

Responding to State Subpoenas: New Jersey

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A Q&A guide on the different ways to respond to a subpoena issued in a New Jersey civil proceeding. This Q&A addresses the requirements for complying with a subpoena, objecting to a subpoena seeking documents, moving to quash a subpoena and moving for a protective order.

OVERVIEW OF RESPONDING TO STATE SUBPOENAS

1. Please identify and describe the different ways to respond to a subpoena in your jurisdiction.

After receiving a subpoena, a party or witness may respond to the subpoena by:

- Complying with the subpoena.
- Moving to quash the subpoena.
- Moving for a protective order to modify the subpoena.
- Informally communicating with the issuing party or attorney to informally resolve any disputes over the subpoena.

2. Please identify the requirements for complying with the different subpoenas in your jurisdiction.

COMPLYING WITH A DOCUMENT SUBPOENA

To comply with a document subpoena, the person subpoenaed must:

- Produce all non-privileged responsive documents.
- Produce the documents as they are kept in the usual course of business, unless the documents are organized to correspond with the categories of the request (*N.J. Ct. R. 4:18-1(b)(2)(A)*). Electronically stored information (ESI) must be produced in the form in which it is usually maintained, unless the parties agree otherwise (*N.J. Ct. R. 4:18-1(b)(2)(B)*).
- Include a written response to the request certifying that the production is complete and accurate (*N.J. Ct. R. 4:18-1(b)(2)*).

- Produce any additional responsive documents obtained after the initial production, with a supplemental response (*N.J. Ct. R. 4:18-1(b)(3)*).

To withhold privileged documents, the subpoenaed person must submit a privilege log that describes the withheld documents in a manner that enables other parties to assess whether the unproduced evidence is actually privileged (*N.J. Ct. R. 4:10-2(e)*).

Although Rule 4:14-7(c) of the New Jersey Rules of Court requires that document subpoenas also compel a witness' attendance at a deposition, in practice, many document subpoenas allow the subpoenaed party to comply by directly mailing documents to the requesting party. Responding parties should carefully read the instructions on the subpoena.

COMPLYING WITH A TESTIMONIAL SUBPOENA

To comply with a testimonial subpoena, the subpoenaed witness must:

- Appear at the place and time designated on the subpoena.
- Agree to be sworn.
- Answer questions if directed to do so.

A witness who refuses to cooperate may face sanctions. (*N.J. Ct. R. 4:23-2(a)*.)

COMPLYING WITH AN INFORMATION SUBPOENA

To comply with an information subpoena, the person subpoenaed must answer the questions in the information subpoena. Answers to information subpoenas must be in writing and under oath. The subpoenaed witness must respond within 14 days of service of the information subpoenas. (*N.J. Ct. R. 6:7-2*.)

3. Please indicate whether written objections may be served in response to a subpoena in your jurisdiction.

In response to a testimonial or document subpoena, a party or person subpoenaed may move either:

- To quash the subpoena.



- For a protective order modifying the subpoena.

For document subpoenas, a court may quash or modify a document subpoena if compliance would be unreasonable or oppressive. (*N.J. Ct. R. 1:9-2*.)

A motion to quash or modify a subpoena must be filed "promptly" and include:

- The time and place when it is to be presented to the court.
- The grounds on which it is made.
- The nature of the relief sought.

(*N.J. Ct. R. 1:6-2*.)

For more information about the motions to quash or modify a subpoena, see *Question 5*.

4. Please identify and describe the main grounds for objecting to a subpoena in your jurisdiction.

UNREASONABLE OR OPPRESSIVE

For a subpoena issued during the course of discovery, a party or the person who is subpoenaed may object to a subpoena on the grounds that compliance would cause or impose either:

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

(*N.J. Ct. R. 4:10-3*.)

New Jersey courts apply a balancing test to determine whether a subpoena is unreasonable. Among other factors, courts consider:

- The subpoenaed person's interest in the outcome of the litigation.
- The importance of the information sought to the case.
- How easily the information sought can be produced.
- Whether there are less burdensome means of accessing the information.
- The significance of the rights or interests that a party seeks to protect by limiting disclosure.

(*Berrie v. Berrie*, 457 A.2d 76, 80-81 (*N.J. Super. Ct. Ch. Div. 1983*).)

