

Responding to Discovery Subpoenas: Oregon

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A Q&A guide on the different ways to respond to a discovery subpoena issued in an Oregon 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](#)).

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Overview of Responding to Discovery Subpoenas

1. Please identify the different ways a nonparty 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 Oregon, a witness may respond to a subpoena by:

- Complying with the subpoena.
- Objecting to the subpoena.
- Making a motion:
 - to quash, modify, or condition the subpoena; or

- for a protective order.

(Or. R. Civ. P. 55(A)(7).)

A party should informally contact the issuing party or its attorney and confer in good faith to resolve any disputes concerning the subpoena before making a motion (UTCR 5.010(2)).

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 nonparty must designate a witness for deposition).

Complying with a Testimonial Subpoena

An individual served with a testimonial subpoena seeking attendance of the witness at a court, for a trial, or for a deposition in Oregon must appear at the time and place specified in the subpoena (Or. R. Civ. P. 55(B)).

A person subpoenaed to testify as a witness must remain until the testimony is closed, unless:

- The witness is discharged.
- The party fails to pay legal witness fees for the following day when requested by the witness.

(Or. R. Civ. P. 55(A)(6)(a), (b).)

Complying with a Document Subpoena

To comply with a document subpoena, the person subpoenaed must produce and permit the inspection and copying of designated books, papers, documents, or tangible things in the possession, custody, or control of the person at the time and place specified in the subpoena (Or. R. Civ. P. 55(C)).

If a subpoena for document production does not also command inspection or a deposition, the subpoenaed person complies by both:

- Producing copies of the items in the specified manner.

- Certifying the copies are true copies of all the items responsive to the subpoena or, if not included, explaining the exclusion of any requested items.

(Or. R. Civ. P. 55(C).)

If the subpoena does not specify the form of producing **electronically stored information** (ESI), the ESI must be produced in a form in which it is:

- Ordinarily maintained.
- Reasonably usable.

(Or. R. Civ. P. 43(E).)

3. How far in advance must the issuing party serve a discovery subpoena on a nonparty 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)?

Testimonial Subpoenas

A party issuing a subpoena requesting a non-party to provide testimony must serve the subpoena within a reasonable time before the appearance date. The Oregon Rules of Civil Procedure do not define "reasonable time," however, the time should be sufficient to allow the witness to both:

- Prepare for the appearance.
- Travel to the place of attendance.

(Or. R. Civ. P. 55(B)(2).)

A subpoena served on a peace officer requiring attendance at trial must be served at least ten days before the date of attendance (Or. R. Civ. P. 55(B)(3)(b)).

Document Subpoenas

The issuing party must serve the subpoena at least 14 days before the compliance date, unless the court shortens the time period (Or. R. Civ. P. 55(C)(3)(b)).

A party seeking hospital or medical records from a practitioner maintaining the records under the practitioner's own possession must provide a 14-day period to allow the individual that is the subject of the subpoena to object before a subpoena can be served on the custodian of the documents ([Or. R. Civ. P. 55\(D\)\(4\)\(a\)\(i\)](#)). If the subpoena is directed at an institution maintaining records separate and apart from the practitioner, the 14-day rule may not apply ([Mitchell v. Mt. Hood Meadows Or.](#), 99 P.3d 748, 753 (Or. Ct. App. 2004)).

The best practice is to provide 14 days' notice to the individual subject to the subpoena before serving any type of hospital or medical records subpoena to avoid an objection.

Objections and Motions

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

In Oregon, common objections to subpoenas include that:

- The subpoena is invalid due to:
 - lack of authority to issue the subpoena;
 - omission of necessary information;
 - improper service; or
 - service without including the required witness fees.

([Or. R. Civ. P. 55\(A\)](#).)

- The subpoena would work a hardship on the witness or otherwise be oppressive, for example, if the party is given insufficient time to respond ([Or. R. Civ. P. 55\(B\)\(2\)](#); [Benchmark Props. v. Hipolito](#), 984 P.2d 927, 929 (Or. Ct. App. 1999)).
- The requests:
 - are vague or ambiguous;
 - are too broad or not relevant;
 - are unduly burdensome; or

- fail to identify with sufficient particularity the information requested.
- The subpoena seeks privileged information or attorney work product ([Or. Rev. Stat. § 40.225](#)).
- The subpoena seeks confidential, commercial, trade secret, or proprietary information. Objections to requests for otherwise discoverable confidential or proprietary information are often accompanied by a motion for a protective order. ([Or. R. Civ. P. 36\(C\)](#).)
- The subpoena seeks private health information that is protected from disclosure by privacy rights ([Or. R. Civ. P. 55\(D\)](#)).

