

Responding to Discovery Subpoenas: Delaware

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A Q&A guide on the different ways to respond to a discovery subpoena issued in a Delaware civil proceeding. This Q&A addresses the requirements for complying with a discovery subpoena, objecting to a discovery subpoena seeking documents, moving to quash a discovery subpoena and moving for a protective order. Answers to questions can be compared across a number of jurisdictions (see Responding to Discovery Subpoenas: State Q&A Tool).

Following the suspension or modification of nonessential judicial functions in 2020 due to COVID-19, Delaware courts have returned to normal operations, but local courts may impose special rules impacting some litigation (such as remote proceedings). Check [The Delaware Judiciary Response to Coronavirus Disease \(COVID-19\)](#) for the latest developments in this jurisdiction.

Overview of Responding to Discovery Subpoenas

1. Please identify the different ways a non-party witness may respond to a discovery subpoena in your jurisdiction (for example, complying with the subpoena, serving written objections, making a motion to quash, or informally contacting the issuing party).

In Delaware, a non-party witness may respond to a subpoena in the Court of Chancery and the Superior Court by:

- Complying with the subpoena.
- Objecting to the subpoena.
- Moving to quash, condition, or modify the subpoena (Del. Ch. Ct. R. 45(c)(3); Del. Super. Ct. Civ. R. 45(c)(3)).
- Moving for a protective order (Del. Ch. Ct. R. 26(c); Del. Super. Ct. Civ. R. 26(c)).
- Informally contacting the issuing party or its attorney to resolve any disputes concerning the subpoena.

Complying with Discovery Subpoenas

2. For each type of discovery subpoena, please identify any requirements for compliance (for example, how documents must be produced, when a privilege log is required or whether a corporate non-party must designate a witness for deposition).

Complying with a Document Subpoena

In the Delaware Superior Court, a person responding to a subpoena to produce documents must either:

- Produce the documents as they are kept in the usual course of business.
- Organize and label the documents to correspond with the categories in the demand.

(Del. Super. Ct. Civ. R. 45(d)(1).)

Responding to Discovery Subpoenas: Delaware

In the Delaware Court of Chancery:

- A subpoena may specify the form or forms in which documents or electronically stored information (ESI) are to be produced (Del. Ch. Ct. R. 45(a)(2)).
- If a subpoena does not specify a form, the responding person must produce documents or ESI in a form:
 - in which it is ordinarily maintained; or
 - in which it is reasonably usable.
- Absent a showing of good cause, the responding person is not required to produce the same documents or ESI in more than one form.
- The responding person does not need to provide documents or ESI from sources that the responding person identifies as not reasonably accessible because of undue burden or cost.

(Del. Ch. Ct. R. 45(d)(1).)

A person ordered by a subpoena to produce documentary evidence does not need to appear in person at the place of production, unless the subpoena also requires an appearance (Del. Ch. Ct. R. 45(c)(2)(A); Del. Super. Ct. Civ. R. 45(c)(2)(A)).

A witness may withhold information or documents subject to a subpoena based on claims of privilege or work-product protection if the witness:

- Makes the privilege claims expressly.
- Supports the claims with a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(Del. Ch. Ct. R. 45(d)(2); Del. Super. Ct. Civ. R. 45(d)(2).)

Complying with a Testimonial Subpoena

A non-party witness served with a deposition subpoena must appear at the time and place stated in the subpoena (Del. Ch. Ct. R. 45(a)(1)(C); Del. Super. Ct. Civ. R. 45(a)(1)(C)).

If the deponent named in the subpoena is a corporation, partnership, association, or governmental agency, the organization must review the topics for examination and:

- Must designate one or more officers, directors, managing agents, or other persons to testify on its behalf.
- May set out the matters on which each person designated will testify.

The designated persons must testify about information known or reasonably available to the organization. (Del. Ch. Ct. R. 30(b)(6); Del. Super. Ct. Civ. R. 30(b)(6).)

A deposition subpoena may also require the non-party witness to bring documents in the witness' possession, custody, or control for use during the examination (Del. Ch. Ct. R. 45(a)(1)(C); Del. Super. Ct. Civ. R. 45(a)(1)(C)).

