

Practice Note SC GEN 18

Production of and access to subpoenaed material and returning exhibits and subpoenaed material in civil proceedings.

Commencement

1. This Practice Note was issued on 30 September 2013 and commences on 7 October 2013.

Application

2. This Practice Note applies to production of documents in compliance with a subpoena issued in regard to civil proceedings in this Court and the return of subpoena documents and exhibits after proceedings have been determined.
3. This Practice Note is subject to Practice Note SC Eq 11.

Definitions

4. In this Practice Note:
 - (a) **UCPR** means Uniform Civil Procedure Rules 2005;
 - (b) **Issuing party** means the party requesting the issue of a subpoena for production; and
 - (c) **Producing person** means the person to whom a subpoena for production is addressed

Introduction

5. The purpose of this Practice Note is to inform:
 - (a) the parties of:
 - (i) their ability to nominate on the subpoena document before filing a convenient return date for the subpoena;
 - (ii) the Court's preferred practice in relation to the format of documents being produced in response to a subpoena; and
 - (iii) the Court's practice in relation to accessing subpoenaed material produced in an electronic format, and
 - (b) Producing persons and parties of the Court's practice in relation to:
 - (i) the production of bulky material; and
 - (ii) returning exhibits and subpoenaed material.

Serving the subpoena

6. The forms of subpoena to produce, and to attend and give evidence and produce, have been amended to include the Producing person's declaration (in relation to whether the documents produced are originals and whether they need to be returned). See new UCPR forms 26A and 27A. The Issuing party should provide a copy of the subpoena when it is served so that the Producing person can retain the original subpoena and forward the copy with the completed declaration to the Registry.
7. The Issuing party can nominate a convenient return date for the subpoena on the document filed at the Registry, provided that sufficient time is allowed to serve the Producing person. The Court has a subpoena list Monday to Friday at 9:00 am during the Court term. If the subpoena does not include a nominated return date, the Registry will allocate a date.

Production of subpoenaed material

8. The UCPR was updated in 2011 in relation to how to comply with a subpoena to produce. Specific attention is drawn to UCPR rule 33.6 (6) & (7).

9. UCPR rule 33.6 (6) allows the Producing person to produce a copy of documents, unless the subpoena specifically requires the original documents to be produced. The Issuing party should only specify that the original document is required in those special circumstances where the original document may need to be tendered.
10. UCPR rule 33.6 (7) allows the Issuing party to permit the production of documents in a format that is acceptable to that party. Most Producing persons who have access to a photocopier will now also have access to a document scanner. Where documents would otherwise be photocopied to respond to a subpoena it will normally be as convenient, and less costly for the Producing person to scan those documents and save them in an electronic format. If a document already exists in an electronic format it will also be more convenient and less costly to copy that document in an electronic format rather than print it out on paper. It will also normally be more convenient for the Issuing party and the other parties to access subpoenaed documents in an electronic format.
11. To facilitate the production of subpoenaed documents electronically (rather than paper copies), the Issuing party should indicate to the Producing person that production in an electronic format is acceptable. This should particularly be done where a large volume of material is being subpoenaed. This information for the Producing person can be included on the subpoena in the schedule describing the documents to be produced. It can also be included in a covering letter.
12. If a document has been scanned, is a word processing document, a photograph or image, a copy of the document should be saved as, or converted to, a PDF file. Generally it will be sufficient for emails to be provided in a PDF file.
13. If the material is in an electronic format that cannot be conveniently saved as a PDF file, such as a database, a sound or video recording, it is appropriate for a copy of the document to be provided in the original electronic format. If the original format is not a current or common format then the Issuing party should also consider whether a copy in some other electronic format should also be asked for, so that it can be readily accessed by the parties and the Court.
14. Electronic subpoena documents can be provided on a DVD, a CD or a USB device.
15. Electronic subpoena documents can also be emailed to the Registry at sc.enquiries@justice.nsw.gov.au provided that a scanned copy of the subpoena is also attached to the email. The subject line of the email should state "Producing subpoenaed documents" and include the case name and number.