Subpoenas may also be deemed unduly oppressive if they do not provide reasonable time for a party to respond (*Wasserstein v. Swern & Co.*, 200 A.2d 783, 786-87 (*N.J. Super. Ct. App. Div. 1964*); see 4 *N.J. Prac., Civil Practice Forms* § 50:3).

PROCEDURAL DEFECTS

A party or person who is subpoenaed may object to a subpoena on the grounds that the subpoena was procedurally defective. A party may challenge the validity of a subpoena on procedural grounds if the subpoena:

- Compels attendance at a deposition in an improper location (see *N.J. Ct. R. 4:14-7(b)(1)*).
- Is improperly served (for example, by failing to personally serve the subpoena) (see *N.J. Ct. R. 1:9-3*).

- Is missing certain required information (see *State Q&A: Drafting and Issuing Subpoenas: New Jersey: Question 5* (www.practicallaw.com/6-569-5426)).

VAGUENESS

A party or person who is subpoenaed may object to a subpoena on the grounds that the subpoena was unreasonably vague and not specified with reasonable certainty (*Wasserstein*, 200 A.2d at 786). The party seeking to quash the subpoena bears the burden of showing that the description of the documents sought is unreasonably vague (see *In re Grand Jury Subpoena Duces Tecum*, 363 A.2d 936 (*N.J. Super. Ct. Law Div. 1976*)).

IRRELEVANCE

A party or person subpoenaed may object to a subpoena on the grounds that the subpoena targets irrelevant documents. The issuing party must show that the subpoena seeks relevant and material information (*Wasserstein*, 200 A.2d at 786). However, the issuing party is not required to show that the evidence sought will be admissible at trial.

PRIVILEGE

A party or subpoenaed person may object to a subpoena on the grounds that the subpoena targets privileged documents as specified under Rules 500 to 533 of the New Jersey Rules of Evidence. The claims of privilege must be expressly made and describe the nature of the evidence in a way that does not reveal the protected information but allows the requesting party to determine whether privilege applies to the evidence. (*N.J. Ct. R. 4:10-2(e)*.)

Parties may also claim protection for trial preparation materials (*N.J. Ct. R. 4:10-2(c)*).

5. Please identify and describe any motions that may be made in response to a subpoena in your jurisdiction.

The motions that may be made in response to a subpoena are:

- A motion to quash the subpoena.
- A motion for a protective order to modify the subpoena.

MOTION TO QUASH

If informal attempts to resolve a dispute over a subpoena have failed, a party or subpoenaed person may make a motion to quash the subpoena. A motion to quash a subpoena must include:

- A notice of motion.
- A proposed form of order.
- An affidavit setting out the relevant facts.
- A certification that the moving party has been unsuccessful in good faith efforts to resolve the dispute with the opposing party.

(*N.J. Ct. R. 1:6-2*.)

MOTION FOR A PROTECTIVE ORDER MODIFYING THE SUBPOENA

A party or the subpoenaed person may move for a protective order to modify the subpoena if the subpoena would cause either:

- Annoyance.

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

(*N.J. Ct. R. 4:10-3*.)

Although a court may determine any appropriate remedy, Rule 4:10-3 of the New Jersey Rules of Court provides for certain remedies, including that:

- The discovery not be taken.
- The discovery be taken only on specified terms and conditions, including a designation of the time or place.
- The discovery be taken by a different method.
- The scope of the discovery be limited to certain matters.
- The discovery be conducted with no one present except persons designated by the court.
- A deposition be sealed.
- A trade secret or other confidential information not be disclosed.
- The parties must simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court.

(*N.J. Ct. R. 4:10-3*.)

6. What is the time limit for responding to a subpoena in your jurisdiction?

Witnesses must respond to a subpoena by testifying or producing documents at the specified time and place. If the subpoena does not allow adequate time for a witness to respond, a party or the subpoenaed person may move to quash the subpoena or move for a protective order (see *N.J. Ct. R. 1:9-2*).

Some subpoenas have time limits as specified by law. A party must give at least:

- Ten days' notice:
 - to a testifying witness and the other parties of a deposition (*N.J. Ct. R. 4:14-2*); and
 - for a document subpoena compelling a deposition (*N.J. Ct. R. 4:14-2 and 4:14-7(c)*).
 - 30 days' notice for an expert witness subpoenaed to provide an audiovisually recorded deposition:
 - after an expert witness has issued an expert report; and
 - if the parties intend to use the deposition instead of trial testimony.
- (*N.J. Ct. R. 4:14-9*.)
- 30 days for a document request, but only if the request is issued to a party (*N.J. Ct. R. 4:14-2(d) and 4:18-1; 42 N.J. Prac., Discovery § 4.63*).

