

# Drafting and Issuing Discovery Subpoenas: Delaware

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A Q&A guide to drafting, issuing, serving, and enforcing a discovery subpoena in a Delaware civil proceeding. This Q&A addresses the state statutes and rules governing discovery subpoenas, the types of discovery subpoenas available, the requirements for drafting and serving a discovery subpoena, and the methods of enforcing a discovery subpoena. Answers to questions can be compared across a number of jurisdictions (see [Drafting and Issuing Discovery Subpoenas: State Q&A Tool \(w-000-4864\)](#)).

## OVERVIEW OF DISCOVERY SUBPOENAS

### 1. What are the laws or rules in your jurisdiction that generally govern subpoenas to non-party witnesses in discovery?

This Q&A primarily focuses on drafting and issuing subpoenas in the Court of Chancery and the Superior Court.

The primary bodies of law governing subpoenas in the Court of Chancery and the Superior Court of Delaware are:

- Rule 45 of the Court of Chancery Rules.
- Rule 45 of the Superior Court Rules of Civil Procedure.

The following rules of both the Court of Chancery Rules and the Superior Court Rules of Civil Procedure also relate to subpoenas:

- Rule 30 (oral depositions).
- Rule 31 (depositions by written questions).
- Rule 37 (motions to compel).

Rule 137 of the Court of Chancery Rules and Rule 115 of the Superior Court Rules of Civil Procedure grant subpoena powers to Masters.

In addition to individual court rules, the following statutes also relate to Delaware subpoenas:

- Title 10, Section 4311 of the Delaware Code, which covers the Delaware Uniform Interstate Depositions and Discovery Act.
- Title 10, Section 8903 of the Delaware Code, which covers witness fees.

The Guidelines to Help Lawyers Practicing in the Court of Chancery also provide informal guidance from the Court of Chancery regarding subpoenas (see pgs. 8, 24).

### 2. Please identify and describe the different types of discovery subpoenas available in your jurisdiction (for example, document subpoenas, subpoenas for deposition only, or combined deposition and document subpoenas).

There are two types of subpoenas in Delaware:

- Subpoenas ad testificandum (testimonial subpoenas).
- Subpoenas duces tecum (document subpoenas or subpoenas seeking inspection of premises).

#### TESTIMONIAL SUBPOENAS

Subpoenas ad testificandum, or testimonial subpoenas, require the respondent to testify at a deposition (including written questions) or at trial.

#### DOCUMENT SUBPOENAS

Subpoenas duces tecum, or document subpoenas, require the respondent to produce designated books, documents, or tangible things or to permit inspection of premises.

Rule 45 of the Court of Chancery Rules specifically provides for the production of electronically stored information (ESI) under a subpoena (Del. Ch. Ct. R. 45(a)(c)). The Superior Court Civil Rules and the rules of other Delaware state courts do not expressly apply to ESI. Delaware practitioners, however, routinely use subpoenas in the Superior Court and the other Delaware state courts to seek ESI.

A single subpoena can incorporate both an order to testify and an order for production of documents or inspection of premises (Del. Ch. Ct R. 45(a)(2); Del. Super. Ct. Civ. R. 45(a)(1)).

A subpoena cannot request that a non-party respond to interrogatories or requests for admission (*Ridgeway v. Bender*, 2004 WL 2050283, at \*2 (Del. Super. Ct. Sept. 14, 2004)).

### 3. Who has the authority to issue a discovery subpoena?

The following officers may issue a subpoena:

- The Register in Chancery, or any Delaware attorney (as an officer of the court) in the Court of Chancery (Del. Ch. Ct. R. 45(a)(3)).
- The Prothonotary, or any Delaware attorney (as an officer of the court) in Superior Court (Del. Super. Ct. Civ. R. 45(a)(3)).

### 4. Are there any situations when a discovery subpoena must be issued from a court?

Generally, issuing a subpoena does not require leave of the court in Delaware.

For oral depositions, a plaintiff must obtain leave of the court if the plaintiff seeks a deposition in the 30-day period after service of the summons and complaint on any defendant (Del. Ch. Ct. R. 30(a); Del. Super. Ct. Civ. R. 30(a)). Leave of court, however, is not required even in this period if either:

- A defendant has served a notice of deposition or sought discovery.
- The deposition notice states that the person to be examined is about to go out of Delaware and will be unavailable for examination unless the person's deposition is taken before the expiration of the 30-day period.

(Del. Ch. Ct. R. 30(a); Del. Super. Ct. Civ. R. 30(a).)

The party seeking testimony or documents from out-of-state witnesses in a Delaware action may petition the Delaware court for a commission. The law of the state where the witness is found governs the procedure for these subpoenas (see Question 11).

