29.1 Securing the Attendance of Witnesses by Subpoena and Other Process

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A writ issued under the authority of the court to compel the personal attendance of a witness is called a subpoena ad testificandum (also called a witness subpoena). *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966). Generally, a jurisdiction's subpoena procedure is a statutory method of implementing a defendant's Sixth Amendment right to present a defense, which includes the right to compulsory process to obtain witnesses and documents for his or her defense. *See generally United States v. Echeles*, 222 F.2d 144, 152 (7th Cir. 1955) (observing that federal criminal procedure rules implement the right to compulsory process in federal cases).

Among the steps counsel should consider in preparing for trial are subpoenaing potentially helpful witnesses and examining and subpoenaing potentially helpful physical or documentary evidence. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.1(c)(1), (2) General Trial Preparation (Nov. 2004); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 12, at 40 (8th ed. 2018) ("[I]f the defendant desires the testimony of . . . witnesses he or his counsel must call them."). If a witness has not been subpoenaed to appear, the witness is not required to be present, and the court has no authority to punish his or her failure to appear. *State v. Wells*, 290 N.C. 485 (1976).

For a discussion of subpoenas from the perspective of the recipient, see John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005). Although the bulletin focuses on health department records, it discusses requirements and procedures applicable to all subpoenas.

A. Constitutional Basis of Right to Compulsory Process

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." This federal constitutional right is applicable to the states through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense," which is "a fundamental element of due process of law" and thus incorporated into the Fourteenth Amendment and applicable to state proceedings); *accord State v. Melvin*, 326 N.C. 173, 184 (1990); *see also infra* § 29.2F, Constitutional Right to Obtain Evidence in Possession of Third Parties (discussing Due Process right to favorable, material evidence). The right to confront one's accusers and witnesses with other testimony is also guaranteed by article I, section 23 of the N.C. Constitution. *State v. Cradle*, 281 N.C. 198 (1972).

The right to compulsory process is not absolute. The court may require a defendant who requests such process at state expense to establish some "colorable need" for the person to be summoned, "lest the right be abused by those who would make frivolous requests." *State v. House*, 295 N.C. 189, 206 (1978) (quoting *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971)); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (holding that the defendant could not establish a violation of his constitutional right to compulsory process merely by showing that the deportation of potential witnesses deprived him of their testimony; he had to make "some plausible showing" of how their testimony would have been material and favorable to his defense); *Washington v. Texas*, 388 U.S. 14, 23 (finding a violation of the defendant's right to compulsory process where state statutes prohibiting alleged accomplices from testifying for one another prevented the defendant from putting "on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense").

Under North Carolina's subpoena procedures, discussed in subsection B., below, the defendant does not have to make any showing to obtain a subpoena. Nor is it likely in the typical case for the need for a witness subpoena to be questioned before the witness is scheduled to appear because the significance of a witness's testimony is difficult to determine before the witness actually testifies. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(f), at 487–88 (4th ed. 2015) (contrasting witness and document subpoenas). *But see In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (finding no abuse of discretion by the trial judge in allowing a motion to quash respondent-mother's subpoena for her son's testimony in termination of parental rights proceeding where judge found that respondent-mother's specific forecast of the testimony demonstrated that it would be of little probative value); *State v. Carroll*, 17 N.C. App. 691 (1973) (upholding the trial judge's denial of the defendant's request that the State subpoena inmate-witnesses in a prosecution of the defendant for escape where the witnesses had no knowledge of the facts of the alleged escape and could offer no testimony relevant and material to the defense); John Rubin, Ch. 11: Evidence, § 11.2.A.5, Quashing of Subpoena for Child (noting cases in which trial

courts quashed the respondents' subpoenas for children in abuse, neglect, dependency, and termination of parental rights proceedings), *in* SARA DEPASQUALE & JAN S. SIMMONS, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (2017).

The defendant may have to make a showing of "need" for a witness's testimony if the witness challenges a subpoena on the ground that the sought-after testimony is privileged. *See infra* § 29.1I, Motions to Modify or Quash Witness Subpoenas. The question of "need" for a witness's testimony also may arise when the defendant requests a continuance of the trial because the witness has failed to comply with the defendant's subpoena. *See, e.g.*, *State v. Beck*, 346 N.C. 750 (1997) (upholding the denial of a continuance where the likelihood of the witness's availability was de minimus—the record did not contain a copy of a subpoena for the witness, defense counsel was uncertain whether the witness had been served, and law enforcement had been unable to locate the witness despite five outstanding warrants—and where counsel's asserted need for the witness consisted of his unsworn statements about the witness's potential testimony regarding events that occurred after the offense).

