

Responding to Discovery Subpoenas: Alabama

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

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

- Complying with the subpoena.
- Serving written objections to a subpoena for production or inspection at any time before the time specified for compliance (Ala. R. Civ. P. 45(c)(2)(B)).
- Informally contacting the issuing party or their attorney to resolve disputes concerning the subpoena.
- Moving to quash or modify the subpoena (Ala. R. Civ. P. 45(c)(3)(A)).
- Moving for a protective order (Ala. R. Civ. P. 26(c)).

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).

Subpoena for Production or Inspection of Premises

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

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

(Ala. R. Civ. P. 45(d)(1).)

If a subpoena demands electronically stored information (ESI) but does not specify the form for producing the ESI, the person must produce the ESI

as it is ordinarily maintained or in a reasonably usable form (Ala. R. Civ. P. 45(d)(3)). The rules do not require the person to produce the same ESI in more than one form (Ala. R. Civ. P. 45(d)(4)).

A subpoena may provide the option to deliver or mail copies of the requested documents or materials to the issuing party, but the responding person may condition the preparation of copies on the advance payment of reasonable copying costs (Ala. R. Civ. P. 45(a)(3)(C)).

A person responding to a subpoena may serve a written objection to the person or attorney designated in the subpoena objecting to producing some or all of the designated materials. (Serve means mailing.) If objection is made, the party serving the subpoena is not entitled to access to the materials requested in the subpoena except under a court order. If an objection is made, the party serving the subpoena may (on notice to the person commanded to produce) move the court for an order compelling compliance by the responding person. (Ala. R. Civ. P. 45(c)(2)(B).)

If a person withholds documents based on a privilege claim, the person must make the claim expressly and support it by a description of the nature of the privileged material sufficient to enable the demanding party to contest the claim (Ala. R. Civ. P. 45(d)(2)).

To comply with a subpoena for inspection, the person subpoenaed must permit inspection at the time and place specified (Ala. R. Civ. P. 45(a)(1)(c)).

The person producing documents or tangible items or permitting inspection does not need to appear in person at the place of production or inspection unless the subpoena also commands the person to appear for deposition (Ala. R. Civ. P. 45(c)(2)(a)).

Subpoena for Testimony

A non-party witness served with a deposition subpoena must appear at the time and place stated in the subpoena (Ala. R. Civ. P. 30(b)(1) and 45(a)(1)(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 examination (Ala. R. Civ. P. 30(b)(1) and 45(a)(1)(C)).

The entity subpoenaed for deposition must designate at least one representative to testify on its behalf, to the extent that information is known or reasonably available to the entity (Ala. R. Civ. P. 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)?

Under Alabama law, a party must serve the subpoena for production or inspection at least 15 days before compliance is required (Ala. R. Civ. P. 45(a)(3)(C)).

The Alabama Rules of Civil Procedure do not provide a minimum time for compliance with deposition subpoenas. However, the court can quash or modify a subpoena if it fails to allow a reasonable time for compliance (Ala. R. Civ. P. 45(c)(3)(A)(i)).

Objections and Motions

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

The main grounds for objecting to discovery subpoenas in Alabama include:

- Lack of authority to issue the subpoena (Ala. R. Civ. P. 45(a)(2)).
- Failure to pay copying costs (Ala. R. Civ. P. 45(a)(3)(C)).
- Failure to pay witness fees (Ala. R. Civ. P. 45(b)(1)).
- Failure to allow reasonable time for compliance (Ala. R. Civ. P. 45(c)(3)(A)(i); see Question 3).
- The subpoena issued on a non-party witness requires an unreasonable amount of travel (Ala. R. Civ. P. 45(c)(3)(A)(ii)).
- The subpoena imposes an undue burden or expense (Ala. R. Civ. P. 26(c) and 45(c)(1), (3)(A)(iv)).
- The subpoena subjects the witness to annoyance, embarrassment, or oppression (Ala. R. Civ. P. 26(c)).
- The subpoena constitutes harassment (*Ex parte Crawford Broad. Co.*, 904 So. 2d 221, 224 (Ala. 2004)).
- Compliance with the subpoena would infringe constitutional rights, for example, the right against self-incrimination (see *Ex parte Klingler*, 438 So. 2d 307, 310 (Ala. 1983)).

Common objections to subpoenas that seek documents (either with or without deposition) include:

- The subpoena requires disclosure of:
 - trade secrets or other confidential information (Ala. R. Civ. P. 45(c)(3)(B)(i));
 - an unretained expert's opinion or information irrelevant to the dispute and resulting from the expert's study not made at the request of any party (Ala. R. Civ. P. 45(c)(3)(B)(ii)); or
 - privileged or otherwise protected information, and no waiver applies (Ala. R. Civ. P. 45(c)(3)(A)(iii)).
- The subpoena requests electronically stored information that is not reasonably accessible because of undue burden or cost (Ala. R. Civ. P. 45(d)(5)).
- The subpoena contains overbroad requests (*Ex parte Belk*, 681 So. 2d 1386, 1387 (Ala. 1996)).
- The subpoena seeks irrelevant information that clearly constitutes harassment (*Ex parte Crawford Broad. Co.*, 904 So. 2d at 224-25).

