

Drafting and Issuing Subpoenas: New Jersey

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A Q&A guide to drafting, issuing, serving and enforcing a subpoena in a New Jersey civil proceeding. This Q&A addresses the state statutes and rules governing subpoenas, the types of subpoenas available, the requirements for drafting and serving a subpoena, and the methods of enforcing a subpoena.

OVERVIEW OF STATE SUBPOENAS

1. What are the laws or rules in your jurisdiction that generally govern subpoenas?

The main law governing civil subpoena practice in New Jersey is the New Jersey Rules of Court. Most key subpoena rules are contained in the following sections of the New Jersey Rules of Court:

- Part I (rules of general application), specifically:
 - Rule 1:9-1 (attendance of witnesses; forms; issuance; notice in lieu of subpoena);
 - Rule 1:9-2 (production of documentary evidence and electronically stored information; notice in lieu of subpoena);
 - Rule 1:9-3 (service);
 - Rule 1:9-4 (place of service); and
 - Rule 1:9-5 (failure to appear).
- Part II (rules governing the state appeals courts), specifically:
 - Rule 2:2-4 (appeals to the Appellate Division from interlocutory orders, decisions or actions);
 - Rule 2:4-2 (time for cross appeals and appeals by respondents);
 - Rule 2:5-6 (appeals from interlocutory orders, decisions and actions); and
 - Rule 2:8-1 (motions).

- Part IV (rules governing civil practice), specifically:
 - Rule 4:4-4 (summons; personal service; in personam jurisdiction);
 - Rule 4:10-2 (scope of discovery; treating physician);
 - Rule 4:10-3 (protective orders);
 - Rule 4:11-5 (depositions outside the state);
 - Rule 4:14-2 (notice of examination; general requirements; deposition of organization); and
 - Rule 4:14-7 (subpoena for taking depositions).
- Rule 5:5-1 (discovery in the New Jersey Superior Court, Chancery Division, Family Part).
- Rule 6:7-2 (orders for discovery; information subpoenas in the New Jersey Superior Court, Law Division, Special Civil Part).
- Rule 7:7-8 (subpoenas in municipal court proceedings).

Statutory rules may also apply, for example, Sections 1:1-11.1 to 1:1-11.5 of the New Jersey Administrative Code (subpoenas in administrative agency proceedings).

2. Please identify and describe the different types of subpoenas available in your jurisdiction.

TESTIMONIAL SUBPOENA

A testimonial subpoena (subpoena *ad testificandum*) requires a witness to appear and give testimony at a specific time and place (*N.J. Ct. R. 1:9-1*). The subpoena can compel a witness to attend a:

- Trial (*N.J. Ct. R. 1:9-1*).
- Deposition in the course of discovery (*N.J. Ct. R. 4:14-7*).

DOCUMENT SUBPOENA

A document subpoena (subpoena *duces tecum*) requires the person to whom it is directed to produce books, papers, documents, electronically stored information (ESI) or other tangible evidence (*N.J. Ct. R. 1:9-2*).

INFORMATION SUBPOENAS

An information subpoena may be used when enforcing judgments to gather information from a judgment-debtor or another party that may have relevant information (*N.J. Ct. R. 6:7-2*).

3. Who has the authority to issue a subpoena?

A subpoena may be issued by either:

- The clerk of the court.
- An attorney.
- A party in the name of the clerk.

(*N.J. Ct. R. 1:9-1*.)

Practitioners most commonly issue subpoenas by signing the subpoena in the name of the clerk.

In certain specialized proceedings, the following may also issue subpoenas:

- Judicial officers and sometimes law enforcement officers in municipal proceedings (*N.J. Ct. R. 7:7-8*).
- Judges and non-lawyer party representatives in administrative proceedings (*N.J. Admin. Code § 1:1-11.1*).
- Arbitrators in arbitration proceedings (*N.J. Stat. Ann. § 2A:23B-17*).

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

Leave of court is generally not required to issue a subpoena. However, specific subpoena procedures require permission from the court, including:

- An information subpoena to certain third-party entities in connection with enforcing a judgment (*N.J. Ct. R. 6:7-2(b)(2)*).
- Subpoenas directed to witnesses outside New Jersey (see *Question 11*).