Although beyond the scope of this Q&A, practitioners should note these rules regarding deposition practice in Delaware:

- There are no time limits on depositions in Delaware. However, a deposition generally does not last for more than one day. If a party believes that more than a day of testimony is necessary, whether and to what extent to provide additional time must be negotiated. The court may limit or expand the time permitted for the deposition (Del. Ch. Ct. R. 30(d)(2); Del. Super. Ct. Civ. R. 30(d)(2)).
- The deponent's attorney may not direct the deponent not to answer a question, except to:
 - protect a privilege if necessary;
 - enforce a court-ordered limitation on discovery; or
 - make a motion to the court to terminate or limit the proceedings.

(Del. Ch. Ct. R. 30(d)(1); Del. Super. Ct. Civ. R. 30(d)(1).)

The court may terminate or limit the proceedings if the deposition is conducted in bad faith or in a manner as unreasonably to annoy, embarrass, or oppress the deponent or moving party (Del. Ch. Ct. R. 30(d)(3); Del. Super. Ct. Civ. R. 30(d)(3)).

These rules apply to all depositions taken in an action before a Delaware court, regardless of whether the deposition is taken in Delaware or another jurisdiction (see *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 n.23 (Del. 1993)).

A deposition subpoena may also command a non-party witness to testify by deposition on written questions (Del. Ch. Ct. R. 31(a); Del. Super. Ct. Civ. R. 31(a)).

3. How far in advance must the issuing party serve a discovery subpoena on a non-party before the compliance date stated in the subpoena (for example, a specific number of days before the compliance date or a reasonable time before the compliance date)?

In Delaware, the issuing party must provide a reasonable time for compliance with a discovery subpoena on a non-party witness (Del. Ch. Ct. R. 45(c)(3)(A); Del. Super. Ct. Civ. R. 45(c)(3)(A)). Whether the compliance time

is reasonable depends heavily on the facts in a given situation. For instance, a reasonable time in an expedited case is likely far shorter than in a case that is not on an expedited schedule.

The non-party witness may object to a document subpoena within 14 days or before the time specified for compliance, if this time is less than 14 days after service of the subpoena (Del. Ch. Ct. R. 45(c)(2)(B); Del. Super. Ct. Civ. R. 45(c)(2)(B)). Subpoenas often specify return dates of less than 14 days from service during expedited litigation.

Objections and Motions

4. Please identify and describe the main grounds for objecting to a discovery subpoena.

In Delaware, several types of objections to discovery subpoenas can be made, including:

- The party seeking discovery lacks authority to issue the subpoena (Del. Ch. Ct. R. 45(a)(3); Del. Super. Ct. Civ. R. 45(a)(3)).
 - Improper service (Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(1)).
 - The party seeking discovery failed to pay witness fees (10 Del. C. § 8903). This objection is uncommon because typically the statutory witness fees are not paid.
 - The party seeking discovery failed to allow a reasonable time for compliance (Del. Ch. Ct. R. 45(c)(3)(A)(i); Del. Super. Ct. Civ. R. 45(c)(3)(A)(i)).
 - The subpoena does not seek information that is relevant or reasonably likely to lead to the discovery of admissible evidence (Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1)).
 - The subpoena seeks information that is unreasonably cumulative or duplicative (Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1)).
 - The subpoena seeks information that is obtainable from some other source that is more convenient, less burdensome, or less expensive (Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1)).
 - The party seeking discovery has already had ample opportunity by discovery in the action to obtain the information sought (Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1)).
 - The discovery is not proportional to the needs of the case, considering:
 - the importance of the issues at stake in the action;
 - the amount in controversy;
 - the parties' relative access to relevant information;
 - the parties' resources;
 - the importance of the discovery in resolving the issues; and
 - whether the burden or expense of the proposed discovery outweighs its likely benefit.(Del. Ch. Ct. R. 26(b)(1)(ii); Del. Super. Ct. Civ. R. 26(b)(1)(ii).)
- The requests in the subpoena are overbroad (*Frank v. Engle*, 1998 WL 155553, at *1 (Del. Ch. Ct. Mar. 30, 1998)).
- The subpoena would subject the responding party to:
 - annoyance;
 - embarrassment;
 - oppression;
 - undue burden; or
 - undue expense.(Del. Ch. Ct. R. 26(c), 45(c)(1), (3); Del. Super. Ct. Civ. R. 26(c), 45(c)(1), (3).)
 - The requests in the subpoena are vague or ambiguous (see *Solow v. Aspect Res., LLC*, 2007 WL 3256944, at *1 (Del. Ch. Ct. Oct. 30, 2007)).
 - The subpoena seeks disclosure of privileged or other protected matter and no exception or waiver applies (Del. Ch. Ct. R. 45(c)(3)(A)(ii); Del. Super. Ct. Civ. R. 45(c)(3)(A)(ii)).
 - The subpoena seeks disclosure of a trade secret or other confidential research, development, or commercial information (Del. Ch. Ct. R. 45(c)(3)(B)(i); Del. Super. Ct. Civ. R. 45(c)(3)(B)(i)).
 - The subpoena seeks disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party (Del. Ch. Ct. R. 45(c)(3)(B)(ii); Del. Super. Ct. Civ. R. 45(c)(3)(B)(ii)).

