

Responding to Discovery Subpoenas: Kentucky

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A Q&A guide on the different ways to respond to a discovery subpoena issued in a Kentucky 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 Kentucky, after receiving a subpoena, a non-party witness may respond by:

- Complying with the subpoena.
- Moving to:
 - quash the subpoena;
 - modify the subpoena; or
 - receive reasonable costs for producing books, papers, documents, or tangible items.

(Ky. R. Civ. P. 45.02.)

- Moving for a protective order (Ky. R. Civ. P. 26.03).
- Serving objections to a subpoena duces tecum (document subpoena) (Ky. R. Civ. P. 45.04).

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).

In Kentucky, the requirements for complying with a subpoena rest on the person to whom a valid subpoena is directed, and refusal to comply may result in contempt (KRS 421.110; Ky. R. Civ. P. 45.06).

In addition, if the non-party witness is an entity, 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.

(Ky. R. Civ. P. 30.02(b)(6).)

Complying with a Testimonial Subpoena

To comply with a testimonial subpoena, the person subpoenaed must appear for the deposition or hearing at the time, place, and date specified. The obligation to appear for a deposition continues until the deposition is completed unless the matter extends to the point of:

- Harassment.
- Unreasonable use of the rules.

(Ky. R. Civ. P. 26.03 and 45.04.)

Complying with a Document Subpoena

To comply with a document subpoena, the person subpoenaed must:

- Produce the documents or items sought at the time, place, and date specified.
- Permit both inspection and copying of the designated materials.

(Ky. R. Civ. P. 45.01(1) and 45.04(1).)

Complying with an Inspection Subpoena

To comply with an inspection subpoena, the person subpoenaed must permit inspection at the time and on the date specified (Ky. R. Civ. P. 45.01(1) and 45.04(1)).

The person producing documents or tangible items or permitting inspection does not need to be present during the production or inspection unless the subpoena also commands the person to be present for testimony at a deposition or hearing (Ky. R. Civ. P. 45.04(3)).

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 Kentucky rules do not set out any minimum time frames. However, Ky. R. Civ. P. 45.04 specifically allows for a compliance date of less than ten days after service.

The recipient of a subpoena duces tecum may serve written objections either:

- Within ten days of service.
- If the compliance date is less than ten days after service, on or before the time given for compliance.

(Ky. R. Civ. P. 45.04(2).)

The Kentucky attorney general did not find a seven-day compliance time to be improper for the giving of a deposition on written questions (1983 Ky. Op. Att'y Gen. 2-292, 1983 WL 166495).

Objections and Motions

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

The main grounds for objecting to a subpoena in Kentucky are:

- The subpoena is oppressive, unreasonable, and burdensome (Ky. R. Civ. P. 26.02, 26.03(1), and 45.02).
- The scope of discovery exceeds the permissible bounds of Rule 26 of the Kentucky Rules of Civil Procedure (Ky. R. Civ. P. 45.04(1)).
- The subpoena requires the recipient to attend a deposition outside the county of the person's home or work (Ky. R. Civ. P. 45.04(3)).
- The subpoena seeks trade secrets or confidential information, such as medical records (Ky. R. Civ. P. 26.03(1)(g)).
- The subpoena seeks privileged information (see *Stidham v. Clark*, 74 S.W.3d 719, 721 (Ky. 2002)).
- The recipient is the improper recipient or the documents sought do not exist (Ky. R. Civ. P. 26.03).
- The subpoena is too vague.
- The subpoena constitutes harassment (Ky. R. Civ. P. 26.03 and 45.04(1)).
- The recipient has insufficient time to respond (see Question 3).

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

Written Objections

A non-party witness must make any written objections to a subpoena duces tecum:

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

(Ky. R. Civ. P. 45.04(2).)

The non-party must serve the objection on the attorney or pro se party designated in the subpoena (Ky. R. Civ. P. 45.04(2)).

If an objection is made, the party who served the subpoena is not entitled to either inspect or copy the materials without an order from the court issuing the subpoena. The party who served the subpoena may move for a court order requiring that the inspection move forward. (Ky. R. Civ. P. 45.04(2).)

Kentucky law does not specify the form an objection must take. It is common practice to serve a written objections letter to the attorney who issued the subpoena.

While there is no express requirement that objections be filed with the court, practitioners commonly:

- Draft objections in the style of a pleading.
- File it with the court clerk.
- Serve it on all parties in addition to the party that issued the subpoena.

Either a letter or a pleading-style objection meets the requirements of the rule.

Motion to Quash or Modify

A non-party witness may move to quash or modify a subpoena for production of documentary evidence if the subpoena is unreasonable and oppressive. The motion must be made “promptly and in any event at or before the time specified in the subpoena for compliance.” (Ky. R. Civ. P. 45.02.)

