



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Tentative Report Relating to Spelling of “Subpoena” in the New Jersey Statutes**

**July 10, 2017**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **September 11, 2017**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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*“When you can spell subpoena without  
thinking about it, you[’ve] made it.”<sup>1</sup>*  
- David Lee Roth.

## **Background**

Between 1375 and 1425, English parlance required a word that could be used to summon an individual. The word also had to convey to the recipient that the failure to appear on the date and time specified would result in a consequence of magnitude. By combining the Latin word *sub* “under” and the ablative of *poena* “penalty” the word that resulted was *subpoena*.<sup>2</sup>

The first edition of Black’s Law Dictionary, published in 1891, defined the word “subpoena” as “...a writ or order directed to a person, and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence....”<sup>3</sup> Black’s Law Dictionary recognized the traditional spelling of the word - “s-u-b-p-o-e-n-a.”<sup>4</sup> Another spelling of the word does exist.

A group of two successive letters whose phonetic value is a single sound is commonly referred to as a digraph.<sup>5</sup> In the 1940s a movement began to eliminate the use of Latinate Ligatures, such as digraphs, from modern language.<sup>6</sup> By 1943, American publishers Funk & Wagnalls eliminated Latinate Ligatures, such as “subpoena,” in their *New Standard Unabridged Dictionary of the English Language, in two volumes*.<sup>7</sup> By eliminating the digraph, the spelling of subpoena was changed to “subpena.”<sup>8</sup>

Following the trend of eliminating digraphs, the 1973 edition of the *Government Printing Office Style Manual (GPO Style Manual)* recommended a change in the spelling of the word “subpoena.” The *GPO Style Manual* began to reference the word “subpena.”<sup>9</sup> By 1984, however, the *GPO Style Manual* abandoned the modern spelling of “subpena” and returned to the

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<sup>1</sup> <http://www.vhlinks.com/pages/interviews/dlr/pm1997.php> (last visited July 6, 2017).

<sup>2</sup> Webster’s Third New Int’l Dictionary, Unabridged, 2278 (3d ed. 1986); *see also* [www.dictionary.com/browse/subpoena](http://www.dictionary.com/browse/subpoena) (last visited Jul. 6, 2017).

<sup>3</sup> Henry Campbell Black, *A Dictionary of Law Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, including the Principal Terms of International, Constitutional and Commercial Law; with a Collection of Legal Maxims and Numerous Select Titles from Civil Law and Other Foreign Systems* (St. Paul, Minn.: 1891), 1131, “subpoena.”

<sup>4</sup> *Id.*

<sup>5</sup> Webster’s Third New Int’l Dictionary, Unabridged, 632 (3d ed. 1986).

<sup>6</sup> *Subpoena vs. Subpena*, LawPose.org, <http://www.lawprose.org/lawprose-lesson-201-subpoena-vs-subpena/> (last visited July 6, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> In this document the spelling “subpoena” will be referred to as the “traditional spelling” of the term; and, “subpena” will be referred to as the “modern spelling” of the word.

<sup>9</sup> *Id.*

traditional spelling of the word – “subpoena.” The abandonment of the anti-digraph movement left some state statutes with anomalous spellings of the word “subpoena.”

### New Jersey Statutes

A review of the New Jersey statutes confirms a variation in the spelling of the word “subpoena.” The statutes use both the traditional and the modern spelling of the word.<sup>10</sup> Presently, there are 345 New Jersey statutes that utilize the traditional spelling (“subpoena”).<sup>11</sup> In addition, there are 87 statutes that reference the modern spelling of the word (“subpena”).<sup>12</sup>

A closer examination of the statutes containing the word “subpoena,” reveals yet another incongruity. The spelling of the word “subpoena” in a statutory title can differ from the spelling of the word “subpoena” in the text of the statute itself. New Jersey has a statute that uses the modern spelling of the word “subpena” in its title and references the traditional spelling of the word “subpoena” within the statutory text. Conversely, there is a title that implements the traditional spelling of the word “subpoena” and uses the modern spelling of the term throughout the statutory text.

Among the statutes that make up the Alternative Dispute Resolution Procedures Act (APDRA) is a section that permits an umpire, in a contract action, to issue a writ ordering a person to testify before a court of record.<sup>13</sup> This section is entitled, “Hearings; Multiple Umpires; witnesses and books or instruments; subpenas; rules of evidence; factual and legal contentions; expert evidence; conduct of hearing.”<sup>14</sup> The section setting forth the authority to issue such a writ is subsection c. This subsection provides:

[s]ubpoenas shall issue in the name of and be signed by the umpire, or if there is more than one umpire, by a majority of them, and shall be directed to the person therein named and served in the same manner as a subpoena to testify before a court of record. If a person subpoenaed to testify refuses or neglects to obey a subpoena, the Superior Court, upon application, may compel his attendance before the umpire or hold the person in contempt as if the person had failed to respond to a subpoena issued by the court. (Emphasis added).

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<sup>10</sup> The New Jersey Statutes reference the word “*subpoena*” and “*subpena*” as the mechanism for directing a person, and requiring his attendance at a particular time and place to testify as a witness. The word also appears, with both spellings, in the plural and past tense form.

<sup>11</sup> <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (last visited July 6, 2017).

<sup>12</sup> <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (last visited July 6, 2017).

<sup>13</sup> *N.J. Stat.* §2A:23A-11.