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 Subpoena for Production or Inspection

A non-party witness in Alabama can object to a subpoena for production or inspection by mailing a written objection to the party or attorney designated in the subpoena at any time before the time specified for compliance (Ala. R. Civ. P. 45(c)(2)(B)).

Once the non-party witness objects, the issuing party can move at any time for an order to compel production on notice to the subpoenaed witness but must first contact the witness or witness's counsel and attempt to resolve the issues (Ala. R. Civ. P. 37(a)(2) and 45(c)(2)(B)).

A trial court can issue a valid order on the sufficiency of objections to producing certain documents only after the discovering party moves to compel production under Ala. R. Civ. P. 37(a) (*Ex parte The Terminix Int'l Co. L.P.*, 897 So. 2d 280, 283-84 (Ala. 2004)).

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.
- Requires an unreasonable amount of travel.
- Seeks privileged or otherwise protected information, and no waiver applies. However, the witness must make the claim of privilege or protection expressly and support it by a description of the nature of the documents sufficient to enable the demanding party to contest the claim (Ala. R. Civ. P. 45(d)(2)).
- Imposes an undue burden.

(Ala. R. Civ. P. 45(c)(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:

- Disclosure of trade secrets or other confidential information.
- Disclosure of an unretained expert's opinion or information irrelevant to the dispute and resulting from the expert's study not made at the request of any party.

(Ala. R. Civ. P. 45(c)(3)(B).)

Motion for a Protective Order

A non-party witness can move for a protective order to protect against:

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

(Ala. R. Civ. P. 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 the time, place, and allocation of expenses for discovery.
- Specify the method of discovery.
- Limit or specify the scope of discovery.

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- Designate persons who can be present at a deposition or hearing.
- Require a deposition to be sealed and only opened by court order.
- Require that a trade secret or otherwise confidential information not be disclosed or only be disclosed 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.

(Ala. R. Civ. P. 26(c).)

A statement from the movant's attorney that the attorney attempted to informally resolve the issues before filing the motion must accompany a motion for a protective order (Ala. R. Civ. 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 Alabama, if a party objects to the issuance of a subpoena for production or inspection within ten days of service of the notice of subpoena, the subpoena is not issued (Ala. R. Civ. P. 45(a)(3) (B)). The issuing party may then move for an order compelling compliance with the subpoena under Ala. R. Civ. P. 37(a)(2) after an attempt to resolve the issues informally (see [State Q&A, Drafting and Issuing Discovery Subpoenas: Alabama: Question 14](#)).

A trial court can issue a valid order on the sufficiency of objections to producing certain documents only after the discovering party moves to compel production under Ala. R. Civ. P. 37(a) (*Ex parte The Terminix Int'l Co.*, 897 So. 2d at 283-84).

A party can also file a motion to quash or modify a subpoena or for a protective order in the same manner as a non-party witness (Ala. R. Civ. P. 26(c) and 45(c)(3); see Question 5: Motion to Quash or Modify and Motion for a Protective Order).

Consequences for Failing to Respond

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

Motion to Compel

If a non-party witness fails to comply with a subpoena in Alabama, the discovering party can move for an order to compel an answer, production, or inspection (Ala. R. Civ. P. 37(a)(2)). If the court grants the motion, the court must, after a hearing, order the payment of reasonable expenses to the moving party from either or both:

- The person whose failure to comply resulted in the motion to compel.
- The person who advised the conduct that resulted in the motion to compel.

(Ala. R. Civ. P. 37(a)(4).)

The court may refrain from awarding expenses if it finds:

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

(Ala. R. Civ. P. 37(a)(4).)

Contempt

Failure to comply with a subpoena is punishable as a contempt of the court that issued the subpoena (Ala. R. Civ. P. 37(b)(1), 45(e), and 70A(a)(2)(D); *Ex parte Tarpley*, 300 So. 2d 409, 412 (Ala. 1974)). Penalties for contempt of court can include:

- An order that the court commit a person found to be in contempt to the custody of the sheriff until that person complies with the subpoena (Ala. R. Civ. P. 70A(e)(2)).
- A writ of arrest to compel a person's presence if the person has been given notice of a contempt hearing and fails to appear at the hearing (Ala. R. Civ. P. 70A(d)).

The court can excuse a non-party for failing to obey a subpoena if the subpoena requires the non-party to attend or produce at a place not within the limits provided by Ala. R. Civ. P. 45(c)(3)(A)(ii) (Ala. R. Civ. P. 45(e)).

