

# Responding to Discovery Subpoenas: Washington

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

## 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 Washington, a non-party witness may respond to a subpoena by either:

- Complying with the subpoena.
- Serving written objections to a document or inspection subpoena (Wash. Super. Ct. Civ. R. 45(c)(2)(B)).
- Making a motion to quash, condition, or modify the subpoena (Wash. Super. Ct. Civ. R. 45(c)(4)(A)).
- Making a motion for a protective order (Wash. 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 or Inspection Subpoena

In Washington, a non-party witness must produce documents either:

- As they are kept in the usual course of business.
- Organized and labeled to correspond with the categories in the demand.

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

If documents are withheld on the basis of a privilege claim or subject to protection as trial preparation materials, the withholding party must make the claim expressly and support it by a description of

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the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim (Wash. Super. Ct. Civ. R. 45(d)(2)(A)).

Generally, parties should be prepared to negotiate the specifics of privilege logging at Rule 26(f) conferences early on in litigation (Wash. Super. Ct. Civ. R. 26(f)).

A person served with a document or inspection subpoena only needs to appear in person at the place of production or inspection if the person is also commanded to appear for deposition, hearing, or trial (Wash. Super. Ct. Civ. R. 45(c)(2)(A)).

A Washington resident may be required to produce documents or permit inspection only:

- In the county where the person:
  - resides;
  - is employed; or
  - transacts business in person.
- At another convenient place fixed by an order of the court.

(Wash. Super. Ct. Civ. R. 45(e)(2).)

A nonresident of Washington may be required to produce documents or permit inspection only either:

- In the county where the person is served with a subpoena.
- Within 40 miles from the place of service.
- At another convenient place fixed by an order of the court.

(Wash. Super. Ct. Civ. R. 45(e)(2).)

### Complying with a Deposition Subpoena

The witness must appear to testify at the time and place as stated in the subpoena, which may require an in-person or remote appearance (Wash. Super. Ct. Civ. R. 45(a)(1)(C)). However, the issuing party must take reasonable steps to avoid imposing undue burden or expense on the witness. Washington courts enforce this responsibility. (Wash. Super. Ct. Civ. R. 45(c)(1).)

If a person commanded to appear remotely does not have access to the required technology, they must notify the issuing party within five days of receiving the subpoena. The issuing party must then arrange

for access to the technology or issue an amended subpoena for an in-person deposition. (Wash. Super. Ct. Civ. R. 45(c)(3).)

A Washington resident may be required to attend a deposition only either:

- In the county where the person:
  - resides;
  - is employed; or
  - transacts business in person.
- At another convenient place fixed by an order of the court.

(Wash. Super. Ct. Civ. R. 45(e)(2).)

A nonresident of Washington may be required to attend a deposition only either:

- In the county where the person was served with a subpoena.
- Within 40 miles from the place of service.
- At another convenient place fixed by an order of the court.

(Wash. Super. Ct. Civ. R. 45(e)(2).)

However, when a deposition is authorized by the law of another US state, a US territory, or another country, any Washington court may require attendance at any place within the court's jurisdiction (Wash. Super. Ct. Civ. R. 45(e)(4)).

If the non-party witness is an entity, then the entity:

- Must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf.
- May specify, for each person designated, the matters that the individual will testify on.

(Wash. Super. Ct. Civ. R. 30(b)(6).) The designated individual or individuals must testify as to matters known or reasonably available to the entity (Wash. Super. Ct. Civ. R. 30(b)(6)).

**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 Washington, the issuing party of a deposition subpoena must give the non-party deponent and every other party reasonable notice in writing at least five business days before the deposition. Failure to give timely notice may result in sanctions in the deponent's favor, but it is not automatically grounds for quashing the subpoena. (Wash. Super. Ct. Civ. R. 30(b)(1).)

For document and inspection subpoenas, the issuing party must allow a reasonable time for compliance (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(i)). Although the Rules do not explicitly define what a reasonable time is, Wash. Super. Ct. Civ. R. 45(c)(2)(B) provides that a person has 14 days to object to a document or inspection subpoena after it is served, or "before the time specified for compliance if such time is less than 14 days after service," suggesting that 14 days might be a reasonable time for compliance.

