
29.2 Securing the Production of Documents or Physical Evidence by Subpoena

A subpoena duces tecum (also called a document subpoena) is used to compel a witness to produce papers or other tangible objects needed at trial. It is a useful tool for obtaining records that are not subject to discovery because they are not in the possession, custody, or control of the State. *See State v. Burr*, 341 N.C. 263 (1995). This ancient writ was recognized at common law, and its use is now authorized and governed by several statutes discussed below. *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966) (in-depth discussion of subpoenas duces tecum); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 13, at 43 (8th ed. 2018); *see also Wilson v. United States*, 221 U.S. 361 (1911) (discussing the origins of the subpoena duces tecum).

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. Statutory Authorization

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by a subpoena properly issued and served as provided in Rule 45 of the N.C. Rules of Civil Procedure, which is applicable to criminal proceedings in most respects. G.S. 15A-802 (so stating); *see also* G.S. 8-61 ("Subpoenas for the production of records, books, papers, documents, or tangible things may be issued in criminal actions in the same manner as provided for civil actions in Rule 45 of the Rules of Civil Procedure.").

In 2011, Rule 45 was amended "to recognize that electronically stored information, as defined by Rule 34(a) [of the N.C. Rules of Civil Procedure], also can be sought by subpoena." N.C. R. CIV. P. 45 Official Commentary. While the related criminal statutes were not specifically amended to clarify that electronically stored information is discoverable in criminal cases, the criminal provisions appear to be broad enough to include the production of electronically stored information.

Generally, a criminal action must actually have been commenced for a party to issue a subpoena under G.S. 15A-802. *See In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63 (1984), *rev'd on other grounds*, 315 N.C. 378 (1986); *see also* N.C. R. CIV. P. 45(a)(1)a. (every subpoena must state the name of the court in which the action is pending); *cf.* John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82, at 3 & n.4 (UNC School of Government, Sept. 2005) (discussing circumstances in which a party may obtain a subpoena or its equivalent before the filing of a case).

Technically, the person named in the subpoena is not being compelled to testify but rather to produce and authenticate the specified records. If the party also needs the person to testify, he or she also should subpoena the person for that purpose. *See State v. Richardson*, 59 N.C. App. 558 (1982), *rev'd in part on other grounds*, 308 N.C. 470 (1983); *see supra* § 29.1, Securing the Attendance of Witnesses by Subpoena and Other Process (discussing subpoenas to testify). A subpoena to produce evidence may be issued separately or joined with a subpoena to appear and testify. N.C. R. CIV. P. 45(a)(2). The AOC form subpoena, AOC-G-100, may be used for both purposes; it contains boxes for the subpoenaing party to indicate whether the recipient is being asked to testify, to produce documents, or both. *See* AOC-G-100, "Subpoena" (Feb. 2018).

The items sought by a subpoena duces tecum must be material to the inquiry. The subpoena "must specify with as much precision as fair and feasible the particular items desired." *State v. Newell*, 82 N.C. App. 707, 708 (1986). It must describe the items sought "with such definiteness that the witness can identify them without prolonged or extensive search." *Vaughan v. Broadfoot*, 267 N.C. 691, 696 (1966). Discovery is not a proper purpose for a subpoena duces tecum. Parties are not entitled to have a mass of records and other documents brought into court to search through them for evidence. *Id.* (disapproving of "fishing or ransacking" expeditions). A defendant is not limited, however, to using a subpoena duces tecum to require production of documents at trial; a subpoena duces tecum is an appropriate device for a defendant to obtain documents before trial that are potentially material and favorable to his or her defense, which is not for improper discovery but rather is considered a part of a defendant's right to a fair trial. *See infra* § 29.2F, Constitutional Right to Obtain Evidence in Possession of Third Parties. For a further discussion of the right to obtain documents before trial, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties, and § 4.7, Subpoenas (2d ed. 2013).

If the documents sought are not material to the issue or are protected by a privilege, the witness may contest their production. *See infra* § 29.2E, Motions to Modify or Quash a Subpoena Duces Tecum.

