

## **Is it possible to compel the appearance of an out of state employee of the opposing party's company as a witness at trial?**

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In commercial litigation, it is very common that the corporate designee at trial is not a particularly insightful factual witness. When the factual witnesses at trial are employees of an opposing party that is headquartered out of state, this often puts you in a position where you are taking "trial depositions" and reading in transcripts at trial. As you can imagine, this does not have the same effect that a live witness does, but is there a way around it?

Unfortunately, the answer is without agreement by the opposing party to provide the witnesses at trial in your out of state venue, you are likely stuck reading in depositions. Even though Florida does provide for subpoena power over witnesses, there is currently no rule, statute or case law that can compel an out-of-state witness to appear at trial.

Florida law does provide for subpoena power over witnesses for trial. Fla.R.Civ.P. 1.410(b) states that a subpoena for testimony before the court may be issued either by the attorney of record or the clerk of the court. The subpoena for a witness shall be made in accordance with Fla. Stat. § 48.031(1), which is the same rule for general service of process. Florida law does allow for service of process outside of the state, which is to be effected in the same manner as if performed within the state. Fla. Stat. § 48.194. Fla. Stat. § 92.151 further states that witnesses must be compensated for travel expenses by the party summoning the witness to court. Compensation for mileage and the per diem for one day must be paid to the witness prior to that witness appearing in court. If those amounts are not paid in advance, the witness cannot be compelled to appear. The amounts to be paid as compensation for appearance are defined in Fla. Stat. §92.142.

Though my cursory search of the case law on point did not yield any particular results as it pertained to employees of a party located out of state, there are multiple cases which make reference to the inability to compel an out of state witness to appear in court. In *Washington v. State*, 973 So.2d 611, 612 (Fla. 3<sup>rd</sup> DCA 2008), Washington appealed an adjudication of civil commitment as a sexual predator based on deposition testimony from his previous criminal trial in 1986. The court upheld the use of the previous testimony even though the State was able to locate the deponent, noting that "[t]here was no method to compel an out-of-state witness to testify in a civil proceeding." *Id.* at 613. The Second District followed the same line of thinking in *Packaging Corporation of America et. al. v. DeRycke*, 49 So.2d 286 (Fla. 2<sup>nd</sup> DCA 2010). In this case, the defendant was awarded a judgment due largely in part to the failure of Packaging Corporation of America's (PCA) key witness to appear at trial. The witness, who lived in South Carolina, was subpoenaed to appear and testify on behalf of PCA in a re-filed action but failed to appear on his scheduled date. *Id.* at 289. PCA argued that deposition testimony and testimony from the previous trial should be used in place of live testimony because they could not compel the out-of-state individual to appear. *Id.* The court agreed with PCA and referenced the language of *Washington* in that it was unable to compel the appearance of an out-of-state witness to testify in a civil proceeding. *Id.* at 290. Based on the foregoing, a party has the power to subpoena an out-of-state individual as a witness, but that individual cannot be compelled should they choose not to appear.

Keep this in mind as you are scheduling and conducting your depositions. In circumstances like these, videotaped depositions will be as close to the real thing as you can possibly get. Moreover, make sure you are rephrasing objectionable questions and making a clear record that can be read in if necessary at the subsequent trial.

Practice areas: [Business Litigation](#)

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