

Drafting and Issuing Discovery Subpoenas: West Virginia

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A Q&A guide to drafting, issuing, serving, and enforcing a discovery subpoena in a West Virginia 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).

Due to the ongoing COVID-19 outbreak, the West Virginia Courts have suspended or modified many court rules and procedures on a state-wide or court-by-court basis. As of October 6, 2020, West Virginia courts are operating under the [Revised Resumption of Operations Protocols](#). Check the West Virginia Judiciary's Coronavirus Disease 2019 (COVID-19) [website](#) for the latest developments in the jurisdiction.

Overview of Discovery Subpoenas

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

The West Virginia Rules of Civil Procedure and the West Virginia Code generally govern civil subpoenas. The provisions relating to subpoenas are:

- Rule 45 of the West Virginia Rules of Civil Procedure (subpoenas generally).
- Rules 26 through 37 of the West Virginia Rules of Civil Procedure (discovery subpoenas) (see *Keplinger v. Virginia Elec. & Power Co.*, 537 S.E.2d 632, 641-42 (W. Va. 2000)).
- Sections 56-12-1 to 56-12-8 of the West Virginia Code (Uniform Interstate Depositions and Discovery Act).

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).

In West Virginia, a party may use both document subpoenas and deposition subpoenas during discovery. A party may issue a combined deposition and document subpoena or serve separate subpoenas. (W. Va. R. C. P. 45(a)(1).)

Document Subpoena

A subpoena for production may command a person to:

- Produce and permit inspection and copying of designated:
 - books;
 - documents; and
 - tangible things.
- Permit inspection of premises at a specified time and place.

(W. Va. R. C. P. 45(a)(1)(C).)

Deposition Subpoena

A subpoena for testimony may command a person to appear and provide testimony at a specific time and place for:



- A trial.
- A hearing.
- A deposition.

(W. Va. R. C. P. 45(a)(1), (2).)

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

In West Virginia, a subpoena may be issued by:

- A clerk of the court.
- An attorney acting as an officer of the court.

(W. Va. R. C. P. 45(a)(3).)

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

Document Subpoena

In West Virginia, a subpoena for production or inspection must issue from the circuit court in the location where the production or inspection is to be made (W. Va. R. C. P. 45(a)(2)).

Deposition Subpoena

A deposition subpoena must issue from the circuit court in the jurisdiction where the deposition is to take place. The notice of deposition sets the location of the deposition within certain limits (see Question 12: In-State Limits on Service). (W. Va. R. C. P. 45(a)(2), (c).)

Drafting a Discovery Subpoena

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

Every subpoena must be in a form which substantially complies with [Form 33](#) (Civil Case Subpoena), as provided in the Appendix of Forms of the West Virginia Rules of Civil Procedure. Every subpoena must be issued in the name of the state and contain:

- The name of the court from which it was issued.
- The title of the action.
- The name of the court in which it is pending.
- The civil action number.
- The time and place for:

- producing or inspecting documents;
- inspecting premises; or
- providing testimony.

- The text of Rule 45(c), (d), and (e) of the West Virginia Rules of Civil Procedure.

(W. Va. R. C. P. 45(a)(1).)

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

Every subpoena must be in a form that substantially complies with [Form 33](#) (Civil Case Subpoena), as provided in the Appendix of Forms of the West Virginia Rules of Civil Procedure (W. Va. R. C. P. 45(a)).

Serving a Discovery Subpoena

7. Who may serve a discovery subpoena?

In West Virginia, an individual may serve a subpoena if the individual is:

- Not a party to the action.
- At least 18 years of age.

(W. Va. R. C. P. 45(b)(1).)

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

In West Virginia, there are special restrictions for serving a discovery subpoena on infants, incompetents, and convicts.

Infants and Incompetents

When serving an infant or incompetent under 14 years of age, the issuing party must serve the subpoena on:

- The infant or incompetent's guardian or conservator resident in West Virginia.
- The infant or incompetent's parent, if there is no guardian or conservator.
- A guardian *ad litem* appointed under Rule 17(c) of the West Virginia Rules of Civil Procedure, if the parent cannot be found.

(W. Va. R. C. P. 4(d)(2) and 45(b)(1).)

When serving an infant or incompetent 14 years of age or older, the issuing party must serve the subpoena on both:

- The infant or incompetent.
- The infant or incompetent's guardian, parent, or appointed guardian *ad litem*, as required under Rule 4(d)(2) of the West Virginia Rules of Civil Procedure.