DRAFTING A STATE SUBPOENA

5. What information must be included in a subpoena?

All subpoenas must contain the following information:

- The filing attorney's:
 - name;
 - New Jersey Bar ID number; and
 - contact information.
- The case caption, including:
 - the name of the court;
 - the title of the action; and
 - the type of subpoena (for example, subpoena *ad testificandum*).
- A command for the witness to appear at a specified time and place.
- The signature of either:
 - the issuing attorney;
 - the clerk of the court; or
 - the party signing in the name of the clerk.

(*N.J. Ct. R. 1:9-1*.)

Testimonial subpoenas compelling a witness' attendance at a deposition must comply with the procedural requirements for deposition notices and must contain:

- The name and address of each person to be examined (*N.J. Ct. R. 4:14-2(a)*).
- If the witness' name is not known, either:
 - a general description sufficient to identify the person (for example, a company's records custodian); or
 - a request that a corporate or business entity designate the person most knowledgeable about a particular topic.
 (*N.J. Ct. R. 4:14-2(a), (c)*.)
- A command that the witness appear at the deposition and bring the requested documents (*N.J. Ct. R. 4:14-2(d)*).
- A description of the documents, books, papers or tangible evidence sought.
- If applicable, a statement that the deposition will be audiovisually recorded (*N.J. Ct. R. 4:14-9*).

Document subpoenas issued to a non-party witness must:

- Compel that witness to attend a deposition.
- Comply with the procedural requirements for deposition notices.
- Instruct the witness not to release the subpoenaed evidence:
 - before the deposition date; and
 - if a motion to quash has been filed, unless the witness has been ordered to do so by the court or all parties consent to disclosure.
 (*N.J. Ct. R. 4:14-7(c)*.)

In the document subpoena, a practitioner may:

- Inform the witness of the option to produce the documents by mail, if the practitioner is interested only in receiving the documents.
- Compel the deposition testimony of a witness where, for example, the records custodian is needed to authenticate the documents produced.

Information subpoenas issued as part of post-judgment enforcement efforts must:

- Follow the prescribed form of questions.
- Include an appropriate certification.

(*N.J. Ct. R. 6:7-2(b)*.)

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

The standard form for subpoenas are available at the New Jersey Courts website, specifically:

- Testimonial subpoenas.
- Document subpoenas.
- Information subpoenas directed at:
 - a party (for example, judgment debtors); or
 - a third party (for example, banks).

SERVING A STATE SUBPOENA

7. Who may serve a subpoena?

A subpoena may be served by any person who is at least 18 years old. New Jersey requires personal service of subpoenas. (*N.J. Ct. R. 1:9-3.*)

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

Individuals traveling to or through New Jersey to testify in a civil or criminal proceeding as required by a summons are not subject to service of process, including service of a subpoena, on matters that arose before the individual arrived in New Jersey under the summons (*N.J. Stat. Ann. § 2A:81-21*).

There are special service of process rules for out-of-state witnesses and foreign corporations (see *Question 11*).

9. Please indicate the minimum time frame, if any, in which the issuing party may demand compliance with a subpoena.

Witnesses should generally be given a reasonable amount of time to respond to a subpoena, particularly if the subpoena requires production of documentary evidence (*4 N.J. Prac., Civil Practice Forms § 50:3*).

Certain subpoenas issued during civil litigation have minimum notice requirements. A practitioner must provide:

- At least **ten days** notice to witnesses and other parties for a deposition (*N.J. Ct. R. 4:14-2*). This includes document subpoenas, which simultaneously compel attendance at a deposition (*N.J. R. 4:14-7(c)*).
- For a subpoena for the audiovisually-recorded deposition testimony of an expert witness or treating physician, at least 30 days notice after the witness issues the expert report if the parties intend to use the deposition in lieu of trial testimony (*N.J. Ct. R. 4:14-9*).
- At least **30 days** notice for document requests issued to parties (*N.J. Ct. R. 4:14-2(d)* and *4:18-1*). However, the 30-day notice rule does not appear to apply to non-party witnesses, who must only be given a reasonable time to respond (*42 N.J. Prac., Discovery § 4.63*; *4 N.J. Prac., Civil Practice Forms § 50:3*).

10. How is a subpoena served?

A practitioner must first have the subpoena personally served on the witness and tender the appropriate witness fee (*N.J. Ct. R. 1:9-3*). The process server must fill out an appropriate affidavit of service (*N.J. Ct. R. 4:4-7*). Additionally, for a deposition subpoena, the issuing party must provide a copy of the subpoena to all parties (*N.J. R. 4:14-2(a)*).

