

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-140
Issued: March 1976

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer cause a subpoena to be issued and served in a pending civil action purportedly compelling a witness to submit to a recorded interview under oath, without giving notice of the interview to opposing counsel affording him an opportunity to be present and cross-examine?

Answer: No.

References: CR 45, 30.02, 31.01; EC 7-25; DR 7-106(C)(7)

OPINION

In the applicant's community, because of bureaucratic practices in the local police departments, it is usually difficult for trial lawyers to obtain written pretrial statements from police officers concerning civil matters they have investigated. As a result, some lawyers have adopted the practice described in the question.

CR 45 sets out the purposes for which subpoenas may be issued and served. Ex parte investigation is not among them. A subpoena may be issued under CR 45.04 to compel an extra-judicial appearance of a witness, but the rule explicitly requires a lawyer's certification that notice has been given as required by CR 30.02 and 31.01.

The practice described in the question is pure bluff, tending to create disrespect for judicial process. Thus it is improper under EC 7-25 and DR 7-106(C)(7).

The applicant also asks if "there is any impropriety in obtaining a sworn statement from the investigating officer, before the filing of suit, on an ex parte basis also?" As the question is put, the answer obviously is "no." Equally obviously, if the applicant wants to know if it is improper to use a subpoena to obtain such statements, the answer is "yes."

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.