Delaware has adopted the Uniform Interstate Depositions and Discovery Act. Under this act, a party to an out-of-state action who has a subpoena from a non-Delaware court may petition the Delaware Superior Court to issue a subpoena for the person named in the foreign subpoena. That party should provide a completed Delaware subpoena to the court that incorporates the terms used in the foreign subpoena. (10 Del. C. § 4311.) The Superior Court provides detailed instructions and a form subpoena for filing a subpoena under the Uniform Interstate Depositions and Discovery Act.

Additionally, the following circumstances require leave of the court for a subpoena:

- For a testimonial subpoena to depose an imprisoned person in the Court of Chancery and the Superior Court (Del. Ch. Ct. R. 30(a); Del. Super. Ct. Civ. R. 30(a)).
- To depose employees of the Superior Court concerning the performance of their official duties in the Superior Court (Del. Super. Ct. Civ. R. 30(j)).

- For a subpoena to compel judges to testify concerning actions taken in their official capacity (Del. J.P. Ct. R. 45(a)(4)). The judge presiding at the trial in any court in Delaware may not testify in that trial as a witness (Del. R. Evidence 605).

## DRAFTING A DISCOVERY SUBPOENA

### 5. What information must be included in each type of discovery subpoena?

#### GENERAL REQUIREMENTS

All Delaware subpoenas must include the following information:

- The name of the issuing court.
- The title, if any, of the action and its civil action number.
- A command to testify, or to produce documents, or to permit inspection of premises.
- The time and place for the testimony, production or inspection.
- If the subpoena requests documents, it must designate the documents it is requesting.

(Del. Ch. Ct. R. 45(a)(1); Del. Super. Ct. Civ. R. 45(a)(1).)

A party, or the attorney responsible for the issuance and service of a subpoena, must take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. Parties or their counsel who breach this duty may be sanctioned, including having to pay lost earnings or a reasonable attorneys' fee. (Del. Ch. Ct. R. 45(c)(1); Del. Super. Ct. Civ. R. 45(c)(1).)

#### REQUIREMENTS FOR DEPOSITION SUBPOENAS

Subpoenas seeking testimony from a corporation, partnership, association, or governmental organization must:

- Name the organization as the deponent.
- Designate with reasonable particularity the matters on which examination is requested.

The organization must then identify the person or persons who will testify on behalf of the corporation.

(Del. Ch. Ct. R. 30(b)(6); Del. Super. Ct. Civ. R. 30(b)(6).)

#### ADDITIONAL REQUIREMENTS

In the Court of Chancery, the subpoena must include:

- The texts of the following rules of the Court of Chancery Rules:
  - rule 45(c) related to protection of persons subject to subpoenas; and
  - rule 45(d) related a person's duty in responding to subpoena.

In the Superior Court, the subpoena must include:

- The county from which the subpoena was issued.
- The name of the court in which the action is pending.
- The texts of the following rules of the Superior Court Rules of Civil Procedure:
  - rule 45(c) related to protection of persons subject to subpoenas;

- rule 45(d) related to duties in responding to subpoena; and
- rule 45(e) related to contempt.

#### 6. Are there any official forms for any of the different types of discovery subpoenas?

The court issues a blank subpoena to any party on request of that party (Del. Ch. Ct. R. 45(a)(3); Del. Super. Ct. Civ. R. 45(a)(3)).

Additionally, the Court of Chancery provides a general subpoena form. The Superior Court provides a subpoena form for filing a subpoena under the Uniform Interstate Depositions and Discovery Act.

Practitioners should note that these subpoena forms are not required.

### SERVING A DISCOVERY SUBPOENA

#### 7. Who may serve a discovery subpoena?

A subpoena may be served by any non-party who is at least 18 years old (Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(1)).

The rules of the Court of Chancery specify that the sheriff or the sheriff's deputy may serve a subpoena. The rules of the Superior Court Rules specify that the sheriff may serve a subpoena. (Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(1).)

#### 8. Are there any restrictions on who may be served with a discovery subpoena?

### PERSONS OUTSIDE DELAWARE

Delaware courts can only subpoena persons within Delaware.

The party seeking to subpoena a person outside Delaware should review the laws of the state in which the person is located and may be required to move for a commission from the Delaware court (see Question 11).

### PARTIES TO THE ACTION

Document subpoenas may not be used to compel a party to the action to produce documents. The party seeking document discovery must use the normal discovery process and make a motion to compel if the opposing party is uncooperative (*Davis v. Town of Georgetown*, 2001 WL 541471, at \*2 (Del. Super. Ct. Apr. 27, 2001) and *Van sant v. Ross*, 171 A.2d 910, 912-13 (Del. Super. Ct. 1961)).