5. Please describe when and how a non-party witness may object to or make a motion relating to a discovery subpoena.

In response to a subpoena in Delaware, a person may:

- Serve written objections to a document subpoena (Del. Ch. Ct. R. 45(c)(2)(B); Del. Super. Ct. Civ. R. 45(c)(2)(B)).
- File a motion to quash or modify a discovery subpoena (Del. Ch. Ct. R. 45(c)(3)(A); Del. Super. Ct. Civ. R. 45(c)(3)(A)).
- File a motion for a protective order (Del. Ch. Ct. R. 26(c); Del. Super. Ct. Civ. R. 26(c)).

Serve Written Objections to a Document Subpoena

A non-party witness that objects to a subpoena to produce or make documents available for inspection can serve written objections to the inspection or copying of any or all of the designated materials on the issuing party. The written objections must be served either:

- Within 14 days of receiving the subpoena.
- At any time before the date of inspection, if the subpoena was served less than 14 days before the time for the inspection specified in the subpoena.

(Del. Ch. Ct. R. 45(c)(2)(B); Del. Super. Ct. Civ. R. 45(c)(2)(B).)

A person responding to a testimonial subpoena may also make written objections to:

- The validity of the subpoena.
- The topics requested for examination if the subpoena requests testimony on behalf of an entity.

Motion to Quash or Modify

The court on whose behalf a subpoena was issued must quash or modify a subpoena if the subpoenaed person timely files a motion objecting to a subpoena because the subpoena:

- Fails to allow a reasonable time for compliance.
- Requires disclosure of privileged or other protected matter, if no exception or waiver applies.
- Subjects a person to undue burden.

(Del. Ch. Ct. R. 45(c)(3)(A); Del. Super. Ct. Civ. R. 45(c)(3)(A).)

The court may quash or modify a subpoena if the subpoenaed person timely files a motion objecting to a subpoena because the subpoena requires disclosing:

- A trade secret or other confidential research, development, or commercial information.
- An unretained expert's opinion or information that does not describe specific occurrences in dispute

and results from the expert's study a party did not request.

(Del. Ch. Ct. R. 45(c)(3)(B); Del. Super. Ct. Civ. R. 45(c)(3)(B).)

A motion to quash or modify a subpoena must be made in a timely manner (Del. Ch. Ct. R. 45(c)(3)(A); Del. Super. Ct. Civ. R. 45(c)(3)(A)).

Motion for Protective Order

A person responding to a subpoena may also move for an order protecting the person from:

- Annoyance.
- Embarrassment.
- Oppression.
- Undue burden or expense.

The order may take any form that justice requires including that the discovery be denied, limited, or conditioned. (Del. Ch. Ct. R. 26(c); Del. Super. Ct. Civ. R. 26(c).)

The court may also limit discovery on a showing by the subpoenaed person that:

- The discovery sought is:
 - unreasonably cumulative or duplicative; or
 - obtainable from another source that is more convenient, less burdensome, or less expensive.
- The party seeking discovery had ample opportunity by discovery in the action to obtain the information sought.
- The discovery sought is not proportional to the needs of the case.

(Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1).)

In determining whether discovery is proportional to the needs of the case, the court will consider:

- The importance of the issues at stake in the litigation.
- The amount in controversy.
- The parties' relative access to relevant information.
- The parties' resources.
- The discovery's importance in resolving the issues.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

(Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. Civ. R. 26(b)(1).)

In the Delaware Court of Chancery, a subpoenaed person from another state can move for a protective order either from the court in the state where discovery is sought or,

if the person agrees to be bound by the court's decision, from the Court of Chancery (Del. Ch. Ct. R. 26(c)).

A motion for a protective order must show that there is good cause to limit or prohibit the discovery (Del. Ch. Ct. R. 26(c); Del. Super. Ct. Civ. R. 26(c)).

6. Please describe when and how a party to an action may object to or make a motion relating to a discovery subpoena served on a non-party witness.