Although there are no time limits set by the Constitution within which to exercise the right to compulsory process, this right can be lost by the defendant's delay in subpoenaing witnesses. Thus, in the following cases, the defendants did not subpoena the witnesses until after the trial had started and failed to explain why they had not issued a subpoena for the witnesses earlier. *See State v. House*, 295 N.C. 189 (1978) (no error in trial judge's refusal to issue subpoenas for defense witnesses where the request was made after the State had rested its case and the testimony sought to be introduced did not appear to be material); *State v. Wells*, 290 N.C. 485 (1976) (finding no constitutional violation where trial judge did not issue subpoenas for defense witnesses mid-trial where defendant failed to subpoena his witnesses prior to trial when he had ample opportunity to do so); *State v. Cyrus*, 60 N.C. App. 774 (1983) (no constitutional or statutory violation by trial judge in denying defendant's motion to secure the attendance of a material out-of-state witness made on the first day of trial where the defense had knowledge well before the case was calendared that the witness had issues that might prevent him from coming back to North Carolina). *But cf. State v. Rankin*, 312 N.C. 592 (1985) (defendant's right to compulsory process was denied where trial judge denied his motion to compel the attendance of prisoners to testify at trial without giving defense counsel an opportunity to show "good cause" or to explain why the motion was not filed until the day before the trial was to start).

Practice note: You should prepare and serve your subpoenas far enough in advance of trial to give the witnesses a reasonable time to make arrangements to appear. If you wait until the last minute to serve a subpoena (without good reason for doing so) and the witness does not appear, the trial judge may have grounds to deny a motion to compel a witness's attendance or for a continuance. If you plan to use your county's sheriff's department to serve the subpoenas, you need to check with them to determine their policies and requirements. For example, in Mecklenburg County, a local order states that defendants who want the sheriff to serve a subpoena on a law enforcement officer must submit the subpoena to the sheriff no less than fourteen days before the scheduled court appearance.

B. Securing the Attendance of In-State Witnesses

Witnesses who are present in North Carolina must come to court to testify in a criminal proceeding if they are properly served with a subpoena ad testificandum. The subpoena must be issued and served in accordance with the provisions of N.C. Rule of Civil Procedure 45. This rule governs subpoenas in criminal proceedings, with certain exceptions discussed below. *See* G.S. 15A-801 (so stating for criminal cases); G.S. 8-59 (so stating for all causes in the trial divisions of the North Carolina courts).

A subpoena to obtain the testimony of a witness in a pending cause may be issued by

- the clerk,
- any district or superior court judge or magistrate, or
- any attorney for a party.

N.C. R. CIV. P. 45(a)(4) (clerk, district court judge, superior court judge, magistrate, or attorney); G.S. 7A-103(1) (powers of clerk of superior court); G.S. 7A-292(a)(4) (powers of magistrate). An unrepresented party may not issue a subpoena but may request the clerk to issue a subpoena, signed but otherwise blank, which the party then fills out. N.C. R. CIV. P. 45(a)(4).

Mandatory contents of subpoena. N.C. Rule of Civil Procedure 45(a)(1) requires that every subpoena state the following:

- the title of the action;
- the name of the court in which the action is pending;
- the name of the party who is responsible for summoning the witness;
- a command to the person to whom it is directed to attend and testify [including the place, date, and time that appearance is required];
- the protections of persons subject to subpoenas as stated in Rule 45(c); and
- the duties of persons in responding to subpoenas as stated in Rule 45(d).

The form subpoena issued by the Administrative Office of the Courts (AOC-G-100, "Subpoena" (Feb. 2018)), contains space for the issuing party to fill in the specific case information as well as the form language required in all cases.

Manner of service. A subpoena may be served by

- the sheriff,
- a sheriff's deputy,
- a coroner, or
- any person who is not a party and is not less than 18 years of age.

N.C. R. CIV. P. 45(b)(1).

Service on the party named in the subpoena may be made by

- personally delivering a copy of the subpoena to that person;
- registered or certified mail, return receipt requested; or
- telephone communication with the person to be subpoenaed if service is made by a sheriff, his or her designee who is not less than 18 years old and not a party, or a coroner. (This last form of service may be used for subpoenas to testify, not for subpoenas to produce documents, discussed *infra* in § 29.2B.)

Id. G.S. 8-59 states that a subpoena also may be served by telephone communication by any employee of a law enforcement agency; however, when a person is served by telephone under that statute, neither a show cause order nor an order for the person's arrest may be issued for a violation of the subpoena until the person is personally served with the written subpoena. Although not expressly stated in Rule 45(b)(1), this limitation also may apply to subpoenas served by telephone by a sheriff, designee, or coroner under the above-cited rule of civil procedure.