The court may deny a motion to quash or modify a subpoena on the condition that the issuing party advances the reasonable cost of producing the requested books, papers, documents, or tangible items (Ky. R. Civ. P. 45.02).

Motion for a Protective Order

A non-party subpoenaed to give testimony may move for a protective order under Ky. R. Civ. P. 26.03. A protective order may:

- Completely bar the discovery.
- Limit the discovery in various ways.
- Limit the use of information or material produced.

(Ky. R. Civ. P. 26.03.)

In Kentucky, parties commonly agree to a protective order containing a confidentiality agreement limiting use of the discovered information. These stipulations are then ordered by the court. This may occur where the subpoenaed party believes that compliance with the subpoena either:

- Violates the law.
- Implicates confidential information, such as production of trade secrets, protected personal health information, or personal financial information.

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 to quash or modify a subpoena or move for a protective order in the same manner as a non-party witness (see Question 5).

Consequences for Failing to Respond

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

Kentucky courts may enter an order either:

- Compelling a person who has failed to respond to a subpoena to do so.
- Finding the person in contempt of court and issuing sanctions.

(KRS 421.110; Ky. R. Civ. P. 45.06.)

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?

Costs for Production of Documents

There is no specific law for the general payment of costs. The party issuing a subpoena duces tecum commonly offers to pay the cost of production.

As a condition of denying a motion to quash or modify, Kentucky courts may require the party seeking the subpoena to pay the reasonable cost of producing the books, papers, documents, or tangible items to the person from whom production is sought (Ky. R. Civ. P. 45.02).

In addition, other Kentucky laws address the issue of costs in certain circumstances. For example, when a subpoena duces tecum seeking patient medical records is served on any hospital, the party serving the subpoena may need to pay the hospital the estimated actual and reasonable expenses of producing the requested records (KRS 422.305(1)).

Costs for Electronically Stored Information

There is no Kentucky law addressing the costs for electronically stored information (ESI).

However, there are parallels between federal law regarding ESI and:

- Ky. R. Civ. P. 26 (governing discovery).
- Ky. R. Civ. P. 34 (governing production of documents and items by parties during pre-trial discovery).

(7 Ky. Prac. R. Civ. Proc. Ann. Rule 45.02 cmt 7.)

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

Kentucky courts have held that when a party to an action receives a request for production of documents, the party has a duty to both:

- Search for the documents.
- Determine whether the requested documents exist and their location.

(*Wal-Mart Stores v. Dickinson*, 29 S.W.3d 796, 804 (Ky. 2000).)

Kentucky courts recognize that where a party has received notice that a document is relevant to litigation, the party must preserve that document, and the loss of the document may warrant sanctions through:

- The evidentiary rule and missing evidence instructions.
- The imposition of civil penalties.

(*Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 790 (Ky. 2011); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).)

Kentucky has not adopted the tort of spoliation of evidence (*Reed*, 950 S.W.2d at 815).

The requirement to preserve relevant documents extends to both existing and potential litigation. The Kentucky Supreme Court has stated that it favors a standard that:

- Deters the loss of evidence.
- Encourages parties in or expecting litigation to protect and preserve evidence, even if this is not advantageous to the litigation.

(*Univ. Med. Ctr.*, 375 S.W.3d at 791.)

The missing evidence instruction advises a jury that if it finds that a document was intentionally and in bad faith lost or destroyed, it may infer that the information recorded in the document was adverse to the party that failed to produce it (*Univ. Med. Ctr.*, 375 S.W.3d at 787-78).

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 may immediately contest a trial court's order regarding a subpoena in an appeals court with a writ of prohibition (*Claussner Hosiery Co. v. City of Paducah*, 120 S.W.2d 1039, 1040 (Ky. 1938)). A petition for a writ of prohibition in Kentucky is not an appeal. Rather, it is an original action brought against a judge whose decisions may be reviewed as a matter of right by the court in which the petition is filed. Original proceedings in an appellate court are governed by:

- KY ST RAP Rule 60.
- Ky. R. Civ. P. 81.

Kentucky courts regard a writ as extraordinary relief reserved for extraordinary cases (*Cox v. Braden*, 266 S.W.3d 792, 796 (Ky. 2008); *Wal-Mart Stores, Inc.*, 29 S.W.3d at 800-01).

When the person contesting a subpoena is not a party, there is no remedy other than a writ of prohibition because a nonparty does not have a remedy by appeal (*Carpenter v. Wells*, 358 S.W.2d 524, 527 (Ky. 1962)).

Parties may appeal to the Kentucky Supreme Court as a matter of right from an order by the Kentucky Court of Appeals in an original action (KY ST RAP Rule 60(A)).

Timing of Appeal

See Appealability.

Standard of Review

Kentucky courts review discovery rulings, including rulings on subpoenas, under an abuse of discretion standard. Courts have "great leeway and discretion in entering and enforcing discovery orders." (*S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 931-32 (Ky. 2013).)

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