### Objections and Motions

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

In Washington, the main grounds for objecting to a discovery subpoena are that the subpoena:

- Fails to allow reasonable time for compliance (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(i)).
- Sets an impermissible place for compliance (Wash. Super. Ct. Civ. R. 45(e)(2)).
- Requires disclosure of privileged or otherwise protected matters and no exception or waiver applies (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(iii)).
- Imposes an undue burden or expense (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(iv)).
- Seeks discovery outside the scope permitted by Wash. Super. Ct. Civ. R. 26(b).
- Requires disclosure of a trade secret or other confidential research, development, or commercial information (Wash. Super. Ct. Civ. R. 45(c)(4)(B)(i)).
- Requires disclosure of information that might tend to incriminate the person in future criminal proceedings (*State v. Brelvis Consulting, LLC*, 436 P.3d 818, 824 (Wash. Ct. App. 2018)).
- Requires 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 (Wash. Super. Ct. Civ. R. 45(c)(4)(B)(ii)).

- Causes annoyance, embarrassment, oppression, or undue burden or expense (Wash. Super. Ct. Civ. R. 26(c), 30(d), and 45(c)(1)).

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

### Serve Written Objections to a Document or Inspection Subpoena

In Washington, a non-party witness may object to a document or inspection subpoena by serving a written objection on the issuing party or attorney either:

- Within 14 days after service of the subpoena.
- If the date for compliance is less than 14 days after service of the subpoena, before the time specified for compliance.

(Wash. Super Ct. Civ. R. 45(c)(2)(B).)

Once the non-party witness makes an objection to a subpoena, the issuing party, on notice to the witness and all other parties, may move for an order to compel production (Wash. Super. Ct. Civ. R. 45(c)(2)(B)).

Failure to timely object to a subpoena can be grounds for finding any objections are waived (*M.M. for O.M. v. Tacoma Sch. Dist. No. 10*, 2023 WL 3250677, at \*3 (W.D. Wash. May 4, 2023)).

### Motion to Quash or Modify

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

- Fails to allow reasonable time for compliance (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(i)).
- Fails to comply with RCW 5.56.010 or Wash. Super. Ct. Civ. R. 45(e)(2).
- Requires an impermissible place for compliance under RCW 5.56.010 or Wash. Super. Ct. Civ. R. 45(e)(2).
- Requires disclosure of privileged or other protected matters and no exception or waiver applies (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(iii)).

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- Subjects a person to undue burden. However, the court may deny a motion on this basis if the party seeking the subpoena advances the reasonable costs of production (Wash. Super. Ct. Civ. R. 45(c)(4)(A)(iv)).

The court may quash or modify the subpoena if it requires disclosure of:

- A trade secret or other confidential research, development, or commercial information.
- An unretained expert's opinion or information not describing specific events or occurrences and resulting from the expert's study made not at the request of either party.

(Wash. Super. Ct. Civ. R. 45(c)(4)(B).)

### Motion for a Protective Order

A non-party witness may move for a protective order to protect the witness from:

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

(Wash. Super. Ct. Civ. R. 26(c).)

For good cause shown, the court may make any order that justice requires, including an order to:

- Deny the discovery request.
- Impose terms and conditions for discovery, including time and place.
- Specify the method of discovery.
- Limit or specify the scope of discovery.
- Designate persons who can be present at a deposition.
- Require a deposition not to be disclosed or be disclosed only in a designated way.
- Require that trade secrets or otherwise confidential information not be disclosed or be disclosed only in a designated way.
- Direct the parties to simultaneously file specified documents or information in sealed envelopes to be opened at the court's direction.

(Wash. Super. Ct. Civ. R. 26(c).)

Before moving for a protective order, the subpoenaed individual or entity must first fulfill the meet and confer requirements of Wash. Super. Ct. Civ. R. 26(i).

### Objections to Remote Depositions

A non-party witness must file a motion to object to a subpoena for a remote deposition within three days of receiving notice (Wash. Super. Ct. Civ. R. 30(b)(7)).

The court may consider the following factors when determining whether the deposition should proceed in-person or remotely:

- The witness's role in the case.
- The complexity of the case.
- Whether remote testimony will prejudice any party or the witness.
- Whether the witness is subject to the court's subpoena power and therefore, whether a party will be able to question the witness in person at another time.
- Whether the mode of deposition serves the purposes of Wash. Super. Ct. Civ. R. 1, to promote a just, speedy, and inexpensive determination of the case.

(Wash. Super. Ct. Civ. R. 30(b)(7).)

### **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 Washington, counsel must meet and confer to attempt to resolve any discovery disputes before moving for a protective order (Wash. Super. Ct. Civ. R. 26(i)).

A party may:

- Move for a protective order.
- Move to quash or modify a subpoena served on a non-party witness.