Other objections include that:

- The subpoena makes improper requests for a foreign deposition or subpoena and fails to comply with the requirements of [Or. R. Civ. P. 38\(B\)](#) or [\(C\)](#).
- The subpoena fails to comply with the detailed procedures required for obtaining individually identifiable health information ([Or. R. Civ. P. 55\(D\)](#)).
- Disclosure of individually identifiable health information is restricted or otherwise limited by state or federal law and the requesting party has not complied with the applicable law ([Or. R. Civ. P. 55\(D\)\(3\)](#)).

A party may not object on the grounds that the material sought by a subpoena is inadmissible if the discovery either:

- Appears relevant to a claim or defense.
- Is reasonably calculated to lead to the discovery of admissible evidence.

([Vaughan v. Taylor](#), 718 P.2d 1387, 1390 (Or. Ct. App. 1986).)

5. Please describe when and how a nonparty witness may object to or make a motion relating to a discovery subpoena.

Serve Written Objections

In Oregon, a non-party must object to a document subpoena within 14 days after service. Objections to inspection or copying of the designated materials must be served on the party or attorney designated in the subpoena. If an objection is made, the party serving the subpoena cannot inspect and copy the subpoenaed materials except by court order. In response to any objections,

the party serving the subpoena may move for an order to compel production at any time once it has provided notice to the non-party. (Or. R. Civ. P. 55(A)(7)(a).)

Motions to Quash, Condition, or Modify

A non-party commanded to produce or permit inspection of documents may file a motion to quash or modify the subpoena if it is unreasonable and oppressive. The motion must be made promptly and before the compliance date provided in the subpoena. (Or. R. Civ. P. 55(A)(7)(b).)

A subpoena is generally considered unreasonable or oppressive if it:

- Requires a witness to appear at a time or a place causing the witness great difficulty or inconvenience.
- Would create hardship on the witness or otherwise be oppressive.

(*Benchmark Props.*, 984 P.2d at 929-30.)

A motion to modify the subpoena seeks to change the date, time, or location to accommodate the witness or avoid the unreasonable or oppressive nature of the subpoena (Or. R. Civ. P. 55(A)(7)(b)).

Although not required by the Oregon Rules of Civil Procedure or the Oregon Uniform Trial Court Rules, in practice most courts expect the subpoenaed party and the issuing party to confer in good faith before filing a motion to quash for inconvenience.

Ordinarily, only the person served with the subpoena has standing to move to quash or modify the subpoena, unless another party believes that compliance would jeopardize its own rights (*Vaughan*, 718 P.2d at 1390). A party claiming a personal right or privilege relating to a subpoenaed document has standing to seek to quash (*Matter of Marriage of Boon*, 786 P.2d 215, 217 (Or. Ct. App. 1990)).

A non-party may also make a motion to condition denial of a motion on the issuing party's payment to the responding party the reasonable cost of producing the subpoenaed documents or items (Or. R. Civ. P. 55(A)(7)(b)).

Motion for Entry of a Protective Order

A non-party witness may make a motion for a protective order to limit the scope of a valid subpoena to protect the person or party. A court may, if good cause is shown, issue any order which justice requires, protecting a party or person from annoyance, embarrassment, oppression, or undue burden or expense. (Or. R. Civ. P. 36(C).) The decision to grant or deny a motion for a protective order is discretionary (*Farmers Ins. Grp. of Oregon v. Hansen*, 611 P.2d 696 (Or. Ct. App. 1980)).

A protective order may:

- Deny the discovery request.
- Impose terms and conditions for discovery, including a specified time or place.

- Specify the method of discovery.
- Limit or specify the scope of discovery.
- Designate the persons who can be present during the discovery.
- Seal a deposition so that it may only be opened by court order.
- Deny disclosure of trade secrets or other confidential research, development, or commercial information, or require that it only be disclosed in a designated manner.
- Direct the parties to simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
- Require the requesting party to pay the reasonable expenses incurred by the responding party in attending the deposition or responding to the discovery request.

(Or. R. Civ. P. 36(C).)

