▶ CIVIL LITIGATION

Can I Get A Witness?

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Television police series love witnesses: tearful mothers, addled addicts, and double-dealers all make for exciting investigation scenes and high drama in the courtroom. But what about the boring bits that lawyers in criminal cases have to handle in-between interviewing the witnesses and examining them on the stand? Subpoenaing witnesses, calculating witness reimbursements, and parsing sequestration orders never seem to make it into the script. But they are frequently a part of *our* script here in the real world of criminal-trial practice, and getting these tasks wrong can wreak havoc in a case. This article will review some of the more quotidian aspects of witness management and offer a few basic reminders to help counsel avoid potential pitfalls when it comes to subpoenas, witness reimbursement, and witness sequestration.

Calling all witnesses

Kansas law makes subpoenas readily available to lawyers: "The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it."[1] Most Kansas lawyers are familiar with statutory rules, subpoena forms, and local custom in their jurisdictions for subpoenaing witnesses. And most witnesses come when called to court. When witnesses don't show up, the summoning lawyer may seek one of a variety of remedies depending on the circumstances: a continuance of the proceeding,[2] an opportunity to depose the witness,[3] a declaration that the witness is unavailable for the purpose of admitting the witness's hearsay,[4] or enforcement of the subpoena through the court's bench warrant[5] or contempt[6] powers. But the district court may be unwilling or unable to remedy a witness's absence if the subpoena was unenforceable in the first place.[7] Two mistakes lawyers sometimes make in subpoenaing witnesses are failing to reissue subpoenas when a hearing date is continued and failing to use the appropriate method for subpoenaing out-of-state witnesses.

A subpoena is a court order to attend and testify or produce documents or electronic information "at a specified time and place" under penalty of contempt for failure to comply.[8] The subpoena has no legal efficacy beyond that "specified time." Thus, for instance, a lawyer who duly subpoenas a witness to a trial that ends in a hung jury, but fails to reissue that subpoena before a second trial, cannot complain if the witness fails to appear for the second trial.[9] Under its own "specified" terms, the subpoena to the first trial "expired at the conclusion of the first trial, relieving [the witness] of the duty of appearing at the second trial in the absence of another subpoena indicating otherwise."[10] When a hearing or trial date is continued, ensuring the appearance of witnesses on the new date — or the availability of a remedy if they do not appear — is as simple as issuing updated subpoenas to the witnesses.

But what about those witnesses who live across the state border or even farther across the country? Securing their attendance is more complicated, but can be done so long as counsel starts early and sees the process through. Kansas courts have no jurisdiction to enforce subpoenas against out-of-state witnesses.[11] Consequently, lawyers who wish to secure the appearance of such witnesses must turn to the Uniform Act to Secure Attendance of Witnesses from Without State.[12] This Act was created to aid consenting states in enforcing process across state lines.[13] All fifty states have adopted the Act, making it possible to subpoena anyone in the United States to appear in court in Kansas.[14] The Act has been held to apply to both witness subpoenas and subpoenas duces tecum.[15]

To comply with this Act, counsel must first petition the Kansas judge presiding over the case to certify under seal of court that (1) there is a criminal prosecution pending; (2) the witness sought to be subpoenaed is a "material witness"[16] in the pending prosecution; and (3) the witness's presence will be required for a specified number of days.[17] If the Kansas judge grants the certificate, counsel must then engage a lawyer in the witness's home state (if counsel is not licensed there) to present the certificate to a judge in that state and ask that judge to issue a summons ordering the witness to appear at a hearing.[18] The judge in the witness's state must thereafter hold a hearing in that state to determine whether (1) the witness is "material and necessary";[19] (2) "it will not cause undue hardship[20] to the witness to be compelled to attend and testify" in Kansas; and (3) the laws of Kansas and any other state through which the witness might be required to pass by ordinary course of travel will protect the witness "from arrest and the service of civil and criminal process."[21] If the judge answers all of these questions in the affirmative, then the judge "shall issue" a summons directing the witness to appear and testify in Kansas.[22]

