

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-315
Issued: January 1987

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: What is the proper response for an attorney who is subpoenaed by a prosecutor to give testimony or supply evidence regarding his or her client before a Grand Jury?

Answer: See discussion.

References: KY.R.Cr.P. 7.02; F.R.Cr.P. 17; U.S. v. Klubock, 639 F.Supp. 117 (D.Mass. 1986); ABA Resolution (Feb. 5-11), 1986); U.S. Attorneys' Manual § 9-2.161 (a); DR 4-101(C)(2); Proposed Kentucky Model Rule 1.6(b)(4).

OPINION

Several defense attorneys have contacted the Committee regarding the above question. The principal question posed by the attorneys is whether such subpoenas are proper, and whether they may properly appear and respond by asserting claims of privilege.

Such subpoenas presumably issue under the authority of Kentucky Rule of Criminal Procedure 17. Whether such a subpoena is appropriate in a given case is a question of law. In addition, the conduct of the prosecutor seeking such a subpoena is not properly before us, inasmuch as our "jurisdiction" is limited to questions relating to the propriety of the requestor's own future conduct. As to limitations that might be placed on such subpoenas by the Courts or other rule-making authorities, *see* United States v. Klubock, 639 F.Supp. 117 (D.Mass. 1986); Resolution of the ABA House of Delegates (February 5-11, 1986). *Cf.* United States Attorneys Manual § 9-2.161(a).

The attorney-recipient of such a subpoena must respond by asserting any privilege (i.e., the attorney-client privilege) and may resolve doubts regarding the applicability of the privilege in favor of the client. The attorney should insist on a court order resolving any such issue, and may challenge the court order to the extent that good faith arguments can be advanced as to its invalidity, prior to providing testimony or documents. DR 4-101(C)(2); Proposed Kentucky Model Rule 1.6(b)(4).

The assertion of any privilege, or the presentation of any other objection to the subpoena, may presumably be made by a motion to quash. In the alternative, the attorney may assert the

privilege and demand a court order before appearing or at his or her appearance, prior to testifying or providing evidence.

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.