(W. Va. R. C. P. 4(d)(3) and 45(b)(1).)

Convicts

If the party is serving an individual confined in a penitentiary, the issuing party must serve the subpoena on:

- That person's committee, guardian, or like fiduciary resident in West Virginia.
- A guardian *ad litem* appointed under Rule 17(c) of the West Virginia Rules of Civil Procedure, if:
 - there is no committee, guardian, or like fiduciary; or
 - the committee, guardian, or like fiduciary is a plaintiff.

(W. Va. R. C. P. 4(d)(4) and 45(b)(1).)

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

In West Virginia, a subpoena must be served by delivering a copy of the subpoena to the individual personally (W. Va. R. C. P. 4(d)(1)(A) and 45(b)(1)).

If demanded, the issuing party must pay the non-party witness fees for one day's attendance and mileage (W. Va. R. C. P. 45(b)(1)).

A subpoena must be served on a domestic or foreign corporation in either:

- The manner described in Rule 4(d)(1)(A) of the West Virginia Rules of Civil Procedure.
- Through the corporation's agent or attorney-in-fact authorized by appointment or by statute to receive or accept service.

(*State ex rel. Progressive Classic Ins. Co. v. Bedell*, 686 S.E.2d 593, 599 (W. Va. 2009).)

Although there is no rule specifying how service is made on state or public entities, in practice, service is handled in the same way as service on domestic corporations.

For more information on serving a discovery subpoena on infants, incompetents, and convicts, see Question 8.

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 West Virginia Rules of Civil Procedure do not provide a minimum time for serving a subpoena. However, the court may quash or modify a subpoena if it fails to allow a reasonable time for compliance (W. Va. R. Civ. P. 45(d)(3)(A)(i)). The reasonableness of time allowed for compliance depends on the circumstances of each case (see *Keplinger*, 537 S.E.2d at 644-45).

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 Subpoena

In West Virginia, for a document subpoena, the issuing party must give prior notice of the intent to serve the subpoena by serving each party through one of the following methods:

- Delivering a copy of the subpoena to the attorney or party.
- Mailing it to the attorney or party at the attorney's or party's last-known address.
- If no address is known, leaving it with the clerk of the court.
- Facsimile transmission to the attorney or party under the West Virginia Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmission.

(W. Va. R. C. P. 5(b) and 45(b)(1).)

Delivery of a copy means:

- Handing it to the attorney or to the party.
- Leaving it at the attorney's or party's office with a clerk or other person in charge.
- If the office is closed or the person to be served has no office, leaving it at the person's home or usual place of

abode with some member of the person's family who is at least 16 years old.

(W. Va. R. C. P. 5(b) and 45(b)(1).)

The issuing party must serve the attorney, if represented, unless the court orders service on the party (W. Va. R. C. P. 5(b) and W. Va. R. C. P. 45(b)(1)).

Deposition Subpoena

For a deposition subpoena, the issuing party must give reasonable notice of the intent to serve the subpoena in writing to every other party to the action. The notice must state:

- The time and place for the deposition.
- The name and address of each person to be examined, if known. If the name is not known, a general description sufficient to identify the person to be examined or the particular class or group to which the person belongs.
- If a subpoena for production is to be served on the person to be examined, the designation of the materials to be produced must be attached to or included in the notice.

(W. Va. R. C. P. 30(b)(1).)

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

A subpoena may be served at any place within West Virginia. However, a subpoena may only command a deponent to attend a deposition:

- In the county where the deponent:
 - resides;
 - works; or
 - does business in person.
- At another convenient place that the court sets.

(W. Va. R. C. P. 45(b)(2), (c).)

Under the West Virginia Uniform Interstate Deposition and Discovery Act, a foreign party may subpoena a West Virginia resident by submitting a foreign subpoena to a court clerk in the county where discovery is sought. After the party submits the subpoena, the clerk must promptly issue a West Virginia subpoena for service on the person to which the foreign subpoena is directed. (W. Va. Code § 56-12-3.) Foreign litigants who seek discovery in West Virginia for actions pending outside of West Virginia can proceed under Rule 45 of the West Virginia Rules of Civil Procedure (W. Va. R. C. P. 28(d)). For more information, see the [Interstate Discovery Chart](#).