Lawyers may wonder whether they can sidestep this complicated process by simply mailing the out-of-state witness a Kansas subpoena. After all, service of subpoenas by return-receipt mail is allowed *within* Kansas.[23] In *State v. Hobbs*,[24] a prosecutor procured the appearance of several out-of-state witnesses by mailing Kansas subpoenas to them. On appeal, Defendant Hobbs complained that the State should have followed the Uniform Act, and that its failure to do so necessitated a reversal of his convictions. Having cited no authority for this radical remedy, Hobbs lost his argument. But the Kansas Supreme Court further appeared to endorse the State's manner of service, noting briefly that "the purpose of the Uniform Act is to secure the attendance of witnesses who are outside the jurisdiction of the district court. The Act has no application when witnesses are willing to testify irrespective of the method of process."[25]

Cautious counsel will not rely on this dicta, for several reasons. First, if an out-of-state witness does not appear, counsel who relied on an unenforceable Kansas subpoena to summon the witness may be denied any remedy for the witness's absence.[26] Second, a criminal-defense lawyer who fails to use the Act to ensure an out-of-state witness's presence may thereby contribute to his own client's conviction and later be deemed constitutionally ineffective.[27] Lastly, giving an out-of-state witness the false impression that he or she is under an enforceable court order to appear and testify in Kansas raises ethical concerns. "An individual summoned by a subpoena — whether a bus driver, a plumber, a grocery store clerk, a Ph.D., or the head of the most powerful corporation in the world — understands that he has received a court order that must be obeyed."[28] A subpoena represents a "limited but coercive power," and counsel "assumes an "awesome responsibility when [he or she] brings that power to bear on the lives of average citizens."[29] If counsel is confident of the witness's voluntary appearance and wishes to provide the witness with a Kansas subpoena for record-keeping purposes, counsel should proceed with caution to ensure that the witness is not misled into believing that the subpoena is valid and enforceable.[30]

How much is that witness in the window?

Under what circumstances counsel may (or must) pay fact witnesses in criminal cases is not always a simple question. The Kansas general subpoena statute requires that service of a subpoena "must, if the subpoena requires a person's attendance, be accompanied by the fees for one day's attendance and the mileage allowed by law."[31] But the Kansas Code of Criminal Procedure eliminates this rule in criminal cases: "It shall not be necessary to tender any fee or mileage allowance to any witness when he is served with a subpoena to attend any criminal case and give testimony either on behalf of the prosecution or the defendant."[32] On the other hand, counsel who has secured an out-of-state subpoena in a criminal case must tender mileage and witness fees to the out-of-state witness.[33]

As for witness expenses, Kansas law explicitly contemplates "reasonable out-of-pocket expenses."[34] The Kansas Rules of Professional Conduct state that lawyers "shall not … offer an inducement to a witness that is prohibited by law."[35] The Comment to this provision explains that "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."[36] The rule has been interpreted to allow prosecutors to offer immunity or leniency in exchange for testimony, as neither of these inducements is "prohibited by law,"[37] but the rule has not otherwise been interpreted by the Kansas appellate courts.

One rule that appears consistent with Kansas law, and that has been endorsed by other jurisdictions and the American Bar Association, is that "fact witnesses may be reimbursed for expenses

incurred and time lost in connection with the litigation but may not be paid a fee for the fact of testifying (or not testifying) or for the substance of the testimony."[38] "Expenses incurred and time lost" in this formulation includes "time lost attending a deposition or trial, meeting with a lawyer to prepare such testimony, or reviewing or researching documents relevant to such testimony."[39] If counsel agrees to reimburse a witness for any of these or other expenses, it may be wise to put the agreement in writing, along with a clear statement that the promised reimbursement is for reasonable expenses only, and will be made regardless of the fact or content of the witness's testimony or the outcome of the trial.[40]