(Wash. Super. Ct. Civ. R. 26(c) and 45(c)(4); see Question 5: Motion to Quash or Modify and Motion for a Protective Order.)

### Consequences of Failing to Respond

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

In Washington, when a non-party witness fails to comply with an attorney-issued subpoena, the issuing party may make a motion to compel on reasonable notice to the other parties and other affected persons. A motion to compel must be made to the court in the county where the deposition is being taken or where the action is pending and include:

- A showing that the witness failed to respond to the subpoena.
- A certification of compliance with Wash. Super. Ct. Civ. R. 26(i).

(Wash. Super. Ct. Civ. R. 37(a).)

If a non-party witness fails to comply with a subpoena, and the issuing party's motion to compel is granted, the non-party witness may be liable for the issuing party's attorneys' fees and costs related to the motion (Wash. Super. Ct. Civ. R. 37(a)(4)).

A non-party witness who fails to respond to a subpoena after a motion to compel is granted may be subject to contempt of court (Wash. Super. Ct. Civ. R. 37(b) and 45(g)).

Penalties for contempt of court may include the following:

- Imprisonment.
- Forfeiture of up to \$2,000 for each day the contempt continues.
- An order designed to ensure compliance with the previous order.
- Any other remedial sanction, if the court finds that the other sanctions specified in RCW 7.21.030(2)(a) to (c) (preceding) would not terminate the ongoing contempt.

(RCW 7.21.030(2).)

In addition to the remedial sanctions listed in RCW 7.21.030(2), a court may order a person found in contempt of court to pay a party for any losses suffered by the party due to the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees (RCW 7.21.030(3)).

### 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?

Washington law does not specify who has the burden of the costs of production. In practice, the party requesting discovery generally pays the reasonable cost of copying the requested documents.

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

A non-party witness responding to a subpoena to produce documents must produce documents as they are kept in the usual course of business, or they must organize and label them to correspond with the categories of documents requested (Wash. Super. Ct. Civ. R. 45(d)(1)).

Washington does not recognize an independent tort of spoliation (5 Wash. Prac., Evidence Law and Practice § 402.6 (6th ed.)). Washington courts also have not addressed whether a non-party may be liable for spoliation of evidence. However, receipt of a subpoena puts the witness on notice of the obligation to preserve relevant documents. If a witness fails to preserve documents as directed by a subpoena, the witness may be subject to contempt of court (Wash. Super. Ct. Civ. R. 45(g)).

### 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.

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### Appealability

In Washington, an order concerning a discovery subpoena may be appealable if it satisfies certain requirements. For example, a superior court's order may be appealed as of right if the order does all of the following:

- Affects a substantial right.
- Effectively determines the action.
- Prevents a final judgment or discontinues the action.

(Wash. R. App. P. 2.2.)

Typically, orders concerning discovery subpoenas may be submitted for discretionary review, unless otherwise expressly prohibited by a statute or court rule (Wash. R. App. P. 2.3(a); see *Dep't of Soc. & Health Servs. v. Latta*, 601 P.2d 520 (Wash. 1979)).

### Timing of Appeal

Unless an exception under Wash. R. App. P. 3.2(e), 5.2(d), or 5.2(f) applies, notice of appeal must be filed in the trial court within the longer of either:

- 30 days after entry of the trial court's decision that the party filing the notice wants reviewed.

- If a statute states that notice of appeal must be filed within a certain time period, the number of days specified by the statute for initiating review.

(Wash. R. App. P. 5.2(a), (e).)

Unless an exception under Wash. R. App. P. 3.2(e), 5.2(d), or 5.2(f) applies, a notice of discretionary review must be filed within the longer of either:

- 30 days after entry of the trial court's act that the party filing the notice wants reviewed.
- 30 days after the entry of an order deciding a timely motion for reconsideration of that act.

(Wash. R. App. P. 5.2(b).)

### Standard of Review

Washington courts review decisions concerning subpoenas under an abuse of discretion standard. A court abuses its discretion when its decision is based on untenable grounds or reasoning. (*Eugster v. City of Spokane*, 91 P.3d 117, 121 (Wash. Ct. App. 2004).)

However, Washington courts review discovery rulings based on the trial court's interpretation of a statute or judicial decision *de novo* (*Volkert v. Fairbank Constr. Co., Inc.*, 438 P.3d 1203, 1207 (Wash. Ct. App. 2019) (citing *Fellows v. Moynihan*, 285 P.3d 864, 868 (Wash. 2012))).

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