Practice note: Because the court may not be able to issue a show cause order re contempt (with an order for arrest) to enforce a subpoena served by telephone communication, and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

Service exception in criminal cases. In civil cases, a copy of the subpoena also must be served on other parties to the case, but G.S. 15A-801 exempts criminal cases from that requirement. The subpoenaing party in a criminal case need only serve the person or entity being subpoenaed in accordance with the above requirements.

Attendance required until discharge; consequences of failure to comply. Every witness who has been summoned in a criminal prosecution must appear and continue to attend from day to day and session to session until discharged by the court or by the party who summoned him or her to appear. G.S. 8-63. A "session" of superior court "refers to the typical one-week assignment within a term." *See State v. Johnson*, 238 N.C. App. 500, 503–04 (2014) (noting that "[t]he use of 'term' refers to the typical six-month assignment of a superior court judge" and holding that because there was no "session" of court scheduled for the date listed on the subpoena, the compulsory attendance of the witness was not triggered and she was not "required to appear 'from session to session' for that case until discharged"); *see also State v. Sammartino*, 120 N.C. App. 597, 599 (1995). A district court session typically lasts one day. *See* Alyson Grine, *District Court is in Session . . . But for How Long?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 20, 2009) (discussing multiday sessions in district court). The statute also states that the prosecutor may discharge a witness from a subpoena, but presumably this authority applies only to witnesses summoned by the prosecutor.

A person who fails to obey a properly served subpoena without adequate excuse may be held in contempt of court for violating a court order (that is, the subpoena directing

attendance, whether signed by an attorney or a judicial official). N.C. R. CIV. P. 45(e)(1); *see also* G.S. 5A-11(a)(3) (criminal contempt for willful disobedience of a court's lawful process or order); G.S. 5A-21 (civil contempt for continuing failure to comply with order of a court). A court may issue an order for arrest along with an order to show cause re contempt if the court has probable cause to believe the person named in the show cause order will not appear in response to the show cause order. G.S. 5A-16(b).

G.S. 8-63 also provides that if a witness does not comply with a subpoena, he or she may be required to pay a financial penalty.

Avoidance of undue burden or expense. N.C. Rule of Civil Procedure 45(c)(1) provides that the party or attorney responsible for issuing a subpoena "shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena." Failure to do so may result in sanctions. The sanctions may include compensating the person unduly burdened for his or her lost earnings and for reasonable attorney's fees. *See infra* § 29.1I, Motions to Modify or Quash Witness Subpoenas.

Compensation and expenses. Witnesses under subpoena, other than salaried law enforcement officers, are entitled to be compensated in the amount of $5.00 per day. G.S. 7A-314(a) (amount of compensation). A witness also may be entitled to receive reimbursement for travel expenses. *See* G.S. 7A-314(b). Witnesses are not entitled to receive their fees in advance. G.S. 6-51. Rather, the witness must apply to the clerk after attendance for payment. *See* G.S. 6-53 (witness to prove attendance by oath or affirmation); G.S. 7A-316 (to same effect); AOC-CR-235, "Witness Attendance Certificate" (Mar. 2015). Subject to the specific limitations in G.S. 7A-305(d)(11), a judge decides, in his or her discretion, what compensation and allowances to authorize for a witness who appears in the capacity of an expert witness. *See* G.S. 7A-314(d). (This statute does not govern requests by the defense for funds for expert assistance, discussed in 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5, Experts and Other Assistance (2d ed. 2013).)

C. Material Witness Orders

Statutory authorization. To assure the attendance of an uncooperative witness, the State or the defendant may seek a material witness order asserting that there are reasonable grounds to believe that a witness in a pending criminal proceeding has information material to the determination of the proceeding and may not come to court to testify even after being served with a subpoena. *See* G.S. 15A-803(a); *see also State v. Jacobs*, 128 N.C. App. 559 (1998).

G.S. 15A-803(g) authorizes the court to assure the attendance of a material witness by issuing a subpoena or an order for arrest. Since the purpose of a material witness order is to assure the attendance of a material witness who may not be responsive to a subpoena, it is not clear when a subpoena alone would be an effective device for the court to use. If arrested, the witness may be incarcerated or released on bond pending the proceeding where his or her testimony is required. *See* G.S. 15A-803(e).