Should I stay or should I go now? Witness sequestration

Sequestration "is a centuries-old practice" that aims "to exercise a restraint on witnesses tailoring their testimony to that of earlier witnesses and aids in detecting testimony that is less than candid."[41] In criminal cases, a prosecution witness's opportunity to observe others' testimony and tailor his or her story to the evidence as it develops "ha[s] the potential to violate the defendant's right to a fair trial."[42] Thus, the need for sequestration in criminal cases may trump the right of testifying victims and their families to be present at trial.[43]

The Kansas Code of Criminal Procedure mandates the exclusion of witnesses from preliminary hearings "on the request of the defendant or state," and authorizes both separation and no-communication orders during such hearings as well.[44] However, there is no statute mandating or otherwise governing the sequestration of witnesses at trial. Rather, sequestration "is committed to the sound discretion of the trial court."[45]

A sequestration order might include a variety of prohibitions, and counsel requesting or attempting to obey such an order should take care to clarify the language of the order. "Sequestration" means different things to different people, and might include (1) excluding witnesses from the courtroom, (2) preventing witnesses from communicating with each other about the case outside of the courtroom, (3) separating witnesses from each other outside of the courtroom; and (4) preventing counsel from sharing previous witness testimony orally or by way of transcripts with counsel's witnesses.[46] Exclusions from some of these prohibitions might include a specified investigator carrying out a continuing investigation,[47] or an expert witness whose exposure to trial testimony may be necessary to the expert's own testimony, or to the expert's role as advisor to counsel.[48]

The Kansas Supreme Court has recently clarified that law-enforcement witnesses have no special exemption from general sequestration orders. In *State v. Sampson*, the Court held that a district court abused its discretion when it allowed a testifying law-enforcement officer to remain in the courtroom despite a general sequestration order, especially when it became apparent that the officer was tying his testimony to that of other prosecution witnesses who had already taken the stand.[49] The *Sampson* Court further held that, even when it may be appropriate to except a law-enforcement officer from a sequestration order, that officer's presence at the prosecution table creates "too great an impression that he [is] 'clothed with public authority,' thereby improperly enhancing his credibility with the jury."[50] Thus, the Court announced a hard-line rule that "a trial court has no discretion to permit a testifying law enforcement officer to sit at the prosecution table, regardless of the practical benefits of that practice to the prosecution."[51]

Conclusion

Witness management may not be the most exciting aspect of lawyering, which is perhaps why it is rarely taught in law school or featured in television dramas. But with enough legal know-how and attention to detail, counsel in criminal cases can ensure that their witnesses are where they want them when they want them, so that the answer to the question "Can I get a witness?" is a resounding "Yes!" ▲

Endnotes

1. K.S.A. 60-245(a)(3).
2. *See State v. Corby*, 237 Kan. 387, 388-89, 699 P.2d 51 (1985) (where prosecutor diligently subpoenaed primary witness, arranged for her appearance, and offered her a ride, district court abused discretion in denying continuance when witness refused to appear); *State v. Jones*, 226 Kan. 503, 509-10, 601 P.2d 1135 (1979) (where defense counsel diligently subpoenaed material witness, discussed case with witness and his parents, arranged for witness's appearance at a particular time, and searched for missing witness over noon recess, district court abused discretion in refusing continuance to allow counsel to locate witness).
3. *See* K.S.A. 22-3211 (authorizing court-ordered depositions under certain circumstances in criminal cases).
4. *See Corby, supra* note 2, 237 Kan. at 388-89 (where prosecutor diligently attempted to secure subpoenaed witness's appearance, district court should have declared recalcitrant witness unavailable and admitted witness's preliminary-hearing testimony).
5. *See Corby*, *supra* note 2, 237 Kan. at 389 (district court should have issued bench warrant for recalcitrant witness); *Jones, supra* note 1, 226 Kan. at 508-09 (district court erred in refusing to issue bench warrant to compel attendance of missing material witness on mistaken belief that court was without jurisdiction to issue warrant for minor: "[u]nder the constitution and our statutes, the court has the inherent power to enforce its process and to insure the presence of witnesses").
6. *See* K.S.A. 60-245(e) ("The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.").
7. *See, e.g., State v. Hobby*, Nos. 92,399, 92,400, 2005 WL 3527000 at *7-8 (Kan. App. Dec. 23, 2005) (where defense counsel merely left subpoena for police officer at police station, court did not err in denying continuance and denying admission of officer's report when officer failed to appear: "the fact remains the subpoena was never served on Officer Bundy; thus, the trial court was powerless to compel Officer Bundy's appearance or hold him in contempt").