Before moving for a protective order, a party should confer in good faith with the opposing party or counsel to comply with the requirements of the Uniform Trial Court Rules ([UTCR 5.010\(2\)](#)).

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 nonparty witness.

In Oregon, 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](#)). Generally, the subpoenaed party brings a motion to quash. A party to the action may bring a motion to quash if:

- The party's rights would be jeopardized in the absence of a protective order.
- The party bringing the motion has an interest or privilege in the information, or the documents sought that would confer standing to bring the motion to quash.

(*Vaughan*, 718 P.2d at 1390; *Marriage of Boon*, 786 P.2d at 217.)

Consequences for Failing to Respond

7. What are the consequences for a nonparty witness' failure to respond to a discovery subpoena?

In Oregon, any person who fails to comply with a subpoena may be found in contempt of the court where the action is pending or by the judge or justice issuing the subpoena ([Or. R. Civ. P. 55\(A\)\(6\)\(d\)](#)).

Considerations for Document Subpoenas

8. For a document subpoena issued to a nonparty witness, who has the burden of the costs associated with retrieving and duplicating the documents and records?

The Oregon Rules of Civil Procedure do not specify which party bears the cost of compliance with a document subpoena. Generally, the person or entity served with a document subpoena is responsible for the costs of the production. However, on a motion made before the time for compliance specified in the subpoena, a court may:

- Quash or modify a subpoena if it is unreasonable or oppressive.
- Condition the denial of the motion on whether the issuing party advances the reasonable cost of producing the documents or records requested.

([Or. R. Civ. P. 55\(A\)\(7\)\(b\)](#).)

If the subpoena recipient is a financial institution, it may require the requesting person to reimburse the financial institution for the reasonable costs that may be incurred in the course of complying with a subpoena before producing documents or making any disclosures ([Or. Rev. Stat. § 192.805](#)). The following charges are considered reasonable:

- **Personnel costs.** \$30 per hour per person, on the basis of a rate of \$7.50 per quarter hour, for time expended by personnel of the financial institution in searching, locating, retrieving, copying, and transporting the requested material to the place of examination.

- **Reproduction costs.** \$1 per page, including copies produced by reader and printer reproduction processes. Photographs, films, and other materials must be reimbursed at actual cost.
- **Travel expenses.** 50 cents per mile plus other actual costs necessary to transport personnel to locate and retrieve the information requested, and to convey the material to the place of examination.

(Or. Rev. Stat. § 192.805.)

When the financial institution is a named party to the litigation in which the subpoena was issued, [Or. Rev. Stat. § 192.805](#) does not apply ([Or. Rev. Stat. § 192.810](#)).

9. What are the obligations of a nonparty witness to preserve documents when responding to a discovery subpoena?

Oregon does not have relevant case law specifying when a subpoenaed individual's obligation to preserve documents and information begins and ends. Receiving a subpoena would likely trigger an obligation to preserve evidence, however, the facts of each situation may trigger an earlier date. A subpoenaed individual may seek release from the duty to preserve evidence from the issuing party after compliance with the subpoena. Any release should be in writing.

Case law is unclear whether Oregon recognizes an independent tort for **spoliation** of evidence (*Classen v. Arete NW, LLC*, 294 P.3d 520, 523-24 (Or. Ct. App. 2012).) However, a non-party that fails to comply with a subpoena may still be subject to punishment for contempt of court and other sanctions ([Or. R. Civ. P. 55\(A\)\(6\)\(d\)](#).)

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

A party may immediately appeal an order involving a subpoena by filing a petition for a writ of **mandamus** (*Assisted Living Concepts, Inc. v. Fellows*, 260 P.3d 726 (Or. Ct. App. 2011)). Strictly speaking, a mandamus proceeding is not an appeal but an original proceeding in the Oregon Supreme Court. Writs are granted sparingly. (Or. Const., art. VII (Amended), § 2; Or. Rev. Stat. §§ 34.110 and 34.250.)

Timing of Appeal

The equitable doctrine of **laches** governs the time period for a party to file a petition for mandamus relief. A party must file within the statutory limitations period, generally 30 days, required for filing an appeal (*State v. Peekema*, 976 P.2d 1128, 1131 (Or. 1999)).

Standard of Review

In exercising its mandamus authority, the court analyzes whether the trial court either:

- Committed a fundamental legal error.
- Acted outside the permissible range of discretionary choices.

(*Longo v. Premo*, 326 P.3d 1152, 1156 (Or. 2014).)