Applicable to in-state witnesses only. G.S. 15A-803 should be used to secure the attendance of uncooperative in-state witnesses. For witnesses located outside North Carolina, the procedures outlined in G.S. 15A-813 (Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings) should be followed. *See State v. Tindall*, 294 N.C. 689 (1978). For a discussion of that procedure, see *infra* § 29.1E, Securing the Attendance of Nonresident Witnesses.

Mandatory procedure. To obtain a material witness order, the State or the defendant must file a motion supported by an affidavit showing cause for its issuance. The witness must be given

- reasonable notice;
- an opportunity to be heard and present evidence; and
- the right to representation by counsel at a hearing on the motion.

G.S. 15A-803(d). The witness is entitled to the appointment of counsel in accordance with rules adopted by the Office of Indigent Defense Services. *Id.*

Issuance of order. A material witness order may be issued by a district court judge at the time that a defendant is bound over to superior court at a probable cause hearing or by a superior court judge at any time after the criminal proceeding is initiated. G.S. 15A-803(b). The judge must make findings of fact that support the issuance of the material witness order. G.S. 15A-803(d).

Length of effectiveness. A witness may be incarcerated pursuant to a material witness order for up to twenty days. This order may be renewed one or more times by a superior court judge, in his or her discretion, for periods not longer than five days each. The material witness order remains in effect for the period stated in the order unless modified or vacated earlier by a superior court judge. G.S. 15A-803(c).

Modification or vacation. A superior court judge may modify or vacate a material witness order if the witness, the State, or any defendant shows new or changed facts or circumstances. G.S. 15A-803(f).

Compliance with the Sixth Amendment. The use of the term "may" in G.S. 15A-803 suggests that the decision whether to grant a motion for a material witness order lies within the discretion of the judge; however, the judge must exercise his or her discretion in a way that does not violate the guarantee of the Sixth Amendment to the U.S. Constitution that a criminal defendant be afforded compulsory process for obtaining witnesses in his or her favor. *State v. Tindall*, 294 N.C. 689 (1978); *see also State v. Jacobs*, 128 N.C. App. 559 (1998) (no abuse of discretion in denying defendant's motion for a material witness order because the testimony of the witness who was the subject of the motion would have been merely cumulative and was therefore not material to the determination of guilt or innocence).

It appears that it would be an abuse of discretion and a violation of the Sixth Amendment if a trial judge denied a motion for a material witness order where the defendant:

- has shown reasonable grounds to believe that the witness possesses material information;
- complies with the requirements of G.S. 15A-803; and
- has not been dilatory in securing the attendance of the witness.

Cf. State v. Love, 131 N.C. App. 350 (1998), *aff'd per curiam*, 350 N.C. 586 (1999); *Jacobs*, 128 N.C. App. 559; *State v. Coen*, 78 N.C. App. 778 (1986).

Practice note: You should file a motion for a material witness order as soon as you have reasonable cause to believe that a witness might not appear for the proceeding. If you have reason to know that the witness is not cooperating but wait until the last minute to file the motion, the trial judge's denial of your motion may be upheld for lack of diligence. *See State v. Coen*, 78 N.C. App. 778 (1986) (finding no abuse of discretion under G.S. 15A-803 and no violation of the Sixth Amendment in trial judge's denial of defendant's motion for a material witness order made right before the defense rested where the defense knew on the first day of trial that the witness was not cooperating with service of the subpoena, which the defense did not issue until the first day of trial); *State v. Poindexter*, 69 N.C. App. 691, 700 (1984) (no merit to pro se defendant's argument that the trial judge failed to assist him in locating and subpoenaing witnesses where defendant failed "to make the necessary motions and applications to secure the presence of any unwilling or confined witnesses" despite having the opportunity to do so, the defendant made his request after the close of the State's case-in-chief, and the judge directed police officers to try to locate defendant's witnesses).

D. Voluntary Protective Custody for Material Witnesses

If a witness wishes, he or she can ask a superior court judge to place him or her in protective custody. If the judge determines that the witness is material, the judge may order that the witness be:

- confined;
- placed in custody in a non-penal institution;
- released to the custody of a law enforcement officer or other person; or
- made subject to any other provisions appropriate to the circumstances.

G.S. 15A-804(a). A superior court judge can modify or vacate the order on request by the witness or on the judge's own motion. G.S. 15A-804(d). A voluntary protective custody order may be issued even if there is also a material witness order in effect for the witness and vice versa. G.S. 15A-804(c).

The custodian of a witness under a voluntary protective custody order may not release the witness without the witness's consent "unless directed to do so by a superior court judge, or unless the order so provides." G.S. 15A-804(b). The Official Commentary to this statute states that "[a]lthough it may seem farfetched in North Carolina, the basis for this section

sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody."