Similarly, a testimonial subpoena is unnecessary for a party to the action because Delaware courts have the inherent power to compel a party to the action to testify, including officers, directors, and managing agents of a corporate party. (*Hamilton v. Englard*, 11 A.3d 1180, 1214 (Del. Ch. 2010).)

### CERTAIN ADJUDICATORY OFFICIALS

Delaware law provides that some adjudicatory officials are not subject to subpoenas. Examples include:

- In a medical malpractice case, the plaintiff may ask the court to convene a medical negligence review panel (18 Del. C. § 6802(b)). The members of this board may not testify at a deposition or at

trial and may not be subpoenaed. (*Brooks v. Johnson*, 560 A.2d 1001, 1004 (Del. 1989).)

- In the Superior Court, leave of court is required to take the deposition of court employees where the inquiry concerns their official duties (Del. Super. Ct. Civ. R. 30(j)).

#### 9. How is a discovery subpoena served on a non-party witness?

A discovery subpoena may be served on a non-party witness in Delaware by delivering a copy to the person named in the subpoena (Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(1)). The attorney for the person or entity being served may accept service on behalf of the client (Del. Ch. Ct. R. 4(d)(1); Del. Super. Ct. Civ. R. 4(f)(1)).

Delaware corporations must have a registered agent to accept service of process. A party may serve a corporation or other organization by serving its registered agent. (8 Del. C. §§ 132, 321 and 376.)

Practitioners should also note that the Court of Chancery encourages parties to facilitate discovery involving their registered agents, especially in expedited proceedings.

#### 10. How far in advance must the issuing party serve a discovery subpoena on a non-party witness 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)?

The issuing party must provide a reasonable time for compliance of 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 a given time is reasonable depends heavily on the facts in a given situation. For instance, a reasonable time in an expedited case will likely be far shorter than in a case that is not on an expedited schedule.

#### 11. When and how must the issuing party notify other parties in the case that a discovery subpoena will be or has been served on a non-party witness? If no notice of that kind is required, please state that in your answer.

### DOCUMENT SUBPOENAS

Before serving a discovery subpoena on a non-party witness, the issuing party must serve prior notice on each party if the discovery subpoena commands:

- Production of:
  - documents;
  - electronically stored information; or
  - tangible things.
- Inspection of premises before trial.

(Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(1).)

The issuing party must also:

- Provide the notice in accordance with Rule 5(b) of either the Court of Chancery Rules or the Superior Court Rules of Civil Procedure, as appropriate.
- File proof of service, which must include a statement of the date and manner of service and the names of the persons served,

certified by the person who made the service (Del. Ch. Ct. R. 45(b); Del. Super. Ct. Civ. R. 45(b)(2)).

### TESTIMONIAL SUBPOENAS

A party seeking the deposition of any person must give reasonable written notice to all other parties (Del. Ch. Ct. R. 30(b)(1); Del. Super. Ct. Civ. R. 30(b)(1)).

The notice must include:

- The time and place of the deposition.
- The name and address of each person to be examined, if known.
- A general written description sufficient to identify the person to be deposed or the particular group or class to which he belongs, if his name and address are not known.
- The method by which the testimony will be recorded.
- The designation of the materials to be produced as specified in the subpoena if a document subpoena is also served on the deponent.

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

For depositions on written questions, the notice must include:

- A copy of the questions.
- The name and address of the deponents, if known.
- A general written description sufficient to identify the person to be deposed or the particular group or class to which he belongs, if his name and address are not known.
- The name or descriptive title and address of the officer before whom the deposition is to be taken.

(Del. Ch. Ct. R. 31(a); Del. Super. Ct. Civ. R. 31(a).)

If a non-party witness does not attend a deposition because the deposing party did not serve a subpoena on the witness, and another party attends the deposition, the court may order the party who failed to serve the subpoena to pay to the attending party the reasonable expenses incurred by that party (and that party's attorney) in attending, including reasonable attorneys' fees (Del. Ch. Ct. R. (30(g)(2); Del. Super. Ct. Civ. R. 30(g)(2)).

#### 12. Are there any territorial limits for service of a discovery subpoena? If so, please describe:

- Any limits on service within the state.
- Any limits on service outside the state.
- The procedure for obtaining discovery from a non-party witness located outside of the issuing court's jurisdiction.

### IN-STATE LIMITS ON SERVICE

In the Delaware Superior Court, a subpoena must issue from the county in which:

- The action is pending.
- The testimony, production, or inspection will occur if the subpoena is seeking testimony, production, or inspection of premises in a non-Delaware action.