Effective March 14, 2024, Ala. R. Civ. P. 30(d) explicitly permits the court to award appropriate remediation and impose sanctions for violations of Rule 30, arising from deposition misconduct, including attorneys' fees and costs due to obstructive tactics that unreasonably prolong a deposition. Remedial

awards and sanctions may be imposed on a non-party witness or that witness's counsel, as well as on a party or that party's counsel. (Ala. R. Civ. P. 30(d) Comm. cmt.; see *Ex parte Hankook Tire Am. Corp.*, 400 So. 3d 585 (Ala. 2023).)

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?

In Alabama, a non-party witness served with a document subpoena commanding the production of copies may condition the preparation of copies on the advance payment of reasonable copying costs (Ala. R. Civ. P. 45(a)(3)(C)).

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

When served with a subpoena for production or inspection in Alabama, a non-party witness should take measures to preserve relevant documents. Alabama recognizes an independent tort of spoliation against a third party. (*Killings v. Enter. Leasing Co., Inc.*, 9 So. 3d 1216, 1220–21 (Ala. 2008); *Smith v. Atkinson*, 771 So. 2d 429, 432 (Ala. 2000).)

The plaintiff in a third-party spoliation case must show all of the following:

- Duty, breach, proximate cause, and damages.
- That the defendant spoliator had actual knowledge of pending or potential litigation.
- That a duty was imposed on the defendant through a voluntary undertaking, an agreement, or a specific request.
- That the missing evidence was vital to the plaintiff's pending or potential action.

(*Atkinson*, 771 So. 2d at 432.)

Once these elements are proven, a rebuttable presumption arises that but for the spoliation of

evidence, the plaintiff would have prevailed in litigation. The defendant must overcome that presumption or be liable for damages. (*Atkinson*, 771 So. 2d at 432–33.)

Although the Alabama Rules of Civil Procedure do not expressly impose a duty to preserve documents on a non-party after being served with a document subpoena, the issuing party can file a motion to compel the non-party to retrieve electronically stored information (ESI). Even if the non-party can show that the requested ESI is not reasonably accessible because of undue burden or cost, the court may order discovery from those sources if the requesting party shows good cause (Ala. R. Civ. P. 45(d)(5)).

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

Discovery orders are not final judgments and parties in Alabama generally may not immediately appeal them (Ala. Code § 12-22-2). The Supreme Court of Alabama may grant *mandamus* review of discovery orders in certain exceptional cases, where the petitioner shows:

- The trial court clearly exceeded its discretion.
- The aggrieved party does not have an adequate remedy by ordinary appeal.

(*Ex parte Tucker*, 66 So. 3d 750, 752 (Ala. 2011).)

These exceptional cases include, but are not limited to, when:

- A discovery order disregards privilege.
- A discovery order compels the production of irrelevant or duplicative documents, clearly constituting harassment or imposing a burden on the producing party far outweighing any benefit the requesting party may obtain.

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- The trial court either imposes sanctions effectively precluding a decision on the merits or denies discovery going to a party's entire action or defense so that, in either event, the outcome is essentially determined and the petitioner would be merely going through the motions of a trial to obtain an appeal.
- The trial court impermissibly prevents the petitioner from making a record on the discovery issue so that the appellate court cannot review the effect of the trial court's error.

(*Ex parte Carlisle*, 26 So. 3d 1202, 1206 (Ala. 2009); *Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813-14 (Ala. 2003)).

A contempt order relating to failure to comply with a subpoena is a final appealable order (Ala. R. Civ. P. 70A(g); see *In re Nat'l Cont. Poultry Growers' Ass'n*, 771 So. 2d 466, 466 (Ala. 2000); see *Gladden v. Gladden*, 942 So.2d 362, 369 (Ala. Civ. App. 2005)).

An appellate court can also review discovery orders and decisions after final judgment in that same action. However, the appellate courts can only reverse judgments that injured the substantial rights of the parties, which in practice cancels out most objections to pre-trial issues involving discovery subpoenas (Ala. R. Civ. P. 61; Ala. R. App. P. 45; see *Nail v. Jeter*, 114 So. 3d 844, 849 (Ala. Civ. App. 2012)).

Timing of Appeal

An issuing party or a non-party seeking a writ of *mandamus* must file the petition within 42 days after the court's order, absent a showing of good cause (Ala. R. App. P. 4(a)(1) and 21(a)(3)). A non-party appealing a contempt order must file a notice of appeal within 42 days after entry of the order (Ala. R. App. P. 4(a)(1)).

If the issuing party or non-party appeals after the final judgment in the action, the appellant must file the notice of the appeal within 42 days of the date of entry of the judgment (Ala. R. App. P. 4(a)(1)).

Standard of Review

If an appellate court grants *mandamus* review of a discovery decision, the appellate court reviews the trial court's order under a *de novo* standard of review (*Ex parte Stewart*, 786 So. 2d 464, 467 (Ala. 2000)).

Alabama appellate courts review a trial court's decisions concerning the issuance or quashing of a subpoena under an abuse of discretion standard (Ala. R. Civ. P. 60(b); *Ex parte Tucker*, 66 So. 3d at 752; *Home Ins. Co. v. Rice*, 585 So. 2d 859, 862 (Ala. 1991)).

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