B. Statutory Requirements

The required contents of a subpoena duces tecum and its manner of service are similar to those for a subpoena ad testificandum under N.C. Rule of Civil Procedure 45(a) and (b). *See supra* § 29.1B, Securing the Attendance of In-State Witnesses. No affidavit showing materiality or necessity is required. *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966). The admissibility of the items will be determined at trial unless the subpoena is quashed before trial. *Id.*

Mandatory contents of subpoena duces tecum. Rule 45(a)(1) requires that every subpoena state all of 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 produce and permit inspection and copying of designated records, books, papers, electronically stored information, documents, or tangible things in the possession, custody, or control of that person;
- the protections for recipients of subpoenas as stated in Rule 45(c); and
- the duties of recipients in responding to subpoenas as stated in Rule 45(d).

The AOC form subpoena, AOC-G-100, includes space for the issuing party to fill in the specific case information as well as the form language required in all cases. *See* AOC-G-100, "Subpoena" (Feb. 2018).

Manner of service. Under Rule 45(b)(1), a subpoena duces tecum 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.

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

- personally delivering a copy of the subpoena to that person; or
- registered or certified mail, return receipt requested.

Unlike a subpoena ad testificandum (discussed *supra* in § 29.1B), a subpoena duces tecum may not be served by telephone communication. *See* N.C. R. CIV. P. 45(b)(1).

In civil cases, a copy of a subpoena duces tecum also must be served on other parties to the case, but G.S. 15A-802 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.

Form of compliance. To comply with a subpoena duces tecum, the person must produce the requested items as kept in the usual course of business, or the documents must be organized and labeled to correspond with the categories stated in the request. N.C. R. CIV. P. 45(d)(1)–(4) (also discussing production of electronically stored information).

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). Thus, before the amendment, a party in a civil case would have to schedule a deposition, to which the party would subpoena the records custodian, even if the party merely wanted to inspect records in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to produce documents at a designated time and place, such as the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena appears to be permissible in a criminal case.

The change in Rule 45 authorizing an "office" subpoena may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, *or any subpoena may be issued separately*." *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008) (so interpreting quoted language); Bill Analysis, H.B. 785: Rules of Civil Proc/Rewrite Rule 45 (S.L. 2003-276), from Trina Griffin, Research. Div., N.C. General Assembly (June 27, 2003) (same); Memorandum to Superior Court Judges et al. re: Subpoena Form Revised (AOC-G-100) & S.L. 2003-276 (HB 785), from Pamela Weaver Best, Assoc. Counsel, Div. of Legal & Legislative Servs., N.C. Admin. Office of the Courts (Sept. 29, 2003) (same). The latter two memos are available from the authors of this manual. The revised language is comparable to Rule 45(a)(1)(C) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3], at 45-18 (3d ed. 2018).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena. The subpoenaed party often will contest the subpoena, necessitating a court hearing in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena), defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party); *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide all the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases, particularly when the defendant is the subpoenaing party, is not entirely clear. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. Those earlier changes, discussed above, allowed a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed under "Manner of service," above). The new subpoena provisions also are in tension with G.S. 15A-905 and 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial.

If the notice and inspection requirements in Rule 45(d1) apply to criminal cases, a party may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a party may move for a court order for production of records, which is not governed by Rule 45. For a discussion of motions for a court order requiring production of records, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

C. Production of Public, Hospital Medical, and Nonparty Business Records

If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to tender the records to the court in which the action is pending instead of making a personal appearance. The custodian may tender the records to the court by registered or certified mail or by personal delivery on or before the time specified in the subpoena. The custodian must certify by affidavit that the records are true and correct copies and that the records were made and kept in the regular course of business or, if no such records were kept, an affidavit to that effect. N.C. R. CIV. P. 45(c)(2).

Rule 45(c)(2) states that if records are delivered under this subsection, the records are admissible in the proceeding without further authentication or certification unless they are otherwise objectionable. The rule also states that if the records are hospital medical records, they are not open to inspection except by the parties and their attorneys until ordered published by the trial judge and nothing in Rule 45(c)(2) shall be construed as waiving the physician-patient privilege or requiring any privileged communication to be disclosed. *Id.* The meaning of this provision is not entirely clear. On the one hand, it appears to allow the parties to review the records without further order of the court; on the other hand, it appears to restrict disclosure of confidential information.

