Compelling an out-of-state defendant to appear at trial

By E. Blair Schilling; Fishman Haygood, LLP; New Orleans, Louisiana

Blair Schilling

Trial attorneys often face the difficult task of determining how to present the testimony of an out-of-state party at trial. Most trial attorneys prefer live testimony instead of introducing deposition testimony into evidence, but all too often key witnesses — including the parties to the lawsuit — refuse to appear and shield themselves from being forced to appear by arguing that they reside outside of the court's subpoena power.

If a nonresident party takes such a position in a case pending in federal court, Rule 45 governs. The 2013 amendment to Rule 45 confirmed that a federal district court may not compel an out-of-state witness to testify at trial simply because the person is a party or a party's officer.[1] This revision has left many attorneys with no choice but to prove the adverse party's liability through deposition designations.

Presentation of evidence through video-recorded testimony has many serious drawbacks. Keeping a jury's attention is no small feat, even for the most experienced attorneys who have a live witness. When the lights dim and a videotaped deposition starts playing in the courtroom, even the most diligent of jurors is likely to doze off or start thinking about lunch.

Assuming anyone in the courtroom is paying attention, key points and nuances of facial expressions and body language may be lost if jurors cannot experience the testimony live.

Introducing deposition testimony is also undesirable because it is fixed; the lawyer cannot adjust his or her questions to fit the present state of the evidence nor ask follow-up questions that may not have seemed important at the time of the deposition but, in the middle of trial, could be essential.

If, however, the case is pending in Louisiana state court, the lawyer has a much better chance of being given an opportunity to conduct a live cross examination of a nonresident party. The Louisiana Fourth Circuit Court of Appeal concluded in an asbestos case that it is within its power to compel an out-of-state defendant to testify at trial.

"In the same way that Louisiana exercised personal jurisdiction over parties participating in litigation in the state, those same parties may, upon the discretion of the court, be compelled to appear in Louisiana for discovery, depositions, hearings, and/or trial." *Hayden v. 3M Co.*, 16-1030 (La.App. 4 Cir. 2/3/2017); 211 So.3d 528, 532. "Out of fundamental fairness," however, "the court must consider . . . travel costs, complexity of the case, the potential recovery, and whether other methods of discovery have been attempted." *Id.*

In *Hayden*, the plaintiff served trial subpoenas on numerous defendants, including out-of-state defendants, for the appearance of a corporate representative at trial. *Id.* at 529. The defendant corporations moved to quash the subpoenas, and the trial court granted the motion as to the out-of-state corporations. *Id.*

The plaintiff appealed, seeking supervisory writs, but the court of appeal declined to hear the case. The plaintiff then looked to the Louisiana Supreme Court, which remanded the case and instructed the appellate court to issue an opinion. *Hayden v. 3M Co.*, 2016-1986 (La. 12/16/16); 211 So.3d 392.

"The sole issue to be determined is whether Louisiana subpoena power extends

Continued on page 14

Compelling an out-of-state defendant

Continued from page 12

to nonresident parties participating in litigation in Louisiana courts," the Fourth Circuit said on remand. Louisiana courts draw their subpoena power from La. C.C.P. art. 1352, which provides:

> A witness, whether a party or not, who resides or is employed in this state may be subpoenaed to attend trial or hearing wherever held in this state. No subpoena shall issue to compel the attendance of such a witness who resides and is employed outside the parish and more than twenty-five miles from the courthouse where the trial or hearing is to be held . . .

The defendant corporations argued that the plain language of the statute precludes a court from compelling a nonresident who is not employed in Louisiana to appear at trial. *Id*. In further support of their argument, the defendant corporations cited *Cattle Farm Inc. and Abercrombie*, 146 So.2d 689 (La.App. 4 Cir. 1962), *reversed on other grounds*, 155 So.2d 426 (La.1963). In *Cattle Farms*, the Fourth Circuit instructed that art. 1352 prohibits an adverse party who is a nonresident and does not work in Louisiana from being compelled to attend trial in the state.

The *Hayden* court rejected the defendant corporations' argument by recognizing that "[c]learly the case law regarding Louisiana's subpoena power has evolved since *Cattle Farm*." *Hayden*, 211 So.3d at 532.

In several post-*Cattle Farm* decisions, Louisiana appellate courts determined there was no prohibition on subpoenaing a nonresident party and instead adopted a discretionary fundamental fairness approach where the court considers the travel costs, the complexity of the case, the potential recovery, and whether other methods of discovery have been attempted.[2]

Moreover, in *Phillips Petroleum Co. v. OKC Ltd Partnership*, the Louisiana Supreme Court discussed the judicial power to compel the appearance of a nonresident defendant in the state for a deposition. Although the issue presented to court in that case involved whether a nonresident third party could be compelled to appear, the court noted that "if the nonresident were a defendant party, thus subject to personal jurisdiction of a Louisiana court, he probably would be compelled to come to the state to give his deposition." 634 So.2d 1186, 1188, n. 3 (1994).

Taking the declaration by the Louisiana Supreme Court in *Phillips Petroleum* together with its previous rulings in *Hohner, Broda*, *O'Rourke*, and *In re Medical Review Panel of Hughes*, the Fourth Circuit in *Hayden* ruled in favor of the plaintiff and reversed the trial court's quashing of the subpoena of the nonresident corporations. It is a decision that all trial attorneys should consider when honing their trial strategies for cases pending in Louisiana.

Endnotes

1. Rule 45 was amended on December 1, 2013, to resolve a circuit slip over whether a district court had nationwide subpoena power over parties and their officers. Rule 45(c)(1) now provides: [a] subpoena may command a person to attend a trial, hearing, or deposition only as follows: (a) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (b) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or party's officer; or (ii) is commanded to attend trial and would not incur substantial expense. The comments to the new rule instruct that "these amendments resolve a split in interpreting Rule 45's provision for subpoenaing parties and party officers.… Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resided, is employed, or regularly transacts business in person in the state."
2. *Hohner v. Travelers Insurance Co.*, 246 So.2d 727 (La.App. 4th Cir. 1971); *Broda v. Jack Sutton Co.*, 488 So. 2d 226 (La. App. 4 Cir. 1986); *Transworld Financial Services Corp. v. Briscoe*, 459 So.2d 100 (La.App. 2 Cir. 1984); *O'Rourke v. Hilton Hotels Corp.*, 560 So.2d 76 (La.App. 4 Cir. 1990); and *In re Medical Review Panel of Hughes*, 01-2313 (La.App. 4 Cir. 1/23/02); 807 So.2d 1074.