

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

NANDY SWEENEY  
CLERK DISTRICT COURT  
FILED BY L. Danell  
DEPUTY

2010 APR 29 P 4: 11

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>IN RE SUBPOENA <i>DUCES TECUM</i> IN CRIMINAL CASES.</p>	<p>Cause No. SB- 75 <b>ORDER</b></p>
---	--

The Judges of the First Judicial District have recently addressed the issue of whether subpoenas *duces tecum* must be issued by the Court rather than the Clerk of Court's Office. There is a distinct difference in procedure required for issuance of a subpoenas *duces tecum* in civil cases and criminal cases.<sup>1</sup> We conclude that current Montana law requires that a subpoena *duces tecum* in a criminal case be issued by the Court.

Section 46-15-106, MCA, is the relevant statute. It states:

- (1) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or other objects designated in the subpoena.
- (2) **The court** may direct that the books, papers, documents, or other objects designated in the subpoena be produced before the court at

<sup>1</sup> In a civil context, the subpoena *duces tecum* is incorporated within the general rule relating to subpoenas. See Rule 45(a), M.R.Civ.P.

1 a time prior to the trial or prior to the time when they are to be offered  
2 into evidence and may upon their production permit the books, papers,  
3 documents, or objects, or portions thereof, to be inspected by the parties  
4 and their attorneys.

5 (3) **The court**, upon a timely motion, may quash or modify a  
6 subpoena if compliance would be unreasonable or oppressive.

7 (Emphasis added). The Commission Comment notes that the statute is modeled  
8 primarily after the federal rule governing such subpoenas. It further states that “[t]he  
9 adoption of this provision should not significantly alter established procedure.”

10 The Comment continues:

11 Subsection (2) allows **the court** to control the manner in which  
12 and the extent to which evidence is produced under a subpoena. The  
13 court may direct which evidence should be produced and the time and  
14 place that it is to be produced. See Rule 17(c), Fed. R. Crim. P.

15 (Emphasis added).

16 Although the comment suggests otherwise, the 1991 version of the  
17 statute does alter the process from that of its predecessor which did not require direct  
18 involvement of the Court. The previous statute, Section 46-15-101, MCA (1987)  
19 stated:

20 Upon request of the prosecuting attorney or the defendant or his  
21 attorney, **the court or the clerk of the court shall issue subpoenas.**  
22 The subpoena shall state the name of the court and the title, if any of the  
23 proceeding and shall command each person to whom it is directed to  
24 attend and give testimony **and produce objects and documents at the  
25 time and place specified.**

(Emphasis added).

The current version of the statute is based on Rule 17(c) of the Federal  
Rules of Criminal Procedure, which states, in part:

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any  
books, papers, documents, data, or other objects the subpoena designates.

1 The court may direct the witness to produce the designated items in court  
2 before trial or before they are to be offered in evidence. When the items  
3 arrive, the court may permit the parties and their attorneys to inspect all  
4 or part of them.

5 In *United States v. Nixon*, 418 U.S. 683 (1974), the United States  
6 Supreme Court examined the application of Rule 17(c) as it related to the efforts of the  
7 special prosecutor to secure information relating to presidential records. The President  
8 sought to have the subpoena quashed, claiming executive privilege. The Supreme  
9 Court stated:

10 A subpoena for documents may be quashed if their production  
11 would be "unreasonable or oppressive," but not otherwise. The leading  
12 case in this Court interpreting this standard is *Bowman Dairy Co. v.*  
13 *United States*, 341 U.S. 214 (1951). This case recognized certain  
14 fundamental characteristics of the subpoena *duces tecum* in criminal  
15 cases: (1) it was not intended to provide a means of discovery for  
16 criminal cases, (2) its chief innovation was to expedite the trial by  
17 providing a time and place *before* trial for the inspection of subpoenaed  
18 materials. As both parties agree, cases decided in the wake of *Bowman*  
19 have generally followed Judge Weinfeld's formulation . . . as to the  
20 required showing. Under this test, in order to require production prior to  
21 trial, the moving party must show: (1) that the documents are evidentiary  
22 and relevant; (2) that they are not otherwise procurable reasonably in  
23 advance of trial by exercise of due diligence; (3) that the party cannot  
24 properly prepare for trial without such production and inspection in  
25 advance of trial and that the failure to obtain such inspection may tend  
unreasonably to delay the trial; and (4) that the application is made in  
good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry  
his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3)  
specificity. Our own review of the record necessarily affords a less  
comprehensive view of the total situation than was available to the trial  
judge and we are unwilling to conclude that the District Court erred in  
the evaluation of the Special Prosecutor's showing under Rule 17(c).

*Nixon*, 418 U.S. at 698-700 (citation omitted).

There is a plethora of other federal cases that generally follow the  
rationale and requirements of *Nixon* as it relates to federal Rule 17(c) and, by  
extension, Section 46-15-106, MCA.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

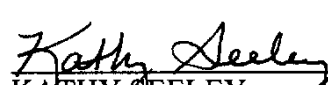
Henceforth, before a subpoena *duces tecum* will be issued in a criminal case, there must be a motion presented to the Court for issuance of the subpoena that states essentially the following information:

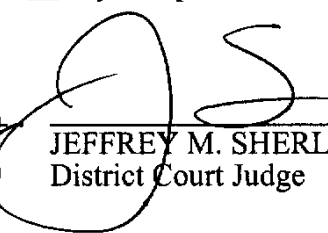
- the nature of the documents requested;
- the relevancy of the documents;
- the documents are necessary for trial preparation;
- that the documents are not otherwise procurable reasonably in advance of trial through discovery processes of Section 46-15-322, MCA;
- that application is made in good faith and not for harassment or delay; and
- that if the applicant seeks the information *ex parte*, the reason why such process is necessary, such as implication of a defendant's trial strategy, protection of a privacy interest, or that disclosure would compromise the integrity of evidence.

If *ex parte* application is made, the Court will determine the propriety of the request and may order that the information be produced first to the Court for an *in camera* inspection.

IT IS SO ORDERED.

DATED this 29<sup>th</sup> day of April 2010.

  
 KATHY SEELEY  
 District Court Judge

  
 JEFFREY M. SHERLOCK  
 District Court Judge

  
 DOROTHY McCARTER  
 District Court Judge

deshare/subpeona duces tecum order.wpd