102 USE OF SUBPOENAS IN CRIMINAL PROCEEDINGS

Adopted March 21, 1998.

Introduction

This opinion addresses problems related to the misuse of subpoenas *duces tecum* in criminal proceedings.[1] Effective October 31, 1996, Rule 17(c) of the Colorado Rules of Criminal Procedure was modified to require the subpoenaing party forthwith provide a copy of a subpoena *duces tecum* to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The rule change was deemed necessary, in part, because some attorneys have misused subpoenas *duces tecum* in criminal proceedings to obtain exclusive reviews of information, documents, photographs and other objects or reviews earlier than opposing counsel or an unrepresented defendant.

Syllabus

In a criminal proceeding, a lawyer may not issue or cause to be issued a subpoena for production of information, documents, photographs or other objects designated therein (a subpoena *duces tecum*) without providing a copy of the subpoena to opposing counsel or an unrepresented defendant when and as required by the applicable Rules of Criminal Procedure and governing law, unless a valid court order provides otherwise. Any attempt at subterfuge to knowingly violate the requirements of applicable rules to obtain an exclusive review of information, documents, photographs or other objects or a review earlier than other counsel or an unrepresented defendant is unethical.

It also is unethical for a lawyer to knowingly mislead the person upon whom a subpoena *duces tecum* has been served into disclosing privileged or confidential information that the witness would not otherwise knowingly reveal or be compelled to reveal except at the designated criminal proceeding and under judicial scrutiny.

If information, documents, photographs or other objects are inadvertently received from a witness on whom a subpoena *duces tecum* has been served that the lawyer knows to be, or that appear on its face to be privileged or confidential,[2] then the lawyer receiving such information has an ethical obligation to refrain from reviewing the information after becoming aware of the privileged or confidential nature of the information. The lawyer then has an ethical duty to notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer must also take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

Opinion

Rule 17(c) of the Colorado and Federal Rules of Criminal Procedure confers upon a witness subject to a subpoena *duces tecum* certain procedural and substantive rights.[3] For instance, if the person upon whom the subpoena *duces tecum* is served thinks it is unreasonable or oppressive, he or she may apply to the court to quash the subpoena. So, too, may a party to the proceeding. Because the notice requirements of Rule 17(c) were designed to protect procedural and substantive rights of a witness and/or party, any attempt at subterfuge to knowingly violate the requirements of Rule 17(c) deprives a witness or party of procedural and substantive rights, is unethical, and may also constitute criminal conduct.[4] *See* Colo. RPC 3.4, Comment [1] (evidence in a case is to be marshalled fairly, even if competitively, by the contending parties); 3.4(c) (a lawyer shall not knowingly disobey the rules of a tribunal); 4.1 (misrepresentation); 4.3 (dealings with unrepresented persons); 4.4 (respect for rights of third persons); and 8.4 (lawyers shall not engage in dishonesty, fraud, deceit or misrepresentation).

The purpose of a subpoena *duces tecum* in a criminal proceeding is to secure jurisdiction over a witness to obtain testimony, documents and/or other tangible things. Rule 17(c) subpoenas may be issued by prosecuting attorneys, counsels for defendants, or courts and compel a witness to produce documents or other physical evidence at a criminal proceeding. A party may also issue a Rule 17(c) subpoena to obtain a pretrial review of information, documents, photographs or other objects.

Colorado Rule 17(c), as amended, authorizes the issuance of a subpoena for the production of information, documents, photographs or other objects only after notice *forthwith* to all other parties to the proceeding. Federal Rule 17(c) requires notice to all other parties to the proceeding, except where the subpoena requests production at trial. *See United States v. Hart*, 826 F. Supp. 380, 381 (D. Colo. 1993) (citing authorities); *United States v. Urlacher*, 136 F.R.D. 550, 555-56 (W.D.N.Y. 1991) (citing authorities).