E. Securing the Attendance of Nonresident Witnesses

Necessity of interstate cooperation. In 1902, the U.S. Supreme Court recognized that state legislatures did not have the power to make any provision that would result in the compulsory attendance of an out-of-state witness in a proceeding held in the home state's court. *See Minder v. Georgia*, 183 U.S. 559 (1902). After that decision, states began adopting the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. This Act was written "to provide a means for state courts to compel the attendance of out-of-state witnesses at criminal proceedings." Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836, 837 (1981). The N.C. General Assembly adopted this Act in 1937, currently codified at G.S. 15A-811 through 15A-816. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971). The Act has been enacted in all fifty states and the District of Columbia and has been found to be constitutional by the U.S. Supreme Court. *See New York v. O'Neill*, 359 U.S. 1 (1959); Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37 (1989).

Required procedures and orders. If the State or the defendant wants to secure the presence of a person located in another state (as defined in G.S. 15A-811) to be a witness in a criminal proceeding in North Carolina, the party first must apply for a certificate and order from the North Carolina court in which the criminal proceeding is pending. The moving party then must seek an order from the other state's courts requiring the person to attend court proceedings in North Carolina. G.S. 15A-813; *see also State v. Tindall*, 294 N.C. 689, 699–700 (1978).

Practice note: The AOC has issued a form certificate for use by parties seeking to require the attendance of out-of-state witnesses. *See* AOC-CR-901M, "Certificate for Attendance of Out-of-State Witness" (Mar. 2015).

Witness must be material. In applying to a North Carolina court for a certificate and order of attendance for an out-of-state witness, the applicant must show that the person requested to be a witness "is a material witness" in a proceeding that is pending in a court of record in this state. G.S. 15A-813. For a discussion on what constitutes materiality, see Jay M. Zitter, Annotation, *Sufficiency of Evidence to Support or Require Finding that Out-of-State Witness in Criminal Case Is "Material Witness" Justifying Certificate to Secure Attendance Under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, 12 A.L.R.4th 742 (1982 & Supp. 2010).

***Practice note*:** Always support your application with affidavits or other testimony to meet your burden of materiality. Bare allegations may be insufficient. *See* 81 AM. JUR. 2D *Witnesses* § 45 (2004). Also, as with a motion for a material witness order, discussed *supra* in § 29.1C, you should file your application as soon as you know that the witness will be

needed. *See State v. Cyrus*, 60 N.C. App. 774 (1983) (no constitutional or statutory violation by trial judge in denying defendant's motion to secure the attendance of a material out-of-state witness made on the first day of trial where the defense had knowledge well before the case was calendared that the witness had issues that might prevent him from coming back to North Carolina).

Specific location must be given. In addition to making an adequate showing that the testimony of the prospective witnesses is material, the applicant must adequately designate the location where the witness can be found. *See State v. Tindall*, 294 N.C. 689, 700 (1978).

Issuance of certificate. If the judge finds that the applicant has made a sufficient showing to secure the witness's presence, he or she may issue a certificate under seal that sets out the facts and specifies the number of days the witness will be required to attend. G.S. 15A-813. The certificate and order must be "presented to a judge of a court of record in the county [of the other state] in which the witness is found," and it may include a recommendation that the witness be immediately taken into custody and delivered to an officer of this state to assure his or her attendance. G.S. 15A-813.

The judge in the witness's home state then may have the witness appear before him or her to determine whether to issue an order. *See* 81 AM. JUR. 2D *Witnesses* § 48 (2004); *cf.* G.S. 15A-812 (witness in North Carolina may be summoned to another state to testify if found to be a material and necessary witness and no undue hardship will result). If the home state judge finds that the witness is material and necessary, will suffer no undue hardship, and will be protected from arrest and service of process by the trial state, he or she may issue an order directing the witness's attendance in North Carolina. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971); *State v. Tindall*, 294 N.C. 689 (1978); Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37 (1989).

Practice note: To obtain an order from another state requiring the attendance of a witness, North Carolina counsel will need to arrange for the matter to be presented to the court of the other state. The AOC form certificate states that it and the bill of indictment (or presumably an information if indictment has been waived) are to be transmitted to the presiding judge of the court of the other state, but counsel still needs to ensure that the matter is properly presented and argued. Typically, North Carolina counsel will associate counsel in the other state to appear before that state's court. A public defender's office in the other state, if there is one for the county where the witness is located, may be willing to handle the matter as a courtesy. Failing that, North Carolina counsel should request funds from the court to obtain counsel to appear in the other state. Counsel also may be able arrange to appear pro hac vice in the other state (that is, be permitted to appear in the other jurisdiction although not admitted to practice in the other jurisdiction).