(Del. Super. Ct. Civ. R. 45(a)(2).)

There are no in-state limits on service of a subpoena for actions in the Court of Chancery.

### OUT-OF-STATE LIMITS ON SERVICE

Delaware subpoenas served outside Delaware are not enforceable unless specifically authorized by the other state's laws.

### PROCEDURE FOR DISCOVERY OF NON-PARTY WITNESS LOCATED OUTSIDE OF THE ISSUING COURT'S JURISDICTION

The party seeking discovery of a non-party witness located outside of the issuing court's jurisdiction must obtain a subpoena in the non-party's jurisdiction, in accordance with that jurisdiction's rules.

If the other jurisdiction has adopted the Uniform Interstate Deposition and Discovery Act, the party can obtain a subpoena in accordance with that act. Otherwise, the party may seek a commission from the Delaware court (10 Del. C. § 362, Del. Ch. Ct. R. 28(b) and Del. Super. Ct. Civ. R. 28(b)).

A subpoena obtained through either of these processes compels the non-party to appear for a deposition (or produce documents) in the foreign jurisdiction. With limited exceptions, an out-of-state witness cannot be compelled to come to Delaware to be deposed (or to testify) (see *McGonigle v. Vtech Constr., Inc.*, 2011 WL 1493083, at \*1 (Del. Ch. Ct. Apr. 8, 2011)).

### WITNESS FEES

#### 13. What are the applicable witness fees for a deposition in your state? In particular, please describe:

- How the fees are calculated.
- In what form fees are paid (for example, cash or check).
- When the fees must be paid.
- The consequences for failing to pay the fees.

### APPLICABLE FEES

A subpoenaed witness must be paid:

- Attendance fees for attending a deposition, hearing, or trial.
- Mileage fees for traveling expenses.

(10 Del. C. § 8903.)

Practitioners should note, however, that witnesses do not typically receive these statutory fees.

### CALCULATING FEES

Witness fees are calculated at a rate of:

- \$2 per day for attendance fees.
- Three cents per mile of travel going and returning to the place where testimony is to be given.

(10 Del. C. § 8903.)

### ENFORCING A DISCOVERY SUBPOENA

#### 14. What are the available methods for enforcing a discovery subpoena against a non-party witness (for example, motion to compel, motion for contempt)?

The primary methods available to enforce subpoenas in Delaware are motions for:

- An order compelling discovery.
- Contempt.

A party can file a motion to compel and a motion for contempt simultaneously. (*Halpern Family Prop. Inv. v. Anderson*, 2010 WL 8250831, at \*1 (Del. Super. Ct. Dec. 22, 2010).)

#### MOTION TO COMPEL

A party may move for an order to compel discovery from a non-party witness. The movant must provide reasonable notice to other parties and all persons affected by the proposed order. (Del. Ch. Ct. R. 37(a) and Del. Super. Ct. Civ. R. 37(a).)

For discovery taking place within Delaware, the party seeking the order must file the motion with the court of record. For discovery taking place in a jurisdiction outside Delaware, the party must bring the motion in a court in that jurisdiction. (Del. Ch. Ct. R. 37(a)(1) and Del. Super. Ct. Civ. R. 37(a)(1).)

If the motion is granted or if the responding person complies with the subpoena after the motion was filed, the responding party must pay the reasonable expenses incurred in bringing the motion, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. (Del. Ch. Ct. R. 37(a)(4)(A) and Del. Super. Ct. Civ. R. 37(a)(4)(A).)

However, if the court denies the motion, then the movant must pay the expenses that the opposing party or deponent incurred in opposing it, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. (Del. Ch. Ct. R. 37(a)(4)(B) and Del. Super. Ct. Civ. R. 37(a)(4)(B).) Finally, if the motion is granted in part and denied in part, the court may apportion costs "in a just manner" (Del. Ch. Ct. R. 37(a)(4)(C) and Del. Super. Ct. Civ. R. 37(a)(4)(C)).

#### MOTION FOR CONTEMPT

Failure by any person without adequate excuse to obey a subpoena served on the person may be deemed contempt (Del. Ch. Ct. R. 45(e) and Del. Super. Ct. Civ. R. 45(e)). Failure to obey a subpoena is civil, not criminal, contempt (*In the Matter of Acierno*, 578 A.2d 1097, 1097 (Del. 1990); Del. Supr. Ct. R. 42).

## APPEALING A COURT DECISION ON A DISCOVERY SUBPOENA

### 15. 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 trial court's decision concerning a subpoena is interlocutory and is subject to the appellate court's rule governing interlocutory appeals (*Acierno*, 578 A.2d at 1097).

#### 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*, 578 A.2d at 1097).

#### 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 (*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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