Kentucky Bar Association
Ethics Opinion KBA E-422
Issued: November 2003

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.

Subject: Use of Subpoena *Duces Tecum* to Obtain Documents from a Non-party in a Civil Case in state court.

Question 1: May a lawyer who has noticed a deposition and served a subpoena *duces tecum* on a non-party witness, cancel the deposition upon receipt the subpoenaed documents, without providing the other parties with copies of all documents obtained.

Answer: No

Question 2: May a lawyer serve a trial subpoena *duces tecum* on a person or entity and orally or in writing request the subpoenaed person or entity to "certify" the records and provide them directly to the requesting lawyer in lieu of attending the trial, without giving notice of the subpoena or the documents produced to the other parties?

Answer: No

References: Rules 3.4, 4.1 and 8.3, Kentucky Rules of Professional Conduct (SCR 3.130); KBA E-356 (1993); CR 30.02, 45.01, 45.02, 45.03; KRS 422.305; Anderson v. Commonwealth, Ky., 63 S.W.3d 135 (2002); Munroe. v. KBA, Ky., 927 S.W.2d 839 (1996).

Opinion

Once again, the Committee has received inquiries about the ethical limitations on the use of a subpoena *duces tecum* to compel the production of documents from a non-party witness in a civil case. The two questions presented raise different but related concerns about the ethical duty to give notice and share information about documents obtained pursuant to a lawfully issued subpoena. Although both questions implicate the Rules of Civil Procedure — particularly those rules relating to discovery and subpoenas — this opinion is confined, to the extent possible, to a discussion of the Rules of Professional Conduct. We emphasize that the discussion that follows relates only to civil cases in state court. Additional considerations arise in the context of criminal cases and they are addressed in KBA E-423 .

I. The Use of a Subpoena *Duces Tecum* in Discovery in a Civil Case

Before beginning the discussion of the ethical issues presented by this inquiry, a brief description of the discovery process may be useful. The Kentucky Rules of Civil Procedure authorize litigants to engage in various forms of discovery and set forth the procedures to be followed. See CR 26.01 – 37.05. Under the civil rules, if a party wishes to compel the production of documents from a non-party witness, a deposition must be noticed and a subpoena *duces tecum* must be issued.[1] Under the rules, written notice of both the deposition and the documents subpoenaed must be given to all parties to the action.[2]

CR 45.01 reinforces the limited purpose of the subpoena and states that subpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial."[3] In the interest of fairness, CR 45.03(2) requires that all documents received pursuant to a subpoena be shared with all other parties. Specifically it provides that "copies of all documents received in response to the subpoena (or in lieu of proceedings hereunder) shall be forthwith furnished to *all* other parties to the action except on motion and for good cause shown (emphasis added)." Although it is not the Committee's goal to analyze all of the intricacies of the discovery rules, it is clear that they are designed to ensure that all participants have notice and equal access to information obtained from non-party witnesses pursuant to these procedures.

This inquiry contemplates that the requesting lawyer will notice a deposition of a non-party witness; cause a subpoena *duces tecum* to be issued and served for production of designated documents and, without notice to the other parties, arrange for the non-party witness to supply the documents, and then unilaterally "cancel" the deposition without providing opposing counsel with copies of the

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[1] CR 30.02 provides in relevant part: "If a subpoena duces tecum is to be served on a person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached or included in the notice." CR 45.02 provides: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein…" Although the state rule seems to require a deposition in order to obtain documents from a non-party witness, the federal rules have eliminated such a requirement. FRCP 45 was amended in 1991 to provide that "a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things,… need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial." The Advisory Committee Notes state that one of the reasons for the amendment was to "facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in possession of persons who are not parties."

[2] CR 30.02 (1) provides:

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined …. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached or included in the notice.

[3] The rule creates one exception to the deposition requirement by providing "upon order of the Court, with the agreement of the parties, documents may be produced without a deposition." In addition, KRS 422.305 provides a special procedure for the production of medical records and permits hospitals to produce "certified" records in lieu of attending a deposition (KRS 422.305). These are the only exceptions provided for by rule or statute.

documents. The implication is that the requesting lawyer obtains the subpoena under the authority of the discovery rules and provides the required notice, but then leads opposing counsel to believe that the entire discovery request has been "cancelled" (including the request for documents) when in fact the lawyer still is relying upon the power of the subpoena to obtain the documents. Reduced to its most basic terms, the question asks whether a lawyer may use the court authorized discovery procedures and the legal power of a subpoena to secretly obtain documents from a non-party witness. The answer is clearly no.