Practice note: As a practical matter, hospital records that have been mailed to the court will not be available for review, and should not be reviewed, by the parties unless the court so orders. Hospital records custodians typically will seal and mark as confidential mailed-in records; and clerks of court who receive the records will not make them available for review by the parties unless the court so orders. Further, counsel is at risk by reviewing confidential records mailed to the court if the court has not ordered disclosure. *See Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

If counsel wants a hospital or public records custodian to appear and testify about the records, counsel should check both the record production and testimony boxes on the subpoena.

In 2015, the General Assembly amended Rule 803(6) of the N.C. Rules of Evidence to provide that business records of a nonparty are admissible if accompanied by an affidavit attesting to their preparation and authenticity. The subpoena procedures in Rule 45 were not amended to allow recipients to respond by affidavit without appearing. If the recipient responds by affidavit, the records would still seem to be admissible under the revised evidence rule.

D. Objections to a Subpoena Duces Tecum

A person who has been served with a subpoena to produce records may object to the subpoena. The objection must be in writing and must be served on the party or the attorney designated in the subpoena within ten days of service of the subpoena or before the time set for compliance if the time is less than ten days after service. A person may object on the grounds that the subpoena:

- does not allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- imposes an undue burden on the party subpoenaed;
- is unreasonable or oppressive; or
- is procedurally defective.

N.C. R. CIV. P. 45(c)(3).

If the person objects to the subpoena because he or she believes that the information sought by the subpoena is privileged or otherwise protected from disclosure, he or she must object "with specificity" and support the objection by sufficiently describing the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced. N.C. R. CIV. P. 45(d)(5).

Court order required to override objection. If an objection is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

Practice note: If the judge refuses to require that the documents be turned over, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Subpoenaed person may be compensated for expenses of production. If following an objection (or motion to modify or quash, discussed next) a judge enters an order compelling the production of records, books, papers, documents, electronically stored information, or other tangible things, he or she may protect any person who is not a party or a party's agent from "significant" expense from complying with the subpoena. The judge may order the subpoenaed person to be "reasonably compensated" for the cost of producing the designated material. N.C. R. CIV. P. 45(c)(6).

Practice note: Typically, judges do not order the payment of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. In a case involving extraordinary production expenses, if a judge orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

E. Motions to Modify or Quash a Subpoena Duces Tecum

A person commanded by a subpoena duces tecum to produce items may test the relevancy and materiality (but not the admissibility) of the designated items by filing a motion to quash or modify the subpoena in the county where the items are to be produced. N.C. R. CIV. P. 45(c)(5); *Vaughan v. Broadfoot*, 267 N.C. 691 (1966). 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 duces tecum if the subpoenaed person shows that it

- does not allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- imposes an undue burden on the party subpoenaed;
- is unreasonable or oppressive; or
- is procedurally defective.

See N.C. R. CIV. P. 45(c)(3), (c)(5). 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).

Although it has been held that the decision whether to quash or modify the subpoena is within the discretion of the trial judge and is not subject to review absent an abuse of that discretion, the judge must be guided by sound legal principles when making the decision. *See Vaughan*, 267 N.C. 691. In exercising his or her discretion, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The ruling also must be measured against the defendant's constitutional right to obtain material, favorable evidence in the possession of third parties, discussed in subsection F., below. *See also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that state trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that information material and favorable to his defense existed within the records), *reviewing on habeas sub nom. State v. Love*, 100 N.C. App. 226 (1990).

Subject to constitutional limitations, a judge may quash or modify a subpoena if it is overly broad or not served in a timely manner. *See, e.g.*, *Newell*, 82 N.C. App. 707, 709 (no abuse of discretion by trial judge in quashing overbroad subpoena where only a "tiny fraction" of the materials requested were "even arguably material to the inquiry") [decided before *Pennsylvania v. Ritchie*, discussed in subsection F., below]; *see also Vaughan*, 267 N.C. 691, 699 (subpoena for production of documents on first day of trial properly quashed where it was a "fishing or ransacking expedition"); *Ward v. Taylor*, 68 N.C. App. 74 (1984) (no abuse of discretion by trial judge in quashing subpoena as unreasonable and oppressive since plaintiffs waited until the last minute to serve an extremely broad subpoena for all time cards and records of all work over an eight-year period when they had known of the importance of the records for at least two weeks); *State v. Richardson*, 59 N.C. App. 558 (1982) (recognizing trial court's authority to modify subpoena to limit it), *aff'd in part and rev'd in part on other grounds*, 308 N.C. 470 (1983).

