

# Responding to Discovery Subpoenas: Maryland

EZRA S. GOLLOGLY AND LOUIS P. MALICK, KRAMON & GRAHAM PA, WITH PRACTICAL LAW LITIGATION

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

How a non-party witness responds to a discovery subpoena depends on the type of discovery sought.

### SUBPOENA FOR DEPOSITION AND TO PRODUCE DOCUMENTS AT A DEPOSITION

A non-party witness may respond to a deposition subpoena by:

- Complying.
- Moving for a protective order under Md. Rule 2-403 (Md. Rule 2-510(f) and 3-510(f)).
- Filing with the court a written objection to the production of any or all of the requested materials within ten days after service of the subpoena. If an objection is timely filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. (Md. Rule 2-510(f) and 3-510(f).)

If the subpoena seeks electronically stored information (ESI), the non-party witness may decline to produce material on the grounds that the sources of ESI are not reasonably accessible because of undue burden or cost (Md. Rule 2-510(g)(2)). A non-party witness declining to produce ESI on these grounds must:

- Identify the sources the witness claims are not reasonably accessible.
- State the reasons why production from each identified source would cause undue burden or cost.

(Md. Rule 2-510(g)(2).)

### SUBPOENA TO ENTER AND INSPECT PROPERTY

If a subpoena seeks entry upon designated land or property, a non-party witness may respond by:

- Complying.
- Filing an objection with the court within 30 days after service of the subpoena and serving the objection on the requesting party. After an objection is filed, entry upon the designated land or property is not permitted unless the court grants a motion to compel by the requesting party. (Md. Rule 2-422.1(f)(1).)

## 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 SUBPOENA FOR DEPOSITION

A non-party witness complies with a deposition subpoena by attending the deposition and testifying at the requested time and place.

If a deposition subpoena names an organization as a deponent and describes with reasonable particularity the topics on which an examination is requested, the organization named must designate one or more officers, directors, managing agents, or other persons to testify on the topics described and may set forth the topics on which each designated person will testify. The designated persons

must testify as to matters known or reasonably available to the organization. (Md. Rule 2-412(d).)

### COMPLYING WITH A SUBPOENA TO PRODUCE DOCUMENTS OR ESI AT DEPOSITION

If the deposition subpoena includes a request to produce documents, ESI, or other information at a deposition, a non-party witness must:

- Produce the documents or information:
  - as they are kept in the usual course of business; or
  - organized and labeled to correspond with categories in the subpoena.
- Produce ESI:
  - in the form specified in the subpoena; or
  - if the subpoena does not specify a form, in the form in which the person ordinarily maintains it or in a form that is reasonably usable.

(Md. Rule 2-510(g)(1).) The witness need not produce the same ESI in more than one form (Md. Rule 2-510(g)(2)).

### COMPLYING WITH A SUBPOENA SEEKING MEDICAL, MENTAL HEALTH, OR FINANCIAL RECORDS

Health care providers and fiduciary institutions have special obligations in responding to a subpoena seeking production of medical, mental health, or financial records. The requesting party must provide the person whose records are being sought notice and an opportunity to object to disclosure before the records are disclosed. (See, for example, Md. Code Ann., Health-Gen. §§ 4-306 and 4-307; Md. Code Ann., Fin. Inst. § 1-304.) Health care providers and fiduciary institutions may face penalties for unauthorized disclosure and should consult with counsel upon receipt of a subpoena seeking such records.

#### 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 Maryland Rules specify the following time frames for service:

- A deposition subpoena must be served on the non-party at least ten days before the date of the deposition (Md. Rule 2-412(a)).
- A subpoena to produce documents or tangible things at a deposition must be served on the non-party at least 30 days before the date of the deposition (Md. Rule 2-412(c)).
- A subpoena to enter and inspect property must be served at least 45 days before the date of a requested entry (Md. Rule 2-422.1(e)).

Additionally, the issuing party may not serve a subpoena more than 60 days after the date of issuance (Md. Rule 2-510(c) and 3-510(c)).

### OBJECTIONS AND MOTIONS

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

A non-party witness may object to a discovery subpoena on the following grounds:

- The information sought is privileged or otherwise protected from disclosure.
- The information sought pertains to a trade secret or other confidential research, development or commercial information.
- The information sought is not relevant to the subject matter of the action.
- The ESI sought is not reasonably accessible because of undue burden or cost.
- The discovery would result in annoyance, embarrassment, oppression, or undue burden or expense to the non-party witness.

(See Md. Rule 2-402(a), 2-403(a), and 2-510(f), (g)(2).) Any objection to the form of a deposition notice is waived unless promptly served in writing on the discovering party. (Md. Rule 2-412(e).)

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

Depending on the type of discovery subpoena, a non-party witness may generally file a motion for a protective order or a written objection.

### PROTECTIVE ORDER

A non-party witness may file a motion for a protective order in response to a subpoena for a deposition or to produce documents at a deposition, or for an inspection of property (Md. Rule 2-403(a), 2-510(f), and 3-510(f)).

The motion must set out specific facts showing that some injustice, prejudice, or consequential harm will result if protection is denied (*Tanis v. Crocker*, 678 A.2d 88, 95 (Md. Ct. Spec. App. 1996)). For good cause shown, a court may enter an order that disallows or limits discovery to protect the non-party from:

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

(Md. Rule 2-403(a), 2-510(f), and 3-510(f).)

Before filing a motion for protective order, the movant must make a good faith effort to informally resolve the dispute with the opposing attorney. The movant must include with the motion a certificate:

- Describing the good faith attempts to discuss with the opposing attorney the resolution of the dispute.
- Certifying that they are unable to reach agreement on the disputed issues.
- Detailing the date, time, and circumstances of each discussion or attempted discussion.

