



Subpoenas At Trial

USING BASIC RULES AND AVOIDING COMMON TRAPS



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Before your first trial (or any trial), you will think carefully about your lists of witnesses that you plan to call and exhibits that you plan to show the jury. But what if those witnesses are unwilling to testify of their own free will, or you haven't been able to procure those documents through defendants? Subpoenas are often the answer. Although subpoenas may be used throughout litigation, they are particularly useful, and occasionally necessary, as part of a trial practice. Below are some of the basics any plaintiff's lawyer should know about subpoenas prior to trial, and a few common traps we and our colleagues at Stoll Berne have

seen in our practice.

Definitions and format

Definitions: Under ORCP 55, which governs subpoenas in Oregon state court, a subpoena is "a writ or order directed to a person and may require the attendance of the person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require the person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place." ORCP 55. The Federal Rules of Civil Procedure similarly define subpoenas, Fed. R. Civ. P. 45(a)(1)(A)(iii), as does Oregon law governing the use of subpoenas in arbitrations, ORS 36.675. In other words, in the context of trials or arbitration hearings, you may issue a subpoena to

order a witness to testify at trial or for the production of documents and other "tangible things" right before trial.

Format: All subpoenas must state the name of the court, the case and the case number. ORCP 55 A; FRCP 45 A. In addition, in federal court, subpoenas must specifically state what it is commanding the person to do (such as testify), and must also "set out the text of Rule 45(d) and (e)," which explain how to object to a subpoena and the duties a person has in responding to a subpoena. Fed. R. Civ. P. 45(a)(1)(A)(iv).

Subpoenas for trial testimony

Service: A subpoena for testimony at trial must be personally served and simultaneously tendered with one day's appearance fees and mileage fees. ORCP 55 D(1); Fed. R. Civ. P. 45(b)(1).

Geographical limitations: The federal rules only allow subpoenas to command trial testimony within 100 miles of where the person lives, works, or "regularly transacts business in person," or within the state where the person lives, works or "regularly transacts business in person," and the person is either a party, a party's officer or would not incur "substantial expense" in attending the trial. Fed. R. Civ. P. 45(c). In one recent federal trial, we argued that an officer of the defendant company who resided overseas could not be compelled to testify at trial although

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the defendant company itself regularly conducted business within Oregon. The so-called “100-mile rule” creates an interesting question for key witnesses who live in neighboring states. For example, an executive of a company party who lives in Seattle may not be subject to a subpoena for testimony at the district courthouse in Portland, while the same executive would be subject to subpoena if that person lived in Baker City.

Oregon law has no similar geographical limitations, at least as to in-state witnesses. Witnesses who live out of state are not “*per se* unamenable to service of a subpoena,” but such a witness must be served in-state before they will be required to testify at a trial. *Graham v. Brix Mar. Co.*, 160 Or. App. 1, 6, 979 P.2d 765, 767 (1999).

Time limitations: A subpoena requiring an individual to testify as a witness requires the witness to remain until tes-

timony is over, unless he or she is discharged sooner. ORCP 55 A. However, there is no requirement that a party issue a subpoena for trial testimony at any particular time, except that “service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.” ORCP 55 D(1).

A subpoena for testimony at trial may even be issued after the trial begins. *Benchmark Properties v. Hipolito*, 161 Or. App. 598, 603, 984 P.2d 927, 929 (1999) (“Nothing in [ORCP 55] or in the appellate case law requires that a party serve a trial subpoena before the beginning of trial for the subpoena to be valid and enforceable.”). In the context of a fast-moving trial, this option can be key to your case. One of our Stoll Berne colleagues remembers a trial during which the other side surprised us with an independent trial witness who testified that a key employee of our client had made a damaging admission to him. The key

employee said he hadn’t done so and, in fact, thought the witness was describing our client’s maintenance man. After the witness left the stand, our colleague sent an investigator, the key employee and the maintenance man to the witness’s home. The witness promptly realized he had made a mistake about the identity of the speaker. The investigator handed him an already-prepared subpoena to testify (and recant his prior testimony) when we received permission to recall him at trial the following day.