The Rules of Professional Conduct are designed to preserve the integrity of the adversary system – to insure that all parties are treated fairly and that lawyers observe not only their obligations to their clients, but also their obligations as officers of the court. These goals and values are reflected throughout the rules, but are clearly apparent in RPC 3.4, 4.1 and 8.3. The most important of these rules is RPC 8.3, which declares that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A lawyer who uses the discovery process and subpoena power to compel a witness to provide documents, but then leads the other parties to believe that the procedure and accompanying obligations have been cancelled, clearly violates RPC 8.3. The lawyer has not only misused the power of the subpoena and misled the non-party witness with regard to his or her obligations, but the lawyer also has deceived the other parties to the proceeding. The lawyer also has violated RPC 4.1, which provides that "a lawyer shall not knowingly make a false statement of material fact or law to a third person." In addition, such conduct violates RCP 3.4(c), which provides that "a lawyer shall not knowingly or intentionally disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." In this case, the rules of the tribunal require that a subpoena only be used to require attendance at a proceeding and that all documents obtained pursuant to a subpoena shall be furnished to all other parties to the proceeding. By failing to share the documents, the lawyer has not only engaged in deceit and misrepresentation, but he or she also has "knowingly and intentionally disobeyed an obligation under the rules of the tribunal" in violation of RPC 3.4(c).

This devious conduct is similar to that described in KBA E-356 (1993), which involved a lawyer who scheduled a deposition, then advised opposing counsel that it had been cancelled, but proceeded to take statements from the non-party witness "under the cloak of the previously issued subpoena." In the view of this Committee, the latter conduct "circumvented the rules and misled opposing counsel and witnesses" in violation of Rules 3.4(c), 4.1 and 8.3. *(*See Munroe v. KBA, Ky., 927 S.W.2d 839 (1996) where a lawyer was disciplined for, among other things, using an *ex parte* subpoena to obtain documents from a non-party.)

For the reasons discussed above, it is the Committee's view that a lawyer violates the Rules of Professional Conduct by giving notice of a deposition and causing a subpoena *duces tecum* to be served on a non-party witness and then canceling the deposition upon receipt of the subpoenaed documents, without furnishing the other parties with copies of the documents.

II. The Use of a Trial Subpoena

The second question differs from the first in that it involves a subpoena compelling the production of documents at trial, rather than a subpoena issued pursuant to the discovery rules. In this scenario, it is contemplated that the trial subpoena will be accompanied by an invitation to certify or otherwise provide the records directly to the lawyer in lieu of appearing at trial. In some cases, the lawyer even provides the subpoenaed witness with a prepared certification form. As in the question above, the lawyer causing the subpoena *duces tecum* to be issued and served obtains the documents and does not share them with opposing counsel. The prejudice to the opposing party is compounded by the

fact that, unlike the discovery situation where the opposing party has notice that the subpoena has been issued, the Rules of Civil Procedure do not appear to require any kind of notice of a trial subpoena.

As in the question above, CR 45.01 is relevant in that it prohibits the use of a subpoena except to compel attendance and production of documents at an official proceeding. Here the letter or other request accompanying the subpoena suggests that the lawyer's primary purpose is not to compel the attendance at trial, but only to obtain the documents. It appears that the lawyer is engaging in discovery, armed with the power of a subpoena, without complying with any of the procedural safeguards of notice provided for under the discovery rules. By using the subpoena for a purpose other than authorized by the rules, the lawyer has violated the ethical rules relating to dishonesty and deceit as discussed above (RPC 8.3). Moreover, irrespective of the lawyer's initial motive, the failure to provide opposing counsel with copies of the documents obtained, as required by CR 45.03(2), is a violation of the rules of the tribunal and, as a consequence, is an ethical violation under RPC 3.4.

In both Questions I and II, the Committee has addressed the obligations of the lawyer under the Kentucky Rules of Professional Conduct. Those rules prohibit dishonest and deceitful conduct and obligate the lawyer to comply with the rules of the tribunal, except for an open refusal that no obligation exists. It is the view of the Committee that the conduct contemplated by both questions violates RPC 3.4, 4.1 and 8.3. The Committee expresses no view on whether, as a matter of law, a lawyer in a civil case has the power to" cancel" a subpoena and relieve the subpoenaed person of his or her obligations to appear.[4]

In conclusion, it should be noted that this opinion focuses on the ethical issues that arise in conjunction with the use of a subpoena in civil cases in state court. It was not drafted to reflect the practice in federal court or before administrative agencies. The Committee notes, however, that all members of the Kentucky Bar Association are bound by the same ethical rules, irrespective of where they practice. Lawyers must comply with the procedural rules of the tribunal and may not engage in conduct that is dishonest or otherwise violates the Rules of Professional Conduct.

Approved by Ethics Committee: October 21, 2003

[4] The issue of the authority of a civil litigant to cancel a subpoena is mentioned because of the recent decision in *Anderson v. Commonwealth*, Ky., 63 S.W.3d 135 (2002). In that case, a criminal defendant sought a new trial on several grounds, including newly discovered evidence. His motion was based, in part, upon the fact that the prosecutor had "released" a trial witness who he previously had subpoenaed. Although the Court declined to reverse on this basis, it took the opportunity to express its view that the prosecutor had acted improperly, in part because "he knew the defense was relying on the Commonwealth's subpoena and purposefully did not disclose that he intended to, or had already, released …" The majority noted that subpoenas are issued by the court (though requested by a party) and stated further that once a subpoena is issued, the witness can only be excused by the court. Three Justices dissented.

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.