If the subpoena is directed to:

- A partnership or unincorporated association, it must be served on:
 - an officer;
 - a managing agent; or
 - a general partner, if the entity is a partnership.

- A corporation, it must be served on:
 - an officer;
 - a director;
 - a trustee;
 - a managing or general agent;
 - any person authorized to receive service of process on behalf of the corporation; or
 - if service cannot be made on any of those persons, an individual specified in Rule 4:4-4(a)(6) of the New Jersey Rules of Court.
- The State of New Jersey, it must be served by personal delivery to:
 - the Attorney General; or
 - the Attorney General's designee named in a document filed with the Clerk of the Superior Court.
- Other public bodies, it must be served on:
 - the presiding officer; or
 - the clerk or secretary.

(*N.J. Ct. R. 4:4-4.*)

Parties to an action may be served by notice to counsel in lieu of a subpoena (*N.J. Ct. R. 1:9-1*).

11. Are there any territorial limits for service of a 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

Subpoenas may be served any place in the state of New Jersey (*N.J. Ct. R. 1:9-4*). However, this does not mean that a witness can be compelled to testify at any place in the state (see *State Q&A: Responding to Subpoenas: New Jersey* (www.practicallaw.com/5-569-5525)).

OUT-OF-STATE LIMITS ON SERVICE

Parties to an action may be subpoenaed to appear at a deposition regardless of where they are (see *42 N.J. Prac., Discovery § 4.62*). A court has the inherent authority to compel non-resident parties to appear but must first establish that it has jurisdiction over the parties. For non-resident corporations, the court must satisfy a traditional minimum contacts analysis. (*Waste Mgmt. v. Admiral Ins. Co.*, 649 A.2d 379, 386-87 (*N.J. 1994*)). New Jersey subpoenas cannot be served on out-of-state, non-party witnesses. Subpoenas for out-of-state, non-party witnesses must follow one of the specialized discovery procedures (see *Out-of-state, Non-party Witness Discovery*).

OUT-OF-STATE, NON-PARTY WITNESS DISCOVERY

The best method to subpoena out-of-state, non-party witnesses is through agreement and stipulation of the parties (see *N.J. Ct. R. 4:11-5*).

If stipulation is not possible, parties may subpoena out-of-state, non-party witnesses through a letter rogatory or a commission (*N.J. Ct. R. 4:11-5*; *42 N.J. Prac., Discovery § 4.73*).

A practitioner may use a letter rogatory or a commission to subpoena witnesses in foreign countries (*N.J. Ct. R. 4:12-3*). However, if a non-party witness is not subject to a New Jersey court's subpoena power, then the Hague Convention on the Taking of Evidence Abroad applies (*Knight v. Ford Motor Co.*, 615 A.2d 297, 298 n.1 (*N.J. Super. Ct. Law Div. 1992*); 28 U.S.C. § 1781). Information on the Hague Convention, including sample forms of request letters, can be found at 28 U.S.C. Section 1781.

12. What are the applicable witness fees in your state? In particular, please describe:

- How the fees are calculated.
- In what form fees are paid.
- When the fees must be paid.
- The consequences for failing to pay the fees.

APPLICABLE FEES

On service of a subpoena, non-party witnesses must be paid:

- A witness fee.
- A mileage fee, if the witness is to attend court in a different county from where the witness resides, is employed or does business in person.

(*N.J. Stat. Ann. § 22A:1-4*; see *Calculating Fees*.)

A non-party must be reimbursed for out-of-pocket expenses and loss of pay resulting from testifying or attending a deposition (*N.J. Ct. R. 4:14-7(b)(1)*).

An expert witness must be paid reasonable fees for time spent:

- Preparing for a deposition, which is paid by the proponent of the expert.
- Attending the deposition, which is paid by the party taking the deposition.

An expert or treating physician who resides or works in New Jersey is entitled to travel time and expenses (paid by the party taking the deposition) unless the deposition take place at the witness's residence or business. (*N.J. Ct. R. 4:10-2*.)

The proponent of an expert witness or treating physician who does not reside or work in New Jersey must either:

- Produce the witness at the proponent's expense.
- Pay the reasonable travel and lodging expenses of all parties to attend the witness' out-of-state deposition.