8. K.S.A. 60-245(a)(1)(A)(iii), (e).
9. *See State v. Martin*, 391 N.W.2d 611, 615-16 (N.D. 1986).
10. *Id*. (interpreting subpoena statute similar to Kansas's).
11. *See* K.S.A. 22-3214(2) (authorizing the issuance of Kansas subpoenas to in-state witnesses only: "[a]ll courts having criminal jurisdiction shall have the power to compel the attendance of witnesses *from any county in the state* to testify either for the prosecution or for the defendant") (emphasis added).
12. *See* K.S.A. 22-4201 *et seq*.
13. *See* E.H. Schopler, *Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings*, 44 A.L.R.2d 732 (1955).
14. *See* Barbara E. Bergman, *et al*., 2 Wharton's Criminal Evidence § 10:12 n.78 (15th ed. 2013) (listing state statutes).
15. *See* Jay M. Zitter, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836 (1981).
16. *See* Jay M. Zitter, *Sufficiency of Evidence to Support or Require Finding That Out-of-State Witness in Criminal Case Is "Material Witness" Justifying Certificate to Secure Attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, 12 A.L.R.4th 742 (1982).
17. K.S.A. 22-4202; K.S.A. 22-4203. The exact language of another state's version of the Act may differ slightly. Counsel should draft out-of-state witness pleadings in the language of the Act as adopted by the witness's state.
18. *Id*.
19. *See* Jay M. Zitter, *Sufficiency of Evidence to Support or Require Finding That In-State Witness in Criminal Case Is "Material and Necessary" Justifying Issuance of Summons Directing Attendance of Witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, 12 A.L.R.4th 771 (1982).
20. The Act requires that the subpoenaing party tender mileage and fees to the out-of-state witness, K.S.A. 22-4203(2), thus mitigating against undue-hardship claims. *See Tran v. Kwok Bun Lee*, 29 A.D.3d 88, 810 N.Y.S.2d 467, 472 (N.Y.A.D. 1 Dept. 2006) (finding New York witness's claim of undue hardship "unpersuasive" where presence in California was required for only two days and subpoenaing party "has also assured respondent and this Court that all his expenses would be paid").
21. K.S.A. 22-4202; K.S.A. 22-4203.
22. *Id*.
23. K.S.A. 60-303.
24. 276 Kan. 44, 71 P.3d 1140 (2003), *disapproved of on other grounds by State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008).
25. 276 Kan. at 52.
26. *See State v. Steward*, 219 Kan. 256, 260, 547 P.2d 773 (1976) (trial court properly denied motion to depose out-of-state witness and properly refused to allow reading of witness's prior testimony at trial where defense counsel made no attempt to subpoena witness under Uniform Act); *State v. Kirk*, 211 Kan. 165, 170-71, 505 P.2d 619 (1973) (State failed to establish out-of-state witness's unavailability for purposes of presenting witness's hearsay where State made little effort to find witness and no effort to subpoena witness under Uniform Act).
27. *See Cortez v. Terhune*, 96 Fed. Appx. 528 (9th Cir. 2004) (granting federal habeas relief and reversing state conviction on grounds of ineffective assistance of counsel where counsel failed to secure attendance of out-of-state witness who had confessed to charged crime); *Cortez v. Terhune*, Appeal No. 0355811, 2003 WL 22955293 (9th Cir. Appellee's Brief filed October 31, 2002) (describing how counsel's failure to invoke Act to secure witness's attendance resulted in witness's absence and trial court's refusal to declare witness unavailable for purposes of admitting his prior admissions; noting state's concession that "counsel was ineffective because there was no strategic or tactical reason not to file a motion under the Uniform Act to Secure Witnesses").