Out-of-State Limits on Service

West Virginia subpoenas cannot be served outside the state of West Virginia (W. Va. R. C. P. 45(b)(2)). Therefore, a party wishing to subpoena an out-of-state nonparty witness needs to obtain and serve the witness with a subpoena from a state with jurisdiction over the witness.

Obtaining Discovery Located Outside Issuing Court's Jurisdiction

West Virginia courts have no power to compel out-of-state witnesses to comply with discovery subpoenas issued in West Virginia. A 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. A party may be able to obtain the deposition testimony of an out-of-state witness in accordance with the Uniform Interstate Depositions and Discovery Act if the state where the witness is located has adopted the Act. For more information, see the [Interstate Discovery Chart](#).

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

In West Virginia, if demanded, the party issuing the subpoena must pay fees for one day's attendance and the required mileage (W. Va. R. C. P. 45(b)(1)).

Calculating Fees

If demanded, the party issuing the subpoena must pay the witness:

- Between \$10 and \$20 for each day's attendance.
- \$0.15 per mile necessarily traveled to the place of attendance, and the same for returning.
- All necessary bridge, ferry, and road tolls if demanded.

(W. Va. Code § 59-1-16.)

Form of Fees

West Virginia law does not specify the required form of payment.

Timing

West Virginia law does not specify the required timing of payment.

Consequences for Failure to Pay

West Virginia law does not specifically address the consequences of a failure to pay fees related to a subpoena. However, failure to pay witness fees could form the basis for an objection to a subpoena.

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)?

Good Faith Effort to Resolve Dispute Over Discovery Subpoena

In West Virginia, if a person fails to comply with or objects to a subpoena, the issuing party should first contact the non-party witness or their attorney to attempt to informally resolve any dispute. If a person fails to obey a discovery subpoena without adequate excuse, the issuing party may seek to force compliance by filing either:

- A motion to compel.
- A motion for contempt.

Motion to Compel

If a witness or party fails to comply or objects to any part of the subpoena, the issuing party cannot proceed without an order from the court that issued the disputed subpoena (W. Va. R. C. P. 37(a)(2) and 45(d)(2)(B)). Before the issuing party can move for an order to compel, it must first attempt to confer with opposing counsel (or the opposing party, if unrepresented) to resolve the dispute without court action (W. Va. R. C. P. 37(a)(2)). If the issuing party cannot informally resolve the dispute, it must:

- Give reasonable notice of the motion to other parties and the person commanded to produce.
- Move for an order to compel an answer, designation, or inspection.
- Include a certification that the movant in good faith attempted to informally resolve the discovery dispute.

(W. Va. R. C. P. 37(a) and 45(d)(2)(B).)

Motion for Contempt

A person's failure to obey a subpoena without adequate excuse may be in contempt of the court from which the subpoena issued. A non-party may be excused for failing to obey a subpoena if the subpoena requires the non-party to attend or produce at a place not within the limits provided by Rule 45(c) of the West Virginia Rules of Civil Procedure. (W. Va. R. C. P. 45(f).)

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

Generally, in West Virginia, discovery orders are not immediately appealable because they are interlocutory

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in nature and, therefore, are reviewable only after entry of a final judgment (W. Va. Code § 58-5-1; *State ex rel. US Fidelity & Guar. Co. v. Canady*, 460 S.E.2d 677, 683 (W. Va. 1995)).

However, the West Virginia Supreme Court may grant review of discovery orders in certain exceptional cases, such as when a discovery order involves the probable invasion of confidential materials that are exempt from discovery under either or both:

- Rule 26(b)(1) of the West Virginia Rules of Civil Procedure (attorney-client privilege).
- Rule 26(b)(3) of the West Virginia Rules of Civil Procedure (work-product doctrine).

(*US Fidelity*, 460 S.E.2d at 683.)

Timing of Appeal

An appellant must file a notice of appeal within 30 days of entry of the judgment being appealed. The notice of appeal must be filed in the Office of the Clerk of the Supreme Court. (W. Va. R. App. P. 5(b).)

Standard of Review

Generally, challenged discovery orders are reviewed under an abuse of discretion standard. However, when the challenged order compels disclosure of material alleged to be privileged, the court will conduct “a hard and more stringent examination” of whether there was an abuse of discretion. (*US Fidelity*, 460 S.E.2d at 685.)

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