Practice note: If the judge quashes a subpoena requiring the production of documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

F. Constitutional Right to Obtain Evidence in Possession of Third Parties

A defendant's constitutional right to compulsory process, discussed *supra* in § 29.1A, includes the right to compel witnesses to produce records or other evidence. *See generally* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(f), at 489 (4th ed. 2015). A defendant also is entitled under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to obtain records from third parties that contain favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency). An attorney in a criminal case may apply directly to a judge for an order of production of records rather than issuing a subpoena duces tecum. Such an application is known as a *Ritchie* motion. For a discussion of the procedure to obtain a court order for the production of records, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

G. Failure to Comply with a Subpoena Duces Tecum

A person who fails to obey a properly served subpoena duces tecum without adequate cause may be held in contempt of court. *See* N.C. R. CIV. P. 45(e)(1); *see also* G.S. 5A-11 (criminal contempt); G.S. 5A-21 (civil contempt).

H. Obtaining Documents or Other Items Located Outside North Carolina

A defendant should be able to secure the production of documents or other tangible items located outside of North Carolina by subpoenaing them through the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. Under the Uniform Act, the word "summons" includes a subpoena, order, or other notice requiring the appearance of a witness. G.S. 15A-811. G.S. 15A-813, which provides that a witness from another state can be summoned to testify in this state, does not use the term "subpoena duces tecum" or explicitly address requests for documents. However, several states have found that "in view of the remedial purpose of the Act and also in view of the broad construction placed on the term 'subpoena' in similar statutes, it is clear that the Act authorizes the issuance of a subpoena duces tecum." 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).

Additionally, the N.C. Court of Appeals implicitly approved of the issuance of a subpoena duces tecum pursuant to G.S. 15A-812 to require an in-state witness in North Carolina to produce documents in an out-of-state proceeding even though that statute does not use the term "subpoena duces tecum" or explicitly address requests for documents. *See In re McKinney*, 462 S.E.2d 530, 531 (N.C. App. 1995) (reversing order of trial judge that found that the North Carolina witness sought to be subpoenaed was not a material witness in a California proceeding and that the enforcement of the subpoena duces tecum would cause her undue hardship; matter remanded for issuance of a summons pursuant to G.S. 15A-812 directing witness "to attend, along with any and all videotapes, transcripts and documents relating to the interviews of Detective Mark Furhman, and testify, if called as a witness"). For a further discussion of the procedure to follow under the uniform interstate subpoena act, see *supra* § 29.1E, Securing the Attendance of Nonresident Witnesses.

The N.C. State Bar has issued a formal ethics opinion stating that an attorney may not serve an out-of-state health care provider with an unenforceable subpoena for medical records and may not use any documents produced pursuant to such a subpoena. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010). This opinion prohibits an attorney from simply serving a North Carolina subpoena on an out-of-state entity. It does not prohibit an attorney from using the interstate subpoena procedure discussed above. In addition, a later State Bar opinion clarifies that an attorney may serve an out-of-state entity with a subpoena as long as it is accompanied by a statement that "the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the entity's records." In that instance, the lawyer has not misled the subpoena recipient, who may determine whether to provide the requested documents voluntarily. 2014 Formal Ethics Opinion 7 (2014) (noting that foreign entity may be willing to comply if it has subpoena "for its records").

Other mechanisms may be effective in obtaining records from an out-of-state entity, such as service of a subpoena on a registered agent in North Carolina for an out-of-state corporation, service of a subpoena on a national company's compliance department if it has one, and use of the relatively new Uniform Interstate Deposition and Discovery Act (UIDDA). For a discussion of these mechanisms, see John Rubin, *How O.J. Got the Furhman Tapes (and You Can Get Out-of-State Materials)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 4, 2017).