Production of bulky or hazardous material

16. The party issuing subpoenas should limit the scope of each subpoena to material relevant to the proceedings. There will nevertheless be circumstances where a party legitimately issues a subpoena that will require the production of a large volume of material that cannot conveniently or inexpensively be produced in an electronic format.
17. Except in circumstances where the Court has made specific directions and prior arrangements have been made (through sc.subpoena@justice.nsw.gov.au), the Registry will decline to accept subpoenaed material that is:
 - (a) not packed in standard document boxes;
 - (b) exceeds more than three standard size (Type 3) or six archive sized (Type 1) boxes in volume (or more than one upright trolley load); or
 - (c) in any way hazardous
18. If a Producing person or their agent attends the Registry to produce bulky or hazardous material without prior arrangements, that person will be directed to retain the material until the return date of the subpoena. Specific directions as to the custody of and access to the material will be made at the return date of the subpoena. In general, access will be given at the Producing person's place of business or wherever the material is normally stored. If the issuing party requires that the Producing person does not retain custody of the material or that the material should be stored at some alternate location this should be specified in the proposed access orders appearing on the issued subpoena or in any draft access orders submitted for consideration.

19. A Producing person producing bulky or hazardous material may comply with a subpoena by sending a letter to the Registry and providing a copy to the issuing party listing the material that they are producing and confirming that the Producing person will comply with any directions of the Court in relations to that material.
20. If an issuing party knows or expects that the material being subpoenaed will be bulky or hazardous they must bring these provisions of this Practice Note to the attention of the Producing person.

Accessing subpoenaed material produced in an electronic format

21. If an unrestricted order for access is made in relation to subpoena material that has been produced in an electronic format, then on application by a party entitled to access that material, an electronic copy of the material will be made and provided by the Registry.
22. The party applying for access should provide a blank DVD, CD or USB device onto which the copy can be made. In the alternative, upon request, the Registry may provide access to the material by sending an email attaching the material to the party applying for access.

Accessing subpoenaed documents produced in hard copy format

23. Access to documents produced under subpoena in a non-electronic format will continue to be provided under the procedure set out in Practice Note SC Gen 3.

Tendering subpoenaed material originally produced in an electronic format

24. If directions have not been made to allow the tendering of documents at the hearing in an electronic format, then it is the responsibility of the party intending to tender a document that was originally provided to the Registry in an electronic format to provide a printed copy of the document to the Court at the hearing, or to make arrangements for the relevant technology to be available so that the document can be viewed. This requirement may be achieved by including the document in a tender bundle.

Returning exhibits and produced documents

25. The UCPR (rules 31.16A and 33.10) require the Court to retain exhibits and subpoenaed material for specified time frames after the determination of the proceedings, unless the Court makes a specific order for the return of this material at an early date.
26. The Court's usual practice in relation to exhibits and subpoenaed material will now be an order when the proceedings are determined that the exhibits and subpoenaed material be returned forthwith. The Court will not retain this material, unless there is an order by the trial judge that it remains on the Court file.
27. When a subpoena is served, the Producing person is asked to complete a declaration stating whether the documents being produced are copies, and if so, acknowledging that they may be destroyed by the Court when they are no longer required. Subpoenaed documents in an electronic format (produced on a DVD, a CD or a USB device) that have been identified as copies, will not be returned to the Producing person and will be destroyed (or deleted) by the Registry unless the Producing person has specifically requested that they be returned.
28. In relation to any exhibits that are returned, those exhibits must be retained intact by the party, or person, that produced the material until the expiry of the time to file an appeal, or until any appeal has been determined. Solicitors should notify their clients of their obligations in relation to this material if it is returned to the clients. If an appeal is filed, the party or persons may be asked to produce the material to the Court of Appeal Registry for the purposes of the appeal, however, generally copies held by the appellant can be used for preparing the appeal books.

T F Bathurst

Chief Justice of New South Wales

30 September 2013

Amendment History:

30 September 2013: This Practice Note replaced former Practice Note SC Gen 18, which was issued and commenced on 3 January 2012

1 December 2011: Practice Note SC Gen 18 was issued with a commencement date of 3 January 2012.

Related Information

[Uniform Civil Procedure Rules 2005](#)

SC Gen 3 - [Supreme Court - Copying of court documents](#)

SC Gen 7 - [Supreme Court – Use of technology](#)