In Delaware, a party to an action may make a motion to quash or for a protective order in the same manner as a non-party witness (Del. Ch. Ct. R. 26(c); Del. Super. Ct. Civ. R. 26(c); Del. Ch. Ct. R. 45(c)(3); Del. Super. Ct. Civ. R. 45(c)(3); see Question 5).

Consequences for Failing to Respond

7. What are the consequences for a non-party witness' failure to respond to a discovery subpoena?

A person who fails to comply with a Delaware subpoena may be:

- Compelled to comply with the subpoena (Del. Ch. Ct. R. 37(a); Del. Super. Ct. Civ. R. 37(a)).
- Held in contempt of court by the issuing court, if the party lacks an adequate excuse for the failure (Del. Ch. Ct. R. 45(e); Del. Super. Ct. Civ. R. 45(e)).

A mistake concerning the obligations under a subpoena is not an adequate excuse for the failure to comply with the subpoena (*Div. of Fam. Serv. v. A.B.*, 980 A.2d 1045, 1050-51 (Del. Fam. Ct. 2009)).

Failure to obey a subpoena is civil, not criminal contempt (*In re Acierno*, 1990 WL 116957, *1 (Del. 1990)).

Considerations for Document Subpoenas

8. For a document subpoena issued to a non-party witness, who has the burden of the costs associated with retrieving and duplicating the documents and records?

Costs for Production of Documents

In Delaware, the responding party generally bears the expenses associated with collecting, reviewing, and producing documents or electronically stored information sought under a subpoena. (*Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, 2009 WL 1515609, at *7 (Del. Ch. Ct. May 29, 2009)).

However, the issuing party (or the attorney responsible for the issuance and service of a subpoena) must take reasonable steps to avoid imposing an undue burden or expense on the responding party. If this duty is breached, the court may sanction the issuing party or its attorney. This sanction may include lost earnings and a reasonable attorneys' fee. (Del. Ch. Ct. R. 45(c)(1); Del. Super. Ct. Civ. R. 45(c)(1).)

Costs for Electronically Stored Information

See Costs for Production of Documents.

A federal court in New York has held that "cost-shifting is potentially appropriate only when inaccessible data is sought" (*Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003)). If the responding party makes a showing that information sought is not reasonably accessible, then the court applies a multi-factor test to determine if cost-shifting is appropriate (*Zubulake*, 216 F.R.D. at 284). In *Omnicare*, the Delaware Court of Chancery praised the *Zubulake* holding, stating that there is "wisdom in the *Zubulake* approach as it considers the wide range of issues informing both the production of ESI discovery and the cost-shifting decision" (*Omnicare*, 2009 WL 1515609, at *7).

9. What are the obligations of a non-party witness to preserve documents when responding to a discovery subpoena?

Parties in Delaware generally have an obligation to preserve documents. A non-party may have a similar obligation when a party controls a non-party so that the non-party's documents are found to be in the party's possession, custody, or control (see *E.I. Du Pont De Nemours & Co. v. Medtronic Vascular, Inc.*, 2012 WL 1408815, at *7 (Del. Super. Ct. Mar. 13, 2012)).

Appealing a Court Decision on a Discovery Subpoena

10. May a court's decision concerning a discovery subpoena be appealed? If so, please indicate:

- Whether the decision may be appealed.
- When the decision may be appealed.
- The standard of review for an appeal.

Appealability

A Delaware trial court's decision concerning a subpoena is interlocutory and is subject to the appellate court's rule governing interlocutory appeals (see *Acierno*, 1990 WL 116957 at *2). The Delaware Supreme Court only permits appeals of interlocutory orders that decide a "substantial issue of material importance that merits appellate review before a final judgment" (Del. Sup. Ct. R. 42(b)(i)).

Timing of Appeal

If the relevant court rule bars interlocutory appeal of the decision, then it is not appealable until the trial court renders a final ruling. Generally, the final decision must be in the underlying matter. However, a contempt order for failure to comply with a subpoena is a final judgment and therefore immediately appealable (*Acierno*, 1990 WL 116957 at *2).

Standard of Review

If the lower court's decision relied on "a purely legal question," the appellate court will review the decision *de novo* (*Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989)).

On the other hand, if the trial court's decision was based on a factual determination, the appellate court will review the decision for abuse of discretion (see *Equitable Life Assurance Soc'y of the U.S. v. Young & Revel, Inc.*, 250 A.2d 509, 510-11 (Del. 1969)).

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