CONSEQUENCES FOR FAILING TO RESPOND

7. What are the consequences for failing to respond to a subpoena in your jurisdiction?

If a witness fails to respond to a subpoena, the party issuing the subpoena may move to bring contempt proceedings (see *N.J. Ct. R.*

1:10-2). To enforce a subpoena, a court may:

- Impose fines.
- Award damages.
- Hold the non-complying party in contempt.
- Issue an arrest warrant for the non-complying party.

(*N.J. Stat. Ann. § 2A:81-15; N.J. Ct. R. 1:10-2*.)

DOCUMENT SUBPOENAS

8. For document subpoenas, who has the burden of the costs associated with retrieving and duplicating the documents and records? Are there any special considerations for electronically stored information?

COSTS FOR PRODUCTION OF DOCUMENTS

The requesting party generally bears reasonable copying costs for both parties and non-parties (*42 N.J. Prac., Discovery § 3.22*; see *N.J. Ct. R. 1:9-2*). However, best practice is for the parties to negotiate the allocation of other production costs.

A party or subpoenaed person may move for a protective order if complying with a subpoena for documents or electronically stored information (ESI) would impose undue burden or expense (*N.J. Ct. R. 4:10-3*).

COSTS FOR ELECTRONICALLY STORED INFORMATION

A party is not required to produce ESI if that information is unduly burdensome or expensive to access (*N.J. Ct. R. 4:10-2(f)*). However, the party from whom discovery is sought must demonstrate that the information is not reasonably accessible when moving for a protective order (*N.J. Ct. R. 4:10-2(f)*). The request for ESI may specify the form in which the information is to be produced (*N.J. Ct. R. 4:18-1(b)(1)*).

To avoid complications, parties may wish to set procedures for producing ESI at the pre-trial case management conference. Rule 4:5B-2 was recently amended to provide for case management orders governing the production of ESI.

9. What are the obligations to preserve documents when responding to a subpoena?

New Jersey courts have imposed a duty to preserve evidence on parties where:

- There is pending or likely litigation.
- The evidence is relevant to the litigation.
- Destroying the evidence would prejudice the opposing party.

(*New Jersey Dep't of Env'tl. Prot. v. Cullen*, 39 A.3d 208, 220-21 (*N.J. Super. Ct. App. Div. 2012*).

Non-parties have a more limited duty to preserve documents, but may be required to preserve documents when requested (*Gilleski v. Cmty. Med. Ctr.*, 765 A.2d 1103, 1107-08 (*N.J. Super. Ct. App. Div. 2001*)). An attorney for a third-party witness should be aware that the client may face a legal obligation to preserve documents after receiving a document subpoena.

APPEALING A COURT DECISION ON A SUBPOENA

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

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

TIMING OF APPEAL

Court decisions concerning subpoenas are interlocutory orders which are subject to the appeals requirements of Rule 2:5-6 of the New Jersey Rules of Court. Interlocutory appeals require first that a party move for leave to appeal (*N.J. Ct. R. 2:8-1*).

Parties must file a notice of motion for leave to appeal with both the trial court and the appeals court within 20 days of the date of service of the appealed order. If a party files a motion for reconsideration of the order with the trial court, the deadline is extended to 20 days following the service of the order deciding the motion for reconsideration. (*N.J. Ct. R. 2:5-6*.)

STANDARD OF REVIEW

The New Jersey Appellate Division may grant leave to appeal an interlocutory order in the interest of justice (*N.J. Ct. R. 2:2-4*).

Although the Appellate Division has considerable discretion to grant leave to appeal, in practice the court exercises the power sparingly (*Brundage v. Estate of Carambio*, 951 A.2d 947, 961 (*N.J.* 2008)). Courts rarely grant leave to appeal for discovery matters (*40 N.J. Prac., Appellate Practice and Procedure* § 5.7).

Appeals courts apply a deferential abuse of discretion standard when reviewing decisions concerning subpoenas (*Pomerantz Paper Corp. v. New Cmty. Corp.*, 25 A.3d 221, 236 (*N.J.* 2011)).

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