

**Kentucky Bar Association  
Ethics Opinion KBA E-423  
Issued: January 2004**

***The Rules of Professional Conduct are amended periodically. 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.***

**Subject:** Use of Subpoena to Obtain Extrajudicial Witness Statements or Documents in a Criminal Case

**Question 1:** May a lawyer use a subpoena to compel the attendance of a witness at a pretrial court proceeding and then, after service, invite the witness to make a statement or execute an affidavit in the requesting lawyer's office without notice to opposing counsel, where required, and thereafter relieve the witness of the obligation to appear at the court proceeding?

**Answer:** No.

**Question 2:** May a lawyer issue a subpoena to a person or entity accompanied by a letter (or by other means) inviting that person or entity to "certify" requested documents and provide them directly to the requesting lawyer, in lieu of attending a pretrial hearing or trial, without notice to opposing counsel, or a grand jury proceeding where such notice is not required?

**Answer:** No.

**References:** Rules 3.4(a), 3.4(c), 4.1, 8.3, and 8.3(c), Kentucky Rules of Professional Conduct (SCR 3.130); KBA Ethics Opinions E-356 (1993), E-304 (1985) and E-140 (1976); Georgia State Bar Disciplinary Board, Opinion 40 (1984); Kentucky Constitution, Section 11; RCr 1.08(2)(a), RCr 3.07, RCr 4.40, RCr 5.06, RCr 7.02, RCr 7.02(3), RCr 7.10, RCr 7.10(1), RCr 7.10(2), RCr 7.10(3), RCr 7.12, RCr 8.06, RCr 9.78 and RCr 13.04; CR 30.02 and CR 45.02; KRS 422.300, KRS 422.305, KRS 422.305(2), KRS 422.320 and KRS 500.070; Fed.R.Crim.P. 17; 45 CFR § 164.512(e); Bishop v. Caudill, Ky., 87 S.W.3d 1, 4 (2002); Anderson v. Commonwealth, Ky., 63 S.W.3d 135, 142 (2001); Munroe v. Kentucky Bar Association, Ky., 927 S.W.2d 839, 840 (1996); King v. Venters, Ky., 596 S.W.2d 721 (1980); United States v. Keen, 509 F.2d 1273, 1274 (6<sup>th</sup> Cir. 1975).

## **Opinion**

Although discovery practices vary to some extent from one jurisdiction to another, the scope of discovery in Kentucky state courts is certainly broader and more expansive in civil cases than in criminal cases. For example, the deposition is a primary component of civil discovery. A party may depose any person thought to have relevant information, including the opposing party, without making any showing of need or justification. See CR 30.02. On the other hand, the use of depositions in the criminal justice process is sharply restricted and aimed at preserving testimony rather than discovery. And, unlike civil practice where the parties essentially control the deposition process, RCr 7.10 requires court authorization for a deposition<sup>1</sup>, except by agreement of the parties [RCr 7.10(3); *but cf.* RCr 7.12 (which indicates the ultimate need for entry of a court order)].

Similarly, the issuance of a subpoena in a criminal action, be it to testify or produce documents before the grand jury, in pretrial proceedings or at trial, is strictly circumscribed by the Rules of Criminal Procedure. The improper use of subpoenas has special implications in criminal proceedings. Generally, a subpoena is a process of the Court, not of the requesting party, and “once subpoenaed, the witness is answerable to the Court and can only be excused by the Court.”<sup>2</sup> Consequently, a lawyer who invites a person under subpoena to forego compliance in the indicated manner violates the Kentucky Rules of Professional Conduct (SCR 3.130) (hereinafter referred to as “RPC”), specifically RPC 8.3(c), by engaging in conduct involving dishonesty, deceit and misrepresentation; RPC 3.4(c), by disobeying an obligation under the rules of a tribunal; and RPC 4.1, by making a false statement of law to a third person. Furthermore, the failure to provide notice to opposing counsel may contravene RPC 3.4(a), by obstructing another party’s access to evidence.

