

## Responding to Discovery Subpoenas: West Virginia

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A Q&A guide on the different ways to respond to a discovery subpoena issued in a West Virginia 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).

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 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 West Virginia, a non-party witness may respond to a subpoena using any of the following methods:

- Complying with the subpoena.
- Serving written objections to a document subpoena within either:
  - 14 days after service of the subpoena; or
  - before the date specified for compliance, if that date is less than 14 days after service.
 (W. Va. R. C. P. 45(d)(2)(B).)
- Moving to quash or modify the subpoena (W. Va. R. C. P. 45(d)(3)(A)).

- Moving for a protective order (W. Va. R. C. P. 26(c)).
- Informally contacting the issuing party or their attorney to resolve any disputes about 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 West Virginia, a witness must produce documents either:

- As they are kept in the usual course of business.
- That are organized and labeled to correspond with the categories listed in the subpoena.

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



A person subpoenaed for documents or to permit inspection of documents does not need to appear in person at the place of production, unless the subpoena also commands the witness's appearance at a deposition, hearing, or trial (W. Va. R. C. P. 45(d)(2)(A)).

If documents are withheld on the basis of a privilege or work product claim, the non-party witness must:

- Make the claim expressly.
- Support it by sufficiently describing the nature of the privileged material so the demanding party can contest the claim.

(W. Va. R. C. P. 45(e)(2).)

In practice, the objecting party typically presents these types of objections in a privilege log.

### Complying with a Deposition Subpoena

A non-party witness served with a deposition subpoena must appear at the time and place stated in the subpoena, but only if the location is either:

- In the county where the witness:
  - lives;
  - works; or
  - does business in person.
- At another convenient place determined by court order.

(W. Va. R. C. P. 45(c).)

A deposition subpoena may also require a non-party witness to bring documents in the witness's possession, custody, or control for use during the deposition (W. Va. R. C. P. 30(b)(1)).

A deposition subpoena and notice must describe with reasonable particularity the matters to be addressed at the deposition when issued to one or more of the following types of organizations:

- A public or private corporation.
- A partnership.
- An association.
- A governmental agency.

A subpoenaed organization must designate one or more representatives who consent to testify on its behalf, and it may set forth for each person designated the matters on which the person will testify to the extent that information is known or reasonably available to the organization. (W. Va. R. C. P. 30(b)(7).)

### 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)?

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. C. P. 45(d)(3)(A)(i)). The reasonableness of time allowed for compliance depends on the circumstances of each case (see *Keplinger v. Va. Elec. and Power Co.*, 537 S.E.2d 632, 644-45 (W. Va. 2000)).

## Objections and Motions

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

In West Virginia, a subpoenaed witness or another party to the case may make several types of objections to discovery subpoenas, including that:

- Service is improper (W. Va. R. C. P. 45(b)).
- The party seeking discovery lacks authority to issue the subpoena (W. Va. R. C. P. 45(a)(2), (3)).
- The subpoena fails to allow reasonable time for compliance (W. Va. R. C. P. 45(d)(3)(A)(i)).
- The subpoena imposes an undue burden or expense (W. Va. R. C. P. 45(d)(1), (d)(3)(A)(iv)).
- The subpoena requires disclosure of trade secrets or other confidential information (W. Va. R. C. P. 45(d)(3)(B)(i)).
- The subpoena requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from a study not requested by any party (W. Va. R. C. P. 45(d)(3)(B)(ii)).
- The subpoena requires disclosure of privileged or otherwise protected information (W. Va. R. C. P. 45(d)(3)(A)(iii)).
- The subpoena commands a deponent to travel to a location other than the county in which the deponent lives, works, or does business in person (W. Va. R. C. P. 45(c)).

- The subpoena would subject the responding party to annoyance, embarrassment, or oppression (W. Va. R. C. P. 26(c)).
- The issuing party failed to pay witness fees (W. Va. R. C. P. 45(b)(1)).
- The subpoena does not substantially conform to Form 33 which the West Virginia Rules of Civil Procedure require (W. Va. R. C. P. 45(a)(1)).

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

#### Informally Contact the Issuing Party

In West Virginia, a non-party witness should first consider contacting the issuing party or their attorney to attempt to informally resolve any dispute.

#### Serve Written Objections

A non-party witness may object to a document subpoena by serving a written objection on the party or attorney designated in the subpoena.

The written objection must be served either:

- Within 14 days after service of the subpoena.
- Before the date specified for compliance, if that date is less than 14 days after service.

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

#### Move to Quash, Condition, or Modify

If a non-party witness makes a timely motion to quash or modify a discovery subpoena, the court must grant the motion if the subpoena:

- Fails to allow reasonable time for compliance.
- Requires a person to travel for a deposition to a place other than the county in which that person lives, works, does business in person, or at a place fixed by order of the court.
- Requires disclosure of privileged or otherwise protected information, and no exception or waiver applies.
- Subjects a person to undue burden.