<sup>14</sup> *Id.*

Although the titles of the statutory sections are not enacted, a review of APDRA confirms an alternate spelling of the word “subpoena” within the statutory text. An arbitrator or a party to a personal injury action may, under APDRA, issue a “subpena.”<sup>15</sup> This section of APDRA is entitled “Subpena.” Pursuant to this section, “[t]he arbitrators may, at their initiative or at the request of any party to the arbitrators, issue subpena for the attendance of witnesses and the production of books, records, documents and other evidence. Subpenas shall be served and shall be enforceable in the manner provided by law. (Emphasis added).” Although N.J.S. 2A:23A-11 and 2A:23A-24 are both found in APDRA, the statutory spelling of the word “subpoena” differs depending on the referenced statute.

By contrast there are statutes that utilize the traditional spelling of the word “subpoena” in their titles, and the modern spelling of the term – “subpena” – in the body of the statute. In New Jersey, motor vehicle and traffic regulations are set forth in Title 39. Contained within this title is a statute entitled “Subpoenas.”<sup>16</sup> This subsection empowers an arbitrator at their own initiative or at the request of a party to “...issue subpenas for the attendance of witnesses and the production of books, records, documents and other evidence. Subpenas shall be served and shall be enforceable in the manner provided by law.” This phenomenon is not limited to the Motor Vehicle Statutes.

In New Jersey, Title 56 was enacted to address, “Trade Names, Trade-Marks and Unfair Trade Practices.” The Legislature entitled section 56:9-9, “Investigations; subpoenas.” Although the title of this section reflects the traditional spelling of the word “subpoena,” the statute contains sixteen (16) references to this term using the modern spelling “subpena.”<sup>17</sup>

To determine whether a unified spelling of the word would be beneficial, the Commission authorized Staff to conduct outreach on this issue.

### **Initial Outreach**

With Commission authorization, Staff elected to discuss this issue with an individual versed in the field of information science. During an informal discussion, the librarian with whom Staff consulted confirmed that even in an era of relatively sophisticated, on-line tools for searching the New Jersey statutes, variations in the spelling of “keywords” could lead to disparate search results. A search of both Lexis and Westlaw confirmed 821 entries for “subpoena” and “subpena.” The New Jersey Legislative website returned 259 entry for the word “subpoena” and 70 entries for the word “subpena.” Finally, the Rutgers Law School website

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<sup>15</sup> *N.J. Stat.* §2A:23A-24.

<sup>16</sup> *N.J. Stat.* §39:6A-29.

<sup>17</sup> *N.J. Stat.* §59-9.

returned 1,014 entries for the word “subpoena” spelled in its traditional and modern form.<sup>18</sup> Thus, from an information technology perspective, there is a preference for a unified spelling of terms. The librarian did not express a preference for one spelling of the word “subpoena” over the other.

One method that could be used to determine which spelling of the word “subpoena” is preferred would be to total the number of statutes that use a specific spelling of the word. The librarian’s review of the statutes agreed with conducted by Commission Staff - 345 statute sections use the traditional spelling of the word “subpoena” and 87 statute sections reference the modern spelling of the word “subpena.”

### **Legislative Preference**

The Office of Legislative Services (OLS) has prepared a manual to provide general standards for OLS staff to draft, review, examine and edit legislation.<sup>19</sup> The *Bill Drafting Manual* does not address the preferred spelling of the word “subpoena.” However, whenever the Manual references the grant of subpoena power to a legislative committee through legislation, it consistently uses the traditional spelling of “subpoena,” and never uses the modern spelling “subpena.”

In recent years, the Legislature has tacitly expressed a preference for the traditional spelling of the word “subpoena” when it has amended various statutes. In 2006, the Legislature made several changes to the Public Utilities statute. The amendments to N.J.S. §48:5A-9, by Chapter 83, in the introductory paragraph, inserted “which is empowered pursuant to P.L.1972, c.186 (C.48:5A-1 et seq.) to be the local franchising authority in this State”; in a., inserted “or franchise,” and substituted “the director” for “him,” and changed the spelling of “subpena” to “subpoena”; in d., inserted “or franchise”; and throughout the section, substituted “P.L.1972, c.186 (C.48:5A-1 et seq.)” for “this act.” This was not the only time that the Legislature has modified the spelling of the word “subpoena.”

In 2013, the Legislature amended Title 30. Specifically, amendments were made to N.J.S. §30:4D-17. The amendments, by Chapter 103, changed terminology referring to mental capacity of individuals, substituted “P.L.1968, c.413 (C.30:4D-1 et seq.)” for “this act” in (a); substituted “P.L.1968, c.413” for “this act” throughout the section; substituted “incapacitated persons” for “incompetents” in (g); substituted “the record” for “his record” in the third sentence of (h); substituted “subpoena” for “subpena” in the first and second sentences of (j); and made stylistic changes.

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<sup>18</sup> The search results were returned based upon standard searches using the spelling of the word; not advanced searches using reference eliminators and “wildcard” searches.

<sup>19</sup> *Bill Drafting Manual*, New Jersey State Legislature, Office of Legislative Services (2013).

In recent years, legislative drafting appears to prefer the traditional spelling of the word “subpoena.” A preliminary review of the New Jersey Rules of Court confirms a preference for the traditional spelling of the word as well.<sup>20</sup>

### **Conclusion**

In their current form, the New Jersey Statutes contain inconsistent spelling and usage of the word “subpoena.” The inconsistent spelling of the “keyword” subpoena may lead to inaccurate search results. The Appendix prepared by Staff (but not attached to this Draft Report because it exceeds 80 pages in length) contains proposed language to unify the spelling of the word subpoena throughout the New Jersey statutes.

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<sup>20</sup> See R. 1:9-1; R.1:9-2; R. 1:9-3; R. 1:9-4; R. 1:9-5; R. 4:14-7; R. 7:7-8.