

Out-Of-State Subpoena Process  
Checklist for Trial Attorney  
Indigent Expense

This is meant to be a guideline for you, in order to make this process proceed as smoothly and efficiently as possible. An out-of-state subpoena process takes a considerable amount of time, and the attorney handling the out-of-state portion needs information given to him/her in a timely and organized manner. It is wise to begin this process no less than a month and a half prior to the date of the court appearance for which you need the witness(es), and the more time you allow the better.

It is also wise, if feasible, to designate one person in your office, or an investigator, to be the person in charge of dealing with the out-of-state attorney and/or office staff person after your initial contact. Having such a person handle the details will allow you to work on other aspects of the case. If you choose to designate such a contact person, be sure that they have current information as to the witness(es) and the court date(s).

Obtaining the appearance of an out-of-state witness for a court appointed client can be cumbersome. First, you must obtain an authorization from Indigent Defense to cover the out-of-state attorney's fees. If the case involves a Ballot Measure 11 or murder charge, you will likely have to get direct authorization from Ann Christian at Indigent Defense. If the charges are less serious, then you need to get approval from the local indigent defense office or presiding judge.

A general estimation for a simple one-county case is approximately \$735.00, not including additional witness fees in the form of travel, food and/or lodging. A simple case in one county involving one or two witnesses will generally take around 8-10 hours of attorney time. Assuming the out-of-state attorney works at the \$50.00/hour rate, then you would need to get \$500.00 authorized for attorney time. Some jurisdictions have a filing fee for the Order To Show Cause filing. The filing fee varies from state to state and, sometimes from county to county within a state. Some jurisdictions allow for that fee to be waived if a person can show indigency. However, as a general rule, it is recommended that the attorney get \$125.00 authorized for filing fees unless they have cleared the issue with the out-of-state attorney. Finally, the documents must be personally served on the out-of-state witness(es) and, therefore, there can be investigator/process server fees.

As stated, additional authorizations may have to be obtained from Indigent Defense, such as mileage, daily witness fee, lodging (if you are requesting the out-of-state witness to stay more than one day), and airplane fares (if the out-of state witness is coming a considerable distance). Each state sets their own fees, as for example, under Washington State statute (RCW 10.55.020), witnesses are paid \$5.00/day for each day the witness is required to travel and attend as a witness and 0.10/mile.

If possible, it is always better to obtain authorization for these costs prior to the date of the hearing on the Order to Show Cause, so that checks for the per diem fee, mileage fee and any additional expenses can be issued to the witness at either the time the witness

appears at the OSC hearing or when the witness signs an Acceptance of Service form. Be aware that the need for the authorization for these expenses may arise when the out-of-state witness is served and states that they will be happy to attend, but cannot do it for, as in Washington, \$5.00 and mileage of .10/mile. (Also, it is wise to be aware that some judges have decided that the fees set by statute hail from the Byzantium Era and will demand that reasonable mileage and per diem fees be paid to the witness.) The out-of-state attorney will need copies of those authorizations.

The following is a checklist of the steps you should take upon your determination that you will need a witness from out-of-state:

Immediately contact the out-of-state attorney and provide him/her with the following information (in writing):

Case name, case number, charges against the accused and county where case has been filed. \_\_\_\_\_

Kind of appearance for which the witness will be required, the reason why the witness is necessary, the length of time the witness will be required to attend and date/time of day of the appearance.

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The names of the witness(es) and current contact information, including home and work addresses and phone numbers. (Be sure of the county in which the witness lives, as some towns overlap county lines, and be certain you list the names of ALL the witnesses you might need. If it turns out that you do not need a witness at a later time, it is easier to call a person off then try and go through the out-of-state subpoena process at the last minute.)

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How long you have been working on the case (yes, this is necessary).

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The name of person who the out-of-state attorney should contact if additional information is needed, and that person's contact information, including cell phone number if contact person is an investigator.

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Whether the witness has previously been contacted by the defense and whether the witnesses are "friendly" and "expecting" the subpoena.