Compensation. The out-of-state witness is entitled to compensation for mileage and $5.00 for each day that he or she is required to travel and attend as a witness. If the witness is required to appear for more than one day, he or she also is entitled to reimbursement of actual expenses incurred for lodging and meals in the same manner as state employees who

are authorized to travel within the state. G.S. 7A-314(c); G.S. 15A-813; AOC-CR-235, "Witness Attendance Certificate" Side Two (Mar. 2015).

Failure to comply. If a witness fails to comply with an order directing him or her to attend a North Carolina proceeding, the witness may be punished by the home state court in the same manner as if the failure had been to attend a trial in the home state. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971); *cf.* G.S. 15A-812 (providing this remedy when North Carolina witness fails to comply with order to attend out-of-state proceeding). Additionally, if a witness comes to this state and then fails without good cause to attend and testify as directed by the order, he or she may be punished as any other witness who disobeys an order issued from a North Carolina court of record. G.S. 15A-813.

Exemption from arrest and service of process. If a nonresident witness comes to North Carolina in obedience to an order directing him or her to attend and testify, the witness may not be arrested or served with criminal or civil process in connection with matters that arose before he or she entered this state under the order. G.S. 15A-814.

Compliance with Sixth Amendment. Use of the term "may" in G.S. 15A-813 indicates that the judge has discretion whether to grant a motion to procure the attendance of an out-of-state witness. Nevertheless, the trial judge may not exercise his or her discretion in a manner inconsistent with the Sixth Amendment's right to compulsory process. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971) (finding an abuse of discretion in the trial judge's denial of the defendants' request to secure the attendance of nonresident witnesses whose testimony was vital to the defendants' right to receive a fair trial); *State v. Brady*, 594 P.2d 94 (Ariz. 1979) (trial court abused its discretion and violated defendant's due process rights by denying her motion to compel the attendance of an out-of-state witness whose testimony went to the heart of the defense; written interrogatories admitted at trial were not a sufficient substitute for live testimony under the Sixth Amendment); *People v. Trice*, 476 N.Y.S.2d 402 (App. Div. 1984) (abuse of discretion found where trial judge denied defendant's motion to secure the attendance of a nonresident witness who signed an affidavit stating that he saw the victim alive two days after the defendant had allegedly killed her).

F. Securing the Attendance of Witnesses in Custody Within the State

Criminal Procedure Act. At common law, anyone who had been convicted of a crime was disqualified from testifying as a witness. The legislature removed this disqualification by enacting G.S. 8-49, which provides that no person shall be excluded from giving testimony "by reason of incapacity from interest or crime." *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 131, at 506 n.5 (8th ed. 2018). Pursuant to G.S. 15A-805(a), the State or the defendant in a pending criminal proceeding may move to require that a North Carolina prisoner "be produced and compelled to attend as a witness in the action or proceeding." If the movant shows good cause, the judge of the court in which a criminal proceeding is pending must order the person be produced as a witness. G.S. 15A-805(a).

G.S. 15A-805 does not require that the motion be in writing, that it be accompanied by an affidavit, or that it be made within a certain time (although see the practice note below). The statute does not specify any particular method by which the movant show the "good cause" necessary to the production of the witness. *See State v. Rankin*, 312 N.C. 592 (1985) (so noting and holding that the defendant's right to compulsory process was denied where trial judge denied defendant's motion to compel the attendance of prisoner to testify at defendant's trial without giving defense counsel an opportunity to show "good cause" or to explain why the motion was not filed until the day before the trial was to start).

Practice note: Although not required, you should file a written motion detailing the reasons why the witness's presence is necessary. Support the motion with an affidavit showing good cause for the production of the prisoner. File the motion as soon as practicable so that the logistics of transporting a prisoner will not delay the trial and potentially provide grounds for denial of the motion. In addition to citing the statute in your motion, you should cite the Sixth Amendment to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution to reinforce your right to production of the witness as well as preserve the constitutional issue for appellate review if your motion is denied.

If the prisoner has pending criminal proceedings and the judge determines that the order of production would unreasonably interfere with those prior proceedings, G.S. 15A-805(b) provides that he or she may deny the motion. That statute also appears to provide that if an order of production is obtained for a prisoner with pending criminal proceedings, the prisoner (that is, that defendant) or the prosecutor in the other district may apply to a judge or justice in the appellate division and request that the order of production be vacated for good cause shown. G.S. 15A-805(b). Presumably, these provisions for denial or cancellation of an order of production would have to yield to the constitutional rights of the defendant then on trial to obtain necessary witnesses for his or her defense.