### **I. The Use of a Subpoena to Obtain Extrajudicial Witness Statements**

As the Committee indicated in KBA E-140 (1976), the use of a subpoena for “ex parte investigation” is strictly prohibited. Kentucky law provides for the compelled extrajudicial testimony of witnesses in criminal cases only by court order or, in limited circumstances, by agreement of the parties. *See* RCr 7.10(3) and 7.12. In such circumstances, there are specific notice requirements to opposing counsel and other protections that are intended to address constitutional concerns in depositions in criminal cases. *See* RCr 7.10(1) & (2) and 7.12. Other than the narrow deposition scenario provided in RCr 7.10, all testimony compelled by subpoena in criminal cases occurs in open court (unless taken in chambers pursuant to motion and order). This includes testimony that is sought and given in response to a subpoena at preliminary hearings (RCr 3.07), bond reduction hearings (RCr 4.40), competency hearings (RCr 8.06), various pretrial motion hearings (RCr 9.78), as well as at trial. Even grand jury subpoenas (RCr 5.06) may be used only for a proper purpose. For example, the Commonwealth may not use grand jury subpoenas as trial preparation or as a “substitute for discovery depositions which,

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<sup>1</sup> The rules require a showing that the prospective witness may be unable or unavailable to testify at a trial or hearing, that the witness’s testimony is material and that it is necessary to take the witness’s deposition in order to prevent a failure of justice.

<sup>2</sup> *See Anderson v. Commonwealth*, Ky., 63 S.W.3d 135, 142 (2001) (finding that a prosecutor who *sua sponte* dismissed a witness the prosecutor had subpoenaed to testify at trial acted improperly.) *See also* KBA E-304 (1985), quoting Georgia State Bar Disciplinary Board, Opinion 40 (1984).

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absent court order or agreement of parties, are not permitted in a criminal case. RCr 7.10.” Such subpoenas must be quashed if found to be issued for the sole or dominant purpose of facilitating discovery.<sup>3</sup>

In short, testimony compelled by subpoena in a criminal case must be for a specific judicial proceeding at a designated time in court, or at such other place as the court may order. The only form of “extrajudicial” testimony that is authorized is pursuant to RCr 7.10, which provides for a deposition by court order, and requires “notice to the parties”. Otherwise, a witness deposition that meets the threshold requirements of the rule may be taken only by “agreement of the parties”, which by implication requires notice to all parties.<sup>4</sup> From an ethical perspective, the lawyer who directs a witness to comply with a subpoena in an unauthorized proceeding misleads the witness as to his or her obligation and thus violates RPC 8.3, which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.” The lawyer who fails to give notice, where required, also violates RPC 3.4(c) by “intentionally disobey[ing] an obligation under the rules of a tribunal” and deceiving the other party in violation of RPC 8.3. Moreover, the improper use of a subpoena to obtain statements in a criminal case also may violate RPC 3.4(a), in that it could have the effect of “unlawfully obstructing another party’s access to evidence ....”

## **II. The Use of a Subpoena to Obtain Documents Ex Parte**

The ethical principles discussed above are equally applicable to situations when a subpoena is used improperly to obtain documents in a criminal proceeding. As previously noted, lawyers are not at liberty to alter the terms of a subpoena, once issued, by inviting a witness to comply through document production in lieu of attendance. According to the Rules of Criminal Procedure, subpoenaed documents may be produced only before the Court in connection with a judicial proceeding or properly authorized deposition. Furthermore, a lawyer who fails to give notice to all parties of document production pursuant to a subpoena *duces tecum*, engages in deceitful conduct in violation of RPC 8.3(c), and obstructs another party’s access to evidence in violation of RPC 3.4(a).

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<sup>3</sup> *Bishop v. Caudill*, Ky., 87 S.W.3d 1, 4 (2002) (finding that the Commonwealth’s post-indictment issuance of subpoenas *ad testificandum* was for discovery purposes.

<sup>4</sup> RCr 7.12 recognizes the special constitutional concerns in criminal cases, requiring that orders authorizing depositions “shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant.” See *Anderson*, *supra*, note 2. Consequently, a lawyer who fails to provide notice to opposing counsel is in violation of both RPC 3.4(a) and (c). Furthermore, when a lawyer directs a witness to comply with a subpoena at an unauthorized proceeding, it is a usurpation of the Court’s authority over its own process (See, e.g., *United States v. Keen*, 509 F.2d 1273, 1274 (6<sup>th</sup> Cir. 1975) finding a U.S. Attorney’s act of subpoenaing a witness to a pretrial interview at his office to be the use of a subpoena for an unauthorized purpose under Fed.R.Crim.P. 17 and “highly improper”). It also may be an obstruction of another party’s access to evidence, as well as the rights to confrontation and due process (See Ky. Const. Sec. 11 “in all criminal prosecutions the accused has the right ... to meet the witnesses face to face[.]”. See also KBA E-356, noting that the Kentucky Rules do not “suggest that a lawyer may dragoon witnesses into his or her office, under color of a ‘subpoena’ for a private interview”).

