

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-348
Issued: June 1991

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 8.3(c), which was renumbered to Rule 8.4(c). Lawyers should consult the current version of the rules and comments, SCR 3.130, (available at <http://www.kybar.org>), before relying on this opinion.

Question: Is it ethical for a lawyer to represent to the court and the opponent, in a pretrial statement, that certain persons will be providing expert testimony on their client's behalf, and that person is not a witness in any other capacity, when the named experts have never been contacted?

Answer: No. This is a deceptive practice.

References: Virginia Op. 768 (1986); Rules 4.1 and 8.3(c); DRs 1-102(A)(4), 7-102(A)(4)(5)(8).

OPINION

With some frequency, it is being brought to the Committee's attention that lawyers are listing persons as expert witnesses when the lawyer has never contacted the named witnesses. In Virginia Op. 768 (1986) the Committee held that it was a "fraud on the court for a lawyer (in response to interrogatories) to list the names of physicians as testifying experts when the lawyer has not contacted the persons named. While there might be some unusual circumstance justifying such conduct, a court or an opponent would be justified in characterizing it as "deceptive."

It would seem to follow that it would be a deceptive practice for a lawyer to name an expert in a pretrial statement when the lawyer has not contacted the person to service in that capacity. That would certainly be the case if the lawyer had no intention of contacting the witness. To suggest otherwise would be to invite bluff and deception, and the misuse of a person's name and reputation for tactical purposes. The practice of naming experts with no prior contact could also be used to discourage the opponent from contacting the person listed, and in an extreme case could result in the "cornering of the market" on a category of experts. Of course, the intent (innocent or otherwise) of the lawyer may be an issue in a particular case.

The practice complained of has occurred most frequently in connection with medical cases and medical cases and medical experts. However, it is particularly distressing to note that lawyers are now taking the liberty of naming the Chairman and other members of the Ethics Committee as "testifying experts" in civil litigation involving lawyers. It has been the position of the Committee Chairman that he will not provide paid expert testimony for or against lawyers in civil and criminal cases in Kentucky during his tenure as Ethics Chairman. This position has been announced in the Bench and Bar, along with references to Virginia Op. 768. Despite this warning, lawyers are still naming the Chairman and other members as "expert witnesses" in pretrial statements filed with the Court.

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.