28. *United States v. Candelario-Santana*, 929 F. Supp. 2d 24, 27-28 (D. P.R. 2013) (sanctioning prosecutors who misused subpoenas to compel pretrial interviews with witnesses).
29. *Id*.
30. *See Stengel v. Kentucky Bar Ass'n*, 162 S.W.3d 914, 919-20 (Ky. 2005) (approving non-misleading use of state subpoenas with complying witnesses to procure out-of-state documents in state grand-jury proceedings).
31. K.S.A. 60-245(b).
32. K.S.A. 22-3214(3).
33. K.S.A. 22-4203(2).
34. K.S.A. 28-125.
35. K.R.P.C. 3.4(b).
36. K.R.P.C. 3.4, Comment n. 3.
37. *See State v. Davis*, 271 Kan. 892, 896, 26 P.3d 681 (2001); *Edwards v. State*, 29 Kan. App. 2d 75, 76, 25 P.3d 142 (2001).
38. Marcellus A. McRae & Kim Nortman, *The Issue of Paying Fact Witnesses Most Commonly Concerns Former or Current Employees of a Party in Litigation*, 35SEP L.A. Law. 31, 31 (2012).
39. *Id*. at 32, *citing* ABA Formal Ethics Opinion 96402; *see also Centennial Mgmt. Servs., Inc. v. AXA Re Vie*, 193 F.R.D. 671, 681 (D. Kan. 2000) (relying in part on ABA opinion in finding witness reimbursement reasonable).
40. *See* Douglas R. Richmond, *Compensating Fact Witnesses: The Price Is Sometimes Right*, 42 Hofstra L. Rev. 905, 941 (2014).
41. *State v. Heath*, 264 Kan. 557, 589, 957 P.2d 449 (1998).
42. *Id*.
43. *Id*.
44. K.S.A. 22-2903.
45. *State v. Francis*, 282 Kan. 120, 142, 145 P.3d 48 (2006).
46. *See* Richard H. Underwood, *Following the Rules: Exclusion of Witnesses, Sequestration, and "Noconsultation" Orders*, 35 Am. J. Trial Advoc. 513 (2012) (offering examples of misunderstood sequestration orders and cautioning: "[I]f you want separation, or something more than separation, ask for it. Assume nothing. When in doubt about the local 'understanding,' ask questions.").
47. *See State v. Johnson*, 258 Kan. 475, 492, 905 P.2d 94 (1995) ("the sequestration rule is intended to keep witnesses from discussing their testimony with each other, not to prevent counsel or investigative authorities from continuing their investigation"; "[b]oth parties must be permitted to continue investigating their cases throughout the trial"), *abrogated on other grounds as stated in State v. Everett*, 296 Kan. 1039, 1044-45, 297 P.3d 292 (2013).
48. *See People v. Novak*, 41 Misc.3d 737, 971 N.Y.S.2d 403 (N.Y. Co. Ct. 2013) (discussing reasons to exempt expert from sequestration order and granting defense expert permission to observe codefendant's testimony); *United States v. Reynolds*, 534 Fed. Appx. 347, 365 (6th Cir. 2013) (citing exception to federal sequestration rule for witnesses whose presence is essential, and noting that "[a] classic example of that exception is an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others").
49. 297 Kan. 288, 298, 301 P.3d 276 (2013); *see also State v. Heath*, 264 Kan. 557, 589-90, 957 P.2d 449 (1998) (court abused discretion in allowing victim's testifying mother to be present throughout trial).
50. 297 Kan. at 296.
51. *Id*. at 297.