Habeas corpus ad testificandum. Independently of G.S. 15A-805, G.S. 17-41 to 17-46 set out a "much more complicated" procedure for obtaining the presence of a prisoner at a proceeding to testify. *See State v. Rankin*, 312 N.C. 592, 597 (1985). According to the Official Commentary to G.S. 15A-805, the provisions of G.S. 15A-805 "replace[d] the old 'habeas corpus ad testificandum' with a simple motion and order for the production of a prisoner (or other person confined in an institution)." Nevertheless, G.S. 17-41 et seq. still provide an alternative method of securing the attendance of a prisoner housed in North Carolina. *See also* AOC-G-112, "Application and Writ of Habeas Corpus Ad Testificandum" (June 2012).

The difference between a writ of habeas corpus ad testificandum and a subpoena ad testificandum is that a subpoena directs the witness to appear at the proceeding while the writ of habeas corpus directs the custodian of the witness to bring him or her to court. *Mabe v. Wythe County Dep't of Soc. Servs.*, 671 S.E.2d 425 (Va. Ct. App. 2009).

G.S. 17-41 authorizes "[e]very court of record," on application of any party to a pending civil or criminal proceeding, to issue a writ of habeas corpus to bring a prisoner in any jail or prison in North Carolina before the court to testify for the applicant. The writ also may be

issued by a magistrate or clerk of superior court if the prisoner is confined in an institution within that county.

This statute allows judges to issue the writ for any incarcerated person except for a prisoner who has been sentenced to death. This exception does not apply to the State of North Carolina—a judge may issue a writ of habeas corpus to bring a condemned prisoner to court to testify on behalf of the State. *See State v. Jones*, 176 N.C. 702 (1918) (holding that the statute stating that a writ of habeas corpus ad testificandum could not be issued for a prisoner who had been sentenced to death did not apply to the State); *cf. State v. Adair*, 68 N.C. 68, 70 (1873) (a prohibition against writs ordering prisoners sentenced for a felony to testify "applies only to parties strictly so called, and not to the State"). There is not a comparable restriction in G.S. 15A-805, discussed above, on the defendant's right to secure the attendance and testimony of a prisoner.

The application for the writ must:

- be made by the party to the proceeding or by his or her agent or attorney;
- be verified by the applicant;
- state "[t]he title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired"; and
- state that the prisoner's testimony is "material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes."

G.S. 17-42. For other miscellaneous statutory requirements regarding the writ of habeas corpus ad testificandum, see G.S. 17-43 et seq.

G. Securing the Attendance of Witnesses in Custody Outside the State

If a prisoner (other than a person confined due to mental illness) who is confined in another state is needed as a witness in a criminal proceeding in North Carolina, the State or the defendant may apply to the court where the action is pending for a certificate securing the attendance of the prisoner. G.S. 15A-822. The judge may issue the certificate if

- there is reasonable cause to believe that the prisoner possesses material information; and
- the state in which the prisoner is confined has a statute that is equivalent to G.S. 15A-821 (permitting prisoners in North Carolina to testify in proceedings in other states).

Id. The certificate, if issued, must

- certify that the prisoner is a material witness in a pending criminal proceeding; and
- specify the number of days that the prisoner's attendance is required.

G.S. 15A-822(a)(4). After the certificate is issued, the judge "may cause it to be delivered to a court of such other state which is authorized to initiate or undertake action for the delivery of such prisoners to this State as witnesses." G.S. 15A-822(c).

H. Securing the Attendance of Witnesses in Federal Custody

The State or the defendant may secure the attendance of a witness who is confined in a federal institution by making application in the court where the defendant's criminal proceeding is pending. The applicant must show that there is "reasonable cause" to believe that the witness "possesses information material" to the pending proceeding. G.S. 15A-823.

Upon application, the judge may issue a certificate (known as a writ of habeas corpus ad testificandum) addressed to the Attorney General of the United States certifying that there is reasonable cause to believe that the prisoner possesses material information and requesting the Attorney General to have the prisoner brought to court "for a specified number of days under custody of a federal public servant." G.S. 15A-823(a)(3).

The judge, after issuing the certificate, "may cause it to be delivered to the Attorney General of the United States" or to his or her authorized representative. G.S. 15A-823(c). It is the policy of the U.S. Bureau of Prisons to allow federal prisoners to testify in state court criminal proceedings pursuant to a writ of habeas corpus ad testificandum issued by a state court. *Barber v. Page*, 390 U.S. 719 (1968).

