

LEGAL ETHICS OPINION 1552

ZEALOUS REPRESENTATION –
REPRESENTING A CLIENT WITHIN
THE BOUNDS OF THE LAW - TRIAL
CONDUCT - MISCONDUCT:
ATTORNEY ISSUING SUBPOENA FOR
DEPOSITION WITHOUT NOTICING
OPPOSING COUNSEL, THEN
INTERVIEWING WITNESS WITHOUT
TAKING THE DEPOSITION.

You have presented a hypothetical situation in which a personal injury case is pending in a circuit court. You indicate that depositions were scheduled for a specific time and date for one of the parties and a witness and that those depositions took place as scheduled.

In addition, you further indicate that, following those depositions and after further investigating the facts, Attorney A discovers that Attorney B served a subpoena for deposition of another witness who was not noticed for his deposition and whose deposition was not taken on the time and date scheduled for the other depositions. Attorney A also discovers that the subpoena for that witness was issued through the clerk's office and that it required the witness to be present at Attorney B's office one hour before the scheduled time for the noticed depositions. Finally, you state that Attorney B spoke with, and then released, the subpoenaed witness and did not advise Attorney A that the witness had been subpoenaed for his deposition and then released without the taking of any such deposition.

You have asked the committee to opine, under the facts of the inquiry, (1) whether it was appropriate for Attorney B to issue a deposition subpoena for the witness whose deposition was not noticed pursuant to the Rules of Court; and (2) whether it was appropriate for Attorney B to use the subpoena power of the court for the purpose of interviewing a witness rather than taking the witness' deposition pursuant to the subpoena.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:7-102(A)(1) which states that a lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another; DR:7-102(A)(3) which provides that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal; DR:7-105(C)(5) which mandates that a lawyer not intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings; and 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. Further guidance is available in Ethical Consideration 7-22 [EC:7-22] which exhorts, in pertinent part, that a lawyer is not justified in consciously

Committee Opinion
October 20, 1993

violating rules of evidence and procedure and should be diligent in efforts to guard against unintentional violations of, those rules.

In the facts you present, the committee believes that Attorney B has improperly obtained information from the witness by a subpoena without notice to opposing counsel. Such information may only be properly obtained by a lawyer, acting on his client's behalf, in accordance with all required rules of procedure including those applicable to discovery. See Nassau County Bar Ass'n LE Op. 92-32 (11/18/92), ABA/BNA Law. Man. On Prof. Conduct, 1001:6259. Thus, the committee opines that Attorney B has violated DR:7-102(A)(3) by concealing or knowingly failing to disclose to Attorney A that he had subpoenaed the witness for deposition prior to the other, scheduled depositions; and DR:7-105(C)(5) since the activities are in violation of the relevant Rules of Court.

Furthermore, the committee is of the opinion that the actions of Attorney B are also in violation of DR:7-102(A)(1) in that he has subjected the witness to a subpoena for a deposition which never took place. The committee is of the further opinion that the use of a subpoena to command the presence of a witness for a deposition or in court, with the knowledge that no deposition or court proceeding is scheduled, but for the sole purpose of interviewing the witness, is violative of the disciplinary rules cited herein.

Committee Opinion
October 20, 1993