Ct., Monroe Co., 1998) (since defendant has right to gather information without alerting prosecution to defense, court will allow defendant opportunity to present ex parte application for subpoenas and will determine whether notice to the adverse party will be required).

In addition, CPLR Rule 3120(1) allows a party to serve a subpoena duces tecum directing a non-party to produce and permit the party to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the person served. This statute can be applied in any family court proceeding, including a juvenile delinquency proceeding, "to the extent [it is] suitable to the proceeding involved." FCA § 165(a). However, the party issuing a subpoena duces tecum shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance with the subpoena, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof. CPLR Rule 3120(3). Moreover, Rule 3120 does not change the requirement in CPLR § 2307 that a motion be made for a subpoena duces tecum directed at government records. CPLR Rule 3120(4). But that still leaves open the possibility of moving pursuant to CPLR § 3103(a) for a protective order "regulating" the discovery process, while arguing that requiring disclosure of records to other parties before a decision has been made to offer records would cause "disadvantage, or other prejudice" to the child.