

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-356
Issued: March 1993

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, which was renumbered to Rule 8.4. 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: Attorney A calls up Attorney B and asks for deposition dates as to fact Witnesses 1, 2, 3, and 4. Attorney B gives Attorney A a date certain upon which to hold depositions of all four witnesses to occur at one hour intervals on the same day. Attorney A then prepares a subpoena to secure the attendance of witnesses 1, 2, 3, and 4 at the scheduled deposition. Attorney A then calls Attorney B and cancels the deposition but proceeds on the date scheduled for the deposition to meet with witnesses 1, 2, 3, and 4 to obtain their statements. Has Attorney A violated the Rules of Professional Conduct?

Answer: Yes.

References: Rules of Professional Conduct 3.4(c), 4.1 and 8.3; KBA E-304 (1985); KBA E-140 (1976); Georgia Op. 40 (1984).

OPINION

In KBA E-140 (1976) the Committee noted that a lawyer may not “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.” The Committee observed that this process is not authorized by the Rules of Procedure and amounts to “pure bluff, tending to create disrespect for judicial process.” Georgia Opinion 40 (1984) had stronger words for such “simulated process.” And again, in KBA E-304 (1985), the Committee objected to resort to so-called “*ex parte* subpoenas,” while observing that questions of procedural law are ordinarily left to the courts.

We note that while the Federal Courts have expanded discovery from non-parties (but again, only with proper, non-deceptive notice), the Kentucky Courts have not. And neither the Kentucky nor the Federal Rules suggest that a lawyer may dragoon a witness into his or her office, under color of a “subpoena”, for a private interview, the taking of a witness statement, or for secret, unnoticed, document production. In Kentucky subpoenas for testimony (45.01) or subpoenas *duces tecum* (45.02) may issue for the taking of depositions (45.04) or for attendance at a hearing or trial

(45.05). No part of the Rule authorizes the use of a subpoena for a lawyer's unnoticed or "ex parte" investigation.

We divine that a lawyer who would issue a notice of deposition scheduling four depositions at one hour intervals on a single day, and who would, to facilitate same, issue subpoenas to non-party witnesses to compel them to come to his or her office, and who would then call opposing counsel to (dare we be frank) lie in order to secure his or her non-attendance, and who would in the exploitation phase of the operation, take statements from non-party witnesses under the cloak of the previously issued subpoena, may very well earn an unpleasant audience with the Presiding Magistrate or the Inquiry Tribunal, since the lawyer is doing indirectly what was condemned in E-304 and E-140.

The requestor has asked whether he or she would violate the Rules if he or she were to engage in this practice. We answer "Yes", since the scheme seems to be designed to circumvent the Rules and mislead opposing counsel and witnesses. See Rules 3.4(c), 4.1, and 8.3. To the extent that the requestor is asking about the conduct of another lawyer in a specific case or is asking for guidance regarding remedies in a specific case, we must defer to the appropriate tribunal, since the Committee does not issue opinions for offensive purposes. Our opinions are "advisory" and issued for the protection of the requesting lawyer. Nor are our opinions binding on court or counsel.

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.