

Advisory Opinion 1990-5

ATTORNEY'S USE OF SUBPOENA LIKE DOCUMENTS NOT ISSUED OR AUTHENTICATED BY COURT TO SECURE ATTENDANCE OF WITNESSES

Inquiring attorney has a practice which includes a large volume of litigation in a New Mexico Court. Cases regularly are set for hearing in which attorney must rely on the presentation of evidence from witnesses. Attorney proposes to use the form of a subpoena from the Court with case related information typed in and to mail the document to the witness hoping it will be honored. This procedure is proposed in lieu of having a subpoena issued by the Court and making service in accordance with New Mexico law, or otherwise requesting cooperation.

In the case of *State v. Eder*, 103 NM 211 (Ct. App., 1985) a prosecutor issued a document purporting to be a subpoena from a Grand Jury which was in fact only the form of such a subpoena filled in and served by the prosecutor. The Court's discussion relies in part on ABA Standards and the law of other jurisdictions and clearly concludes that the practice would not be allowed, requiring any evidence gained through use of the procedure to be suppressed.

In addition to those matters discussed by the Court of Appeals, we add the following concerns about the practice inquired of:

SCRA 16-304 B prohibits a lawyer from offering ". . . an inducement to a witness that is prohibited by law;" We believe this phrase has a broad meaning beyond the obvious, and would prohibit a practice which might be believed by a target or recipient to create a legal obligation to appear as a witness when no such obligation exists.

SCRA 16-304 C says that a lawyer may not "knowingly disobey an obligation under the rules of a tribunal . . ." Law applicable to New Mexico Courts is uniform and specific about the procedure a lawyer must follow to secure the presence before the Court of a witness who will not appear voluntarily. A witness appears voluntarily when the witness has been requested to appear without compulsory process and knowingly makes a choice to do so. Gaining the appearance of a witness by sending the witness a document which the witness might mistakenly believe to be compulsory process is a practice we believe constitutes a knowing disobedience of the Rules.

SCRA 16-401 A prohibits a lawyer from knowingly making ". . . a false statement of material fact or law to a third person . . ." It appears to us that since the purpose of the practice is to cause the potential witnesses to believe the document they receive is official and obligatory, the practice would contravene this Rule.

SCRA 16-404 says that a lawyer ". . . shall not use means that have no substantial purpose other than to . . . burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Persons who do not wish to cooperate as witnesses have a due process right to notice and compensation in accordance with the law. We believe the practice in question contravenes this Rule.

All lawyers who litigate are confronted with the problem of securing the attendance and cooperation of witnesses at discovery or Court proceedings. We are obligated by SCRA 16-101 to understand the process of compelling the attendance of witnesses. In most cases, witnesses will give some measure of cooperation. We do not mean by our opinion to suggest that the subpoena must be used for all witnesses. A lawyer may and should request cooperation from witnesses. A truthful presentation regarding the nature and existence of compulsory process, and advice to the witness that the lawyer intends to use the process absent cooperation are not prohibited. Presentation of a non-authenticated subpoena to a witness, by mail or otherwise, as a tactic to secure the attendance and cooperation of the witness is forbidden.

It is noted that the request came from an attorney practicing in the public sector. This Opinion is applicable equally to attorneys practicing in public and in private areas. The Committee feels that attorneys in a public practice who are in contact with many members of the public who may not otherwise communicate with attorneys should be particularly scrupulous in this conduct.