Fees: In Oregon state court, witnesses in civil cases must be paid \$30 for each day’s attendance at trial and be reimbursed for mileage at a rate of \$0.25/mile, if the witness travels to testify. ORS 44.415(1). At the end of each day of trial, a witness can demand the party (or the party’s attorney) pay the witness’s legal fees for the following day of trial. ORCP 55 A. If the witness does not get paid, he or she is not required to show up the following day for trial. Our practice in state court is to mail a witness a check for their appearance and mileage fees along with the subpoena, ahead of trial. It is also a good practice to bring extra checks to trial, in case a witness needs to stay longer than anticipated.

In federal court, witnesses must be paid an attendance fee of \$40, either reasonable, actual travel expenses or a mileage allowance, and a subsistence allowance for witnesses who must stay overnight. 18 U.S.C. § 1821.

One of our colleagues cautions attorneys to be judicious about calling witnesses you do not need, though his warning may be aimed more at defense attorneys. He remembers a trial in which the defense subpoenaed many of the plaintiff’s friends to testify at trial and then never called them. The friends spent the whole week in a hotel they could not afford (especially on \$30 a day), essentially for no reason. In retrospect, our colleague wishes he’d asked the court if the friends could be released or called. Or at least have the judge point out that



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the defense lawyer appeared to be forcing five people to share a hotel room for no purpose.

Subpoenas for documents

Service: A subpoena to produce documents or “tangible things,” that does not also require testimony, may be served by mail. ORCP 55 D(4).

Time limitations: A subpoena to produce documents or “tangible things,” that does not also require testimony, must be served on parties at least seven days before subpoena is served on the non-party, and must allow a producing party at least 14 days to respond. ORCP 55 B, D(1). The court can order a shorter period for either time limitation, which may be crucial if you need a document production during trial.

Opposing subpoenas

Objections: Under both Oregon and federal law, a person commanded to produce documents or other “tangible things” may object to such production with 14 days after service or within the time specified in the subpoena for compliance. ORCP 55 B; Fed. R. Civ. P 45(d)(2)(B). If objections are made, no documents must be produced except by court order. ORCP 55 B; Fed. R. Civ. P 45(d)(2)(B). The federal rules further protect a non-party recipient of a subpoena. Any order requiring compliance with a subpoena for production of documents “must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.” Fed. R. Civ. P 45(d)(2)(B)(ii).

Moving to quash or moving for a protective order: Under these rules, a party cannot object to a subpoena (unless directed at the party). However, a party in Oregon or federal court can move to quash or move for a protective order in regard to a subpoena directed at a non-party, if the party claims “a personal right or privilege relating to the document sought by the subpoena has standing to seek to quash.” *Matter of Marriage of*

Boon, 100 Or. App. 354, 357, 786 P.2d 215, 217 (1990); see 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure Civil 3d § 2035 (“[A] party may seek an order if it believes its own interest is jeopardized by discovery sought from a third person.”).

In state court, the proper procedure is to move to quash or modify a subpoena “if it is unreasonable and oppressive or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.” ORCP 55 B. Similarly, in federal court, a party or non-party may move to quash or modify a subpoena that “subjects a person to undue burden,” requires disclosure of privileged or protected information, fails to allow a reasonable time to comply, or violates the geographical limits set forth in Fed. R. Civ. P 45(c).

In addition, “[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending.” Fed. R. Civ. P. 26(c); see also ORCP 36 C (stating similar rules on motions for protective orders). “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including... forbidding the disclosure or discovery.” Fed. R. Civ. P. 26(c); ORCP 36 C. In other words, should you believe that a subpoena directed at your client or at a non-party is improper or overly burdensome, moving to quash or moving for a protective order (even right before or during trial) is an option.

Final tips

The official sample subpoena form for federal courts can be found here: <https://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena>

Oregon state courts do not have a sample form at this date, but non-official

forms are available for download and purchase at local businesses.

By having these rules and tips in mind as you head into your first trial, you will be prepared to issue and respond to subpoenas, even in the fast-paced trial environment.

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