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Obtain authorization for out-of-state attorney. \_\_\_\_\_

**YOUR OBLIGATIONS AS TO COURT APPEARANCES AND PAPERWORK**

Either you, or the out-of-state attorney can prepare the appropriate documents. The necessary documents are:

1. A Request for Attendance and supporting Affidavit (completed by trial counsel and submitted to trial judge/presiding judge of county seeking witness);
2. A CERTIFICATE OF JUDGE REQUESTING STATE FOR ATTENDANCE OF OUT-OF-STATE WITNESS (completed by trial counsel for judge's signature after reviewing trial counsel's Request for attendance and supporting affidavit);
3. An Order To show cause pleading (out-of-state attorney to prepare and put on out-of-state attorney's letterhead).

With the above information provided to the out-of-state attorney, the out-of-state attorney can prepare all of the documents, including the Request for Attendance and Judge's Certificate. However, it is recommended that if the trial attorney has the forms, it is easier for the trial attorney to prepare those documents, submit the originals to the judge ex parte and then provide the out-of-state attorney with the signed originals.

Therefore, the trial attorney will take the Request for Attendance and Judge's Certificate to the trial judge in the Oregon county where the case is filed and have a judge sign those documents. This should be done ex-parte and the affidavit in support of Request for Attendance and Judge's Certificate should be sealed, as it is likely to contain attorney work-product and/or theory of defense. Once those documents are signed, then you must send the originals to the out-of-state attorney and keep certified true copies for yourself. You should plan on having these documents signed and to the out-of-state attorney no less than 4 weeks prior to the date the witness(es) will be required to appear and testify.

The out-of-state attorney will then prepare the Order to Show Cause documents.

#### THE OUT-OF-STATE ATTORNEY'S OBLIGATIONS AS TO COURT APPEARANCES AND PAPERWORK

The out-of-state attorney will then take the OSC documents (OSC with attached Request for Attendance, Certificate and Affidavit) ex parte to a Superior Court judge in the county where the witness resides. The judge will sign the OSC, set a date for a hearing, the out-of-state attorney will file the original OSC signed by the judge and the matter will be given a case number.

A process server, who should also be a notary, will serve a certified true copy of the OSC on the witness. Along with the OSC, the process server should take the original and certified true copies of the (unsigned) Summons and the Subpoena, and the original and a certified true copy of the Acceptance of Service (stating that the witness accepts service of the Summons and Subpoena and does not have to appear at the hearing). The process server should offer the witness the chance to sign the Acceptance of Service and avoid the OSC hearing (the witness is under no obligation to sign the Acceptance of Service). The certified true copies of all the documents should be left with the witness, except for the Acceptance of Service if the witness chooses not to sign that document.

If the Acceptance of Service is signed, then the out-of-state attorney will simply take the original documents back to the judge who signed the OSC and have that judge sign the Summons and the Subpoena. Certified true copies will be then served upon the witness(es), the original Acceptance of Service, the Summons and the Subpoena are then filed with the out-of-state court, and conformed and certified true copies will be sent to you for filing with the Oregon court.

If the witness wishes to appear at the OSC hearing, then the out-of-state attorney will also appear and, generally, the same process will follow, as the judge will, most likely, allow for the Summons and Subpoena, sign those documents and they will be served on the witness in the courtroom. Occasionally, a witness will be recalcitrant, and the judge will set another OSC hearing and have the out-of-state attorney contact you in order to inform you of the situation and allow you to make a decision as to whether or not you really need that witness. In addition, sometimes the out-of-state witnesses (especially if they are state employees and are being sought as witnesses in their capacity as state employees) will turn the matter over to the state office of the attorney general. Also, on occasion, the witness will hire private counsel.

Once you have filed the certified true copies with the Oregon court, it is your responsibility to stay in contact with the witness(es) as to any changes in the date of the appearance for which they have been subpoenaed, or if their presence is no longer necessary, for whatever reason (case dismissed, settled or their testimony no longer necessary).

Attached are general form copies of all the out-of-state documents. These are valid as of October 15, 2001, but, as with all forms, the attorneys should review them and determine if they need to be updated prior to using them in a case.