(*N.J. Ct. R. 4:14-7*.)

CALCULATING FEES

A witness must be paid \$2.00 per day of attendance (*N.J. Stat. Ann. § 22A:1-4*). Additionally, if the witness must attend court in a different county from where the witness resides, the witness is entitled to a mileage fee of \$2.00 for every 30 miles of travel (*N.J. Stat. Ann. § 22A:1-4*).

FORM OF FEES

There is no prescribed form of payment for witness fees. In practice, attorneys frequently rely on professional process servers to calculate and pay appropriate witness fees.

TIMING

Witness fees must be paid at the time of service (*N.J. Ct. R. 1:9-3*).

CONSEQUENCES FOR FAILURE TO PAY

Failure to pay witness fees may result in defective service and may be grounds to object to the subpoena.

13. What notice must be provided to other parties that a subpoena has been served?

All parties must be given notice of a subpoena and be sent a copy of the subpoena (*N.J. Ct. R. 4:14-2*). This requirement also applies to a document subpoena issued during discovery, which must also compel the witness' attendance at the deposition (*N.J. Ct. R. 4:14-7(c)*). A party must provide at least:

- Ten days' notice of a deposition (*N.J. Ct. R. 4:14-7(c)*).
- Five days' notice before trial for testimonial subpoenas relating to trial testimony (*N.J. Ct. R. 1:9-1*).

ENFORCING A STATE SUBPOENA

14. What are the available methods for enforcing a subpoena?

If a witness fails to appear to testify, a party may file an order to show cause to request that the court bring contempt proceedings against the witness. The order must be supported by an affidavit and the party must provide notice to the witness. (*N.J. Ct. R. 1:9-5*.)

The court may enforce a subpoena by:

- Imposing fines.
- Awarding damages.
- Holding the non-complying party in contempt.
- Issuing an arrest warrant for the non-complying party.

(*N.J. Stat. Ann. § 2A:81-15*; *N.J. Ct. R. 1:10-2*.)

A court may hold a witness in contempt if the witness:

- Is uncooperative (for example, refusing to answer questions at a deposition) (*N.J. Ct. R. 4:23-2(a)*).
- Refuses to comply with a court discovery order (*N.J. Ct. R. 4:23-2(b)*).

If a **party** fails to comply with a discovery request, the court may issue an order for any of the following:

- Taking certain facts as established for the purposes of the action according to the claim of the party obtaining the order.
- Refusing to allow the disobedient party to support or oppose designated claims or defences.
- Prohibiting the disobedient party from introducing certain items into evidence.
- Striking pleadings or parts of pleadings.
- Staying further proceedings until the order is obeyed.
- Dismissing the action or rendering a default judgment against the disobedient party.

(*N.J. Ct. R. 4:23-2(b)*.)

15. May a court's decision concerning a subpoena be appealed? If so, please indicate: •

- When the decision may be appealed.
- The standard of review for an appeal.

TIMING OF APPEAL

Court decisions concerning subpoenas are interlocutory orders, which are subject to the appeals requirements of Rule 2:5-6 of the New Jersey Rules of Court. Interlocutory appeals first require that a party move for leave to appeal (*N.J. Ct. R. 2:8-1*). Parties must file a notice of motion for leave to appeal with both the trial court and the appeals court within 20 days of the date of service of the appealed order (*N.J. Ct. R. 2:5-6*). If a party files a motion for reconsideration of the order with the trial court, the deadline is extended to 20 days following the service of the order deciding the motion for reconsideration (*N.J. Ct. R. 2:5-6*).

STANDARD OF REVIEW

The Appellate Division may grant leave to appeal an interlocutory order "in the interest of justice" (*N.J. Ct. R. 2:2-4*).

Although the Appellate Division has considerable discretion to grant leave to appeal, in practice the court exercises the power sparingly (*Brundage v. Estate of Carambio, 951 A.2d 947, 961 (N.J. 2008)*). Courts rarely grant a leave to appeal for discovery matters (*40 N.J. Prac., Appellate Practice and Procedure § 5.7 (2d ed.)*).

In reviewing subpoena decisions, appellate courts apply a deferential abuse of discretion standard (*In re Subpoena Duces Tecum on Custodian of Records, Criminal Div. Manager, Morris Cnty., 68 A.3d 308, 317 (N.J. 2013)*).

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