(Md. Rule 2-431.)

### WRITTEN OBJECTION

A non-party witness may file a written objection in response to subpoenas to produce material at a deposition or subpoenas to enter and inspect property.

For subpoenas to produce material at a deposition, a non-party witness may file an objection to the production of any or all of the

designated material, within ten days of service of the subpoena (Md. Rule 2-510(f) and 3-510(f)). The objection must:

- Be in writing.
- State the reasons for the objection.
- Be filed with the court.
- Be supported by a description of each item withheld that is sufficient to enable the demanding party to evaluate the claim, if the objection is based on a claim of privilege or work product protection.

(Md. Rule 2-510(f) and 3-510(f).) A timely-filed objection suspends the witness's obligation to produce the requested materials, but does not suspend the obligation to appear for a deposition (Md. Rule 2-510(f) and 3-510(f)).

For subpoenas to enter and inspect property, a non-party witness may object by both:

- Filing an objection with the court within 30 days after service of the subpoena.
- Serving the objection on the requesting party.

(Md. Rule 2-422.1(f)(1).) After a non-party files an objection, the requesting party may not enter the designated land or property unless the court grants a motion to compel by the requesting party (Md. Rule 2-422.1(f)(1)).

**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.**

A party may move for a protective order to protect either the party or a non-party witness from annoyance, embarrassment, oppression, or undue burden or expense (Md. Rule 2-403(a)). If a party is named or depicted in an item requested in a discovery subpoena, that party may also file either:

- A motion for protective order.
- A written objection filed within 10 days of service of the subpoena.

(Md. Rule 2-510(f) and 3-510(f).)

For subpoenas to enter and inspect property, any person, including a party, who claims an interest in the land or property may object to the entry by both:

- Filing an objection with the court within 30 days after service of the subpoena.
- Serving the objection on the requesting party.

(Md. Rule 2-422.1(f)(1).)

A party or other person whose medical, mental health, or financial records are sought has statutory rights to notice of the subpoena and a specified opportunity to object to disclosure (see, for example, Md. Code Ann., Health-Gen. §§ 4-306 and 4-307; Md. Code Ann., Fin. Inst. § 1-304).

## CONSEQUENCES FOR FAILING TO RESPOND

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

If a non-party witness fails to respond to a discovery subpoena, the witness may be subject to a motion to compel or may be sanctioned or held in contempt by the court.

## MOTION TO COMPEL

The discovering party may move for an order compelling discovery from a non-party witness if the witness:

- Fails to answer a question asked in an oral or written deposition (Md. Rule 2-432(b)(1)(B)).
- Fails to produce designated documents without filing a written objection (Md. Rule 2-432(b)(1)(C)).
- Refuses to permit or objects to entry on designated land (Md. Rule 2-422.1(f)(2)).
- Fails to attend a deposition (see *Coe v. Bass*, 537 A.2d 643, 645 (Md. Ct. Spec. App. 1988)).

If the court grants the motion to compel, the court, after opportunity for a hearing, must require that the deponent, the deponent's attorney, or both pay to the moving party the reasonable costs and expenses incurred in obtaining the order to compel, including attorney's fees, unless:

- The court finds that the opposition to the motion was substantially justified.
- Other circumstances make an award of expenses unjust.

(Md. Rule 2-433(d).)

## MOTION FOR SANCTIONS

The discovering party may file a motion for sanctions if a non-party fails to obey an order compelling discovery (Md. Rule 2-433(c)). A non-party witness who fails to respond to a subpoena may also be subject to body attachment (civil arrest) and a fine for failure to obey the subpoena without sufficient excuse (Md. Rule 2-510(j) and 3-510(i)).

## CONTEMPT

A non-party witness who fails to comply with an order compelling discovery may be held in contempt of court (Md. Rule 2-433(c) and 15-206).

## 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?**

The Maryland Rules do not specify who has the burden of bearing the costs of complying with a subpoena for documents. The issuing party and the issuing party's attorney, however, must take reasonable steps to avoid imposing undue burden or cost on the person subject to a subpoena (Md. Rule 2-510(h)). In practice, the subpoena recipient typically bears the costs.

Should a non-party witness file a motion for a protective order, the court may allocate discovery costs and expenses (Md. Rule 2-403(a)(3)).

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

Maryland law does not expressly require that a non-party witness has a duty to preserve documents. The receipt of a discovery subpoena, however, would likely trigger a duty to preserve. A non-party witness should take measures to preserve documents when served with a document subpoena to avoid being held in contempt of court.

**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**

Parties generally cannot appeal interlocutory discovery orders except under extremely limited circumstances, under the collateral order doctrine, where the order:

- Conclusively determines the disputed question.
- Resolves an important issue.
- Resolves an issue that is completely separate from the merits of the action.
- Would be effectively unreviewable on appeal from a final judgment.

(*St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 896 A.2d 304, 310 (Md. 2006).)

A non-party witness, however, may appeal an adverse discovery order because it is effectively a final disposition with respect to that appellant (*St. Joseph Med. Ctr., Inc.*, 896 A.2d at 313; *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 860 (Md. Ct. Spec. App. 2006)).

**TIMING OF APPEAL**

A notice of appeal must be filed with the circuit court within 30 days after the entry of the order from which the appeal is taken (Md. Rule 8-202; Md. Code Ann., Cts. & Jud. Proc. § 12-401(e)).

**STANDARD OF REVIEW**

The standard of review is abuse of discretion (see *Forensic Advisors, Inc.*, 907 A.2d at 861 n.6).

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