

# ADVISORY ETHICS OPINION 93-04

## **SYNOPSIS:**

An attorney may not "serve" a Vermont subpoena on an out-of-state party to secure that party's attendance at a criminal trial in Vermont where the subpoena to be "served" is unenforceable because served beyond the territorial limits of the court.

## **FACTS:**

An attorney asks out opinion whether the attorney can mail a Vermont District Court subpoena in a criminal matter to an out-of-state witness hoping that the out-of-state witness will comply with the mandate of the subpoena even though the subpoena, in fact, is unenforceable with respect to the out-of-state witness.

## **OPINION:**

The out-of-state service of a subpoena to a witness residing beyond the territorial limits of the court in an effort to mislead the witness subpoenaed into thinking that the witness must comply with the subpoena or face the penalties of the court's contempt sanctions is not permissible. Such conduct would violate numerous disciplinary rules, including DR 1-102(A)(4) and (A)(5) (lawyers shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or engage in conduct prejudicial to the administration of justice), and DR 7-102(A)(1) (lawyers shall not take action on behalf of a client when he knows such action would serve merely to harass or maliciously injure another).

The service of a subpoena under such circumstances would also be an abuse of process which would subject the attorney to a civil action for damages.<sup>1</sup>

The subpoena is a writ of the court carrying with it the sanction of the court's contempt powers for non-compliance. Use of such a writ to compel the attendance of a witness who is beyond the authority of the court and of the writ, constitutes a fraud and deception on the person subpoenaed, and a contempt of court for the knowing and willful misuse of court process. It violates the Code of Professional Responsibility.

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<sup>1</sup> Cf. 1 Am Jur 2nd *Abuse of Process* §§9, 12 (personal service of process procured by fraud, trickery or artifice constitutes actionable abuse of process; use of invalid process knowingly to gain information or evidence is an abuse of process).