I. Motions to Modify or Quash Witness Subpoenas

A person commanded by a subpoena to appear at trial may file a motion to quash or modify the subpoena in the county in which the trial is to occur. The motion must be made within ten days after service of the subpoena or before the time specified for compliance if the time is less than ten days after service. N.C. R. CIV. P. 45(c)(5).

The judge may modify or quash a subpoena if the subpoenaed person shows that it

- fails to allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- subjects the person subpoenaed to an undue burden;
- is unreasonable or oppressive; or
- is procedurally defective.

N.C. R. CIV. P. 45(c)(3), (c)(5); *see, e.g.*, *In re Will of Johnston*, 157 N.C. App. 258 (2003), *aff'd per curiam*, 357 N.C. 569 (2003) (propounder of will filed a motion to quash subpoena of deceased's attorney based on attorney-client privilege); *State v. Pallas*, 144 N.C. App. 277 (2001) (judge properly granted State's motion to quash subpoena of assistant district attorney who had prosecuted the co-defendant because his testimony may have been privileged work product [under former discovery statute] and lacked materiality); *State v. McRae*, 58 N.C. App. 225 (1982) (no error in trial judge's denial of defendant's motion to quash the State's subpoenas for two young children because there is no age below which one is considered incompetent as a matter of law to testify in North Carolina); *see also supra* § 29.1A, Constitutional Basis of Right to Compulsory Process (discussing defendants' constitutional right to compulsory process to secure testimony of witnesses for defense).

If the judge enters an order to quash or modify a subpoena, he or she may order the party who issued the subpoena to pay all or part of the reasonable expenses and attorney's fees of the subpoenaed person. N.C. R. CIV. P. 45(c)(8). This provision appears to have greater applicability to parties in civil cases than to either the State or defendant (particularly an indigent defendant) in a criminal case.

Practice note: If the judge quashes a subpoena or refuses to enforce a subpoena against a witness who fails to comply, you must make an offer of proof showing "the essential content or substance of the witness's testimony" in order for the appellate court to ascertain whether prejudicial error occurred. *See State v. Simpson*, 314 N.C. 359, 370 (1985); *see also* N.C. R. EVID. 103(a)(2); *State v. Pallas*, 144 N.C. App. 277 (2001) (defendant waived appellate review of trial judge's decision not to enforce the subpoena of a co-defendant as a witness because the defendant made no offer of proof as to what the co-defendant would say and its significance was not obvious from the record).

J. Defense Depositions in Criminal Actions

Statutory authority and requirements. G.S. 8-74 provides a procedure for a criminal defendant in limited circumstances to take a witness's deposition before a proceeding. The defendant may take a deposition if he or she files an affidavit with the clerk of superior court where the action is pending stating that:

- the testimony of the named witness is important for the defense; and
- the witness's attendance cannot be procured for the proceeding because the witness is infirm, or otherwise physically incapacitated, or is a nonresident of North Carolina.

Once the affidavit is filed, the clerk must appoint "some responsible person" to take the witness's deposition. The district attorney must be given ten days' notice of the taking of the deposition and may appear (or send a representative) to cross-examine the witness. The deposition may be read during the criminal proceeding in the same manner as depositions in civil cases.

No corresponding right for State to depose. "There is no statute in North Carolina authorizing the taking of depositions to be used as evidence by the State in criminal prosecutions." *State v. Hartsfield*, 188 N.C. 357, 359 (1924) (recognizing that the privilege of taking depositions is extended to the defendant in certain cases pursuant to statute but it may not be exercised by the State as a matter of right because the defendant "is clothed with a constitutional right of confrontation"). However, the defendant can waive his or her confrontation rights by consenting to the State's taking of a deposition or by failing to object at trial to the admission of the deposition into evidence. *Id.*; *cf. State v. Clonts*, ___ N.C. App. ___, 802 S.E.2d 531 (2017) (reviewing defendant's argument that the trial judge erred in allowing a deposition of a State's witness deployed overseas into evidence where defendant opposed the State's motion to depose the witness prior to trial and its motion to admit the deposition at trial, opposed the release of the witness from the deposition subpoena, and offered to consent to a continuance and to waive his right to a speedy trial; court held that trial judge erred in finding that the witness was unavailable within the

meaning of the hearsay exception Evidence Rule 804(a)(5) and was not unavailable for purposes of the Confrontation Clause), *aff'd per curiam in pertinent part*, ___ N.C. ___, 813 S.E.2d 796 (2018).