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With the exception of one discrete statutory provision [*see* discussion of KRS 422.305(2), *infra*], document production directly to a party's lawyer is in violation of the Rules of Criminal Procedure and, thereby, RPC 3.4(c). According to RCr 7.02, in addition to testimony, a subpoena may "also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein." The Rule contemplates that subpoenas *duces tecum* will normally direct the witness to produce documents in connection with testimony at trial, a pretrial hearing, or at a duly authorized deposition.<sup>5</sup> However, provision is made for document production prior to trial or submission into evidence, but that production must occur "before the court", which may, in turn, "permit the ... documents ... to be inspected by the parties and their attorneys."<sup>6</sup> Additionally, KRS 422.305 provides a special procedure for the production of medical records, and permits hospitals to elect to produce "certified" records in lieu of attendance at a proceeding. Although KRS 422.305(2) allows delivery to the requesting party, that party must deliver the records to the clerk of the court after the records are no longer needed for a pretrial proceeding or deposition.<sup>7</sup> KRS 422.300 allows the use of such records in a criminal proceeding, but requesting lawyers must comply with the strict notice requirement to "all other attorneys of record".

The failure to give notice to opposing counsel of documents produced directly to a lawyer's office violates RPC 3.4(a) by obstructing the opposing party's access to evidence, RPC 3.4(c) by knowingly disobeying an obligation under the rules of a tribunal<sup>8</sup>, and RPC 8.3(c) because such conduct is deceitful. Additionally, a party not provided with notice is deprived of the right to object to "unreasonable or oppressive" demands<sup>9</sup> or to assert any applicable privilege. However, criminal cases present special concerns where a defendant is the requesting party. KRS 500.070 provides that a defendant shall not be required to provide notice of a defense prior to trial. Therefore, the Committee recognizes that circumstances may arise where merely furnishing a copy of the subpoena to opposing counsel will, in effect, give notice of a possible defense.<sup>10</sup> Such concerns are properly addressed to the appropriate tribunal, which may

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<sup>5</sup> The use of coordinating conjunctions in the provisions relating to document production indicates that, usually, production will occur in connection with testimony. For example, RCr 7.02(3) indicates that in addition to testimony in subsection 1, a "subpoena may also command the person" to produce documents. Additionally, RCr 7.10 states that a "court may ... order that the witness's testimony be taken by deposition and that any designated ... documents ... not privileged, be produced at the same time and place."

<sup>6</sup> RCr 7.02(3). Contrast CR 45.02, which provides for copies to all parties of documents produced in lieu of attendance. This provision is not applicable to criminal proceedings under RCr 13.04, because it is inconsistent with RCr 7.02(3) providing only for production and inspection before the court.

<sup>7</sup> *See* KRS 422.320. *See also* 45 CFR § 164.512(e) requiring either a court order accompany a subpoena or satisfactory assurances from the requesting party that notice has been given to the subject of the records or that the requesting party has secured a qualified protective order.

<sup>8</sup> *See* Munroe v. Kentucky Bar Association, Ky., 927 S.W.2d 839, 840 (1996).

<sup>9</sup> RCr 7.02(3).

<sup>10</sup> *See* King v. Venters, Ky., 596 S.W.2d 721 (1980) (holding that there is no authority for requiring a defendant to furnish a witness list to the Commonwealth).

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permit *ex parte* orders under RCr 1.08(2)(a).<sup>11</sup> Nonetheless, documents produced pursuant to an *ex parte* order must still comply with RCr 7.02(3) and be produced before the Court, not to the requesting lawyer.

From an ethical perspective, the issues raised by this question are no different than those raised by Question I. By using a subpoena *duces tecum* to obtain documents in a manner other than intended by the rules, or without proper notice, where required, the lawyer violates RPC 8.3(c) and 3.4(c), and may violate RPC 3.4(a). Such use of the Court's processes and procedures to deceive and gain an unfair advantage interferes with the orderly administration of justice and jeopardizes the right of fair trial.

In conclusion, it should be noted that this opinion focuses on the ethical issues that arise in conjunction with the use of subpoenas in criminal cases in state court. This opinion was not drafted to reflect rules of criminal procedure in federal court or proceedings before administrative bodies. The Committee notes, however, that all members of the Kentucky Bar Association are bound by the same rules of professional conduct, irrespective of where they practice. Each must comply with the rules of the tribunal and may not engage in conduct that is dishonest or otherwise violates the rules discussed in this opinion.

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***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.*

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<sup>11</sup> "[E]very paper relating to discovery required to be served upon a party *unless the court otherwise orders*, ... shall be served upon each party."