(W. Va. R. C. P. 45(d)(3)(A).)

If a non-party witness makes a timely motion to quash or modify a discovery subpoena, the court may grant it if the subpoena requires either the disclosure of:

- Trade secrets or other confidential information.
- 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.

(W. Va. R. C. P. 45(d)(3)(B).)

#### Move for a Protective Order

A party may file a motion for a protective order against the issuing party to protect against:

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

(W. Va. R. C. P. 26(c).)

The movant must include a certificate stating that the movant conferred or attempted to confer in good faith with the issuing party to resolve the discovery dispute before moving for a protective order (W. Va. R. C. P. 26(c)).

In deciding a motion for a protective order, a court may, for good cause shown, order that:

- The discovery not be conducted.
- The discovery may be conducted only on specified terms and conditions, including a designation of time or place.
- The discovery may be conducted only by a different method of discovery than originally sought.
- Certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
- The discovery be conducted with no one present except people that the court designates.
- A sealed deposition be opened only by the court's order.
- A trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.
- The parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as the court directs.

(W. Va. R. C. P. 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 West Virginia, a party to an action may object to or make a motion relating to a discovery subpoena in the same manner as a non-party witness (see Question 5).

## Consequences of Failing to Respond

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

In West Virginia, if a non-party witness fails to comply with a subpoena, the issuing party may, upon notice to the subpoenaed witness, move for an order to compel:

- An answer.
- A designation.
- Production.
- Inspection.

The issuing party must include in the motion to compel a statement that the movant attempted in good faith to resolve the issues before filing the motion. (W. Va. R. C. P. 37(a)(2).)

If the court grants the motion and the moving party requests costs and fees, the moving party is, after a hearing, generally entitled to an award of reasonable costs and attorneys' fees from either or both:

- The party whose conduct resulted in the motion to compel.
- The party or attorney who advised the conduct that resulted in the motion to compel.

However, the court may not award expenses in its discretion if any of the following factors exist:

- The movant failed to make a good faith effort to obtain the discovery without court action before filing the motion.
- The opposing party's answer, response, or objection was substantially justified.

- Other circumstances make an award of costs and fees unjust.

(W. Va. R. C. P. 37(a)(4)(A).)

Additionally, if a non-party witness fails to comply with a subpoena without adequate excuse, the court may hold the witness in contempt. 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 of Rule 45(c) of the West Virginia Rules of Civil Procedure. (W. Va. R. C. P. 45(f).)

## 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

West Virginia law does not specify who bears the burden for the costs associated with a non-party's retrieving and duplicating documents and records.

Typically, the responding party pays the reasonable production expenses, but the issuing party must take reasonable steps to avoid imposing an undue burden or expense on the responding party. The court may enforce this duty by imposing sanctions, which may include lost earnings and reasonable attorneys' fees. (W. Va. R. C. P. 45(d)(1).)

To avoid imposing an undue burden or expense, the issuing party may offer to pay the non-party's reasonable costs of production or to apportion the reasonable costs among the issuing party and the non-party.

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

When served with a discovery subpoena, a non-party witness should take measures to preserve relevant documents.

### Intentional Spoliation

West Virginia recognizes an independent tort of intentional spoliation against a third party. The plaintiff in a third-party intentional spoliation case must show:

- A pending or potential civil action.
- The spoliator had actual knowledge of the pending or potential civil action.
- Willful destruction of evidence.
- The spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action.
- The intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action.
- The party's inability to prevail in the civil action.
- Damages.

(*Williams v. Werner Enters.*, 770 S.E.2d 532, 538-39 (W. Va. 2015).)

Once the first six elements are established, a rebuttable presumption arises that the party injured by the spoliation would have prevailed in the litigation if the spoliation had not occurred. The spoliator must overcome the rebuttable presumption or they are liable for damages. (*Williams*, 770 S.E.2d at 538-39.)

### Negligent Spoliation

West Virginia also recognizes an independent tort of negligent spoliation against a third party. The plaintiff in a third-party negligent spoliation case must show:

- A pending or potential civil action.
- The spoliator had actual knowledge of the pending or potential civil action.
- A duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances.
- Spoliation of the evidence.
- The spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action.
- Damages.

(*Mace v. Ford Motor Co.*, 653 S.E.2d 660, 664 (W. Va. 2007).)

Once the first five elements are established, a rebuttable presumption arises that the party injured by the spoliation would have prevailed in the litigation if the spoliation had not occurred. The third-party spoliator must overcome the rebuttable presumption or they are liable for damages. (*Mace*, 653 S.E.2d at 664.)

## 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

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