

LEGAL ETHICS OPINION 1495

MISCONDUCT: REQUESTING
ISSUANCE OF UNENFORCEABLE
SUBPOENA ON OUT-OF-STATE
INDIVIDUAL.

You have presented a hypothetical situation in which an attorney, in divorce litigation, requests issuance of a *subpoena duces tecum* addressed to a resident of North Carolina. The subpoena is signed by the clerk of court and returned to the attorney who apparently mails it to the nonresident. You state that there is no proof of service of the subpoena in the court file. When records are not produced as requested, the attorney files a Request for an Order to Show Cause and mails a copy of the request to the subpoenaed nonresident. You state that the nonresident fears imprisonment and thus complies with the subpoena. Further, you state that the attorney is aware that a Virginia subpoena is unenforceable in another state because a North Carolina bank had earlier refused to release bank records requested by a similar subpoena.

You have asked the Committee to opine, under the facts of the inquiry: (1) whether it is permissible for a Virginia attorney to request a Virginia court to issue a *subpoena duces tecum* to obtain documents from an out-of-state individual, knowing that such subpoena is not enforceable; (2) whether it is ethical for the Virginia attorney to request a show cause summons or contempt order threatening possible imprisonment against a nonresident who does not respond to the *subpoena duces tecum*, knowing such individual cannot be held in contempt; and (3) whether it is ethical for the attorney to request jail time considerably in excess of the maximum ten day sentence permitted under Rule 4:9(d) of the Supreme Court of Virginia and Virginia Code § 18.2-456 and § 18.2-457.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

1. The Committee has previously opined that it is not improper for an attorney to sue on a cause of action previously dismissed by the same court; to fail to inform the court as to the previous suit when not specifically asked by the court for such information; or to file suit on an overdue account after the statute of limitations has run. *See* LE Op. 491, LE Op. 1224.

In the facts you provide, the Committee is of the opinion that it would be improper and violative of DR:1-102(A)(4) for a Virginia attorney to request a Virginia court to issue a *subpoena duces tecum* to obtain documents from an out-of-state individual, knowing that such subpoena is not enforceable, unless the subject of the subpoena has agreed to accept service.

2. The Committee is of the further opinion that it would be similarly improper to request a show cause summons or contempt order against the nonresident for failure to comply with the *subpoena duces tecum*.

Committee Opinion
November 5, 1992

3. Since the Committee finds that both the initial issuance of a *subpoena duces tecum* and the subsequent request for a show cause order in the circumstances you present would be improper, the Committee is of the opinion that a subsequent request for jail time resulting from the out-of-state's lack of response to both would also be improper and violative of DR:1-102(A)(4).