In the past, some prosecuting[5] and defense[6] attorneys have used, or attempted to use, subpoenas in criminal proceedings to conduct secret pretrial discovery, obtaining or attempting to obtain an exclusive review of information, documents, photographs or other objects or an earlier review than other parties. This is clearly a misuse of Rule 17(c) subpoenas, the primary purpose of which is to expedite criminal proceedings or trials by providing a time and place *before* the proceeding or trial for all the parties and their attorneys to inspect material which may be used as evidence.[7]

Communications with Subpoenaed Witnesses

In a criminal proceeding, the witness on whom a subpoena *duces tecum* is served is not required to disclose the information for which he or she has been subpoenaed except at the proceeding at which the witness has been commanded to appear. Nevertheless, a lawyer in preparing a case may want to communicate with a subpoenaed witness in advance of the proceeding. As the Committee discussed in Formal Opinion 65 and Formal Opinion 86 (Revised) [27 *The Colorado Lawyer* 93 (June 1998)], these communications are ethically permissible and encouraged if the witness is informed that there is no legal obligation to submit to the interview and no other legal or ethical impediment exists. *See* Colo. RPC 4.1 and 4.3 (dealing with truthfulness in statements to others and dealing with unrepresented persons). Consequently, it may be unethical to obtain information from a witness on whom a Rule 17(c) subpoena has been served by simply attaching a letter to the subpoena which, in effect, states that the witness need not appear at the criminal proceeding if the witness will simply deliver to the attorney by mail or otherwise the documents, records, or other information requested.

As we pointed out in Formal Opinion 86 (Revised):

> . . . if a lawyer intends to communicate with a non-party witness subsequent to the witness being served the subpoena, but prior to the document production, deposition, hearing or trial referred to in the subpoena, that lawyer should not, during the course of any communication with the nonparty witness, knowingly mislead the witness into disclosing privileged or confidential information.

During any communication with a non-party witness, a lawyer should keep in mind that the imbalance in knowledge and skill between a lawyer and a lay witness may cause even well intentioned acts of the lawyer to have a coercive impact on the witness and induce the witness to disclose privileged or confidential information. Therefore, whenever a lawyer communicates with a non-party witness, he or she should clearly identify himself or herself and state the reason for the communication. [27 *The Colorado Lawyer* 93 (June 1998).]

Inadvertent Delivery of Privileged Or Confidential Material

Despite a lawyer's giving the appropriate admonitions noted above and even in the absence of any direct communication with the witness on whom a subpoena *duces tecum* has been served, a witness may simply send documents, records, or other information sought by the subpoena to the lawyer requesting them in an attempt to obtain a release from the subpoena and an appearance at the proceeding.

Under such circumstances, a lawyer who receives documents, records, or other information that the lawyer knows to be, or that appear on its face to be, privileged or confidential should not review the

materials further after becoming aware of its privileged or confidential nature, and should notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer also must take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information, or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal. *See* ABA Formal Opinion 94-382, "Unsolicited Receipt of Privileged or Confidential Materials" (July 5, 1994) and ABA Formal Opinion 92-368, "Inadvertent Disclosure of Confidential Materials" (November 10, 1992).

Conclusion

The use of a subpoena *duces tecum* to knowingly obtain information or other tangible things from a witness without notice to other parties or their counsel as required by the Rules of Criminal Procedure or order of the court is unethical. It is also unethical to knowingly mislead a witness on whom a subpoena *duces tecum* has been served into disclosing privileged or confidential information that the witness would not otherwise reveal or be compelled to reveal except at the designated criminal proceeding and under judicial scrutiny. Finally, in the event an attorney inadvertently receives information from a witness on whom a subpoena has been served that the lawyer knows to be, or that appears on its face to be, privileged or confidential, the lawyer receiving such information should notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer also must take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

NOTES

1. A criminal proceeding includes not only trials, but all phases of the case, including post-conviction proceedings. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

2. For purposes of this Opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a criminal action or proceeding, even if they are not "privileged" *per se*. Examples of such confidential documents may include those subject to the work product doctrine; documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way; records of services to the mentally ill pursuant to Article 10 of Title 27 of the Colorado Revised Statutes, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; reports of AIDS or HIV-related illness, § 25-4-1404(1) C.R.S.; and records of the professional review committee or the committee on anticompetitive conduct of the Colorado State Board of Medical Examiners or a governing board of any organization of health care providers which has authority to take final action regarding the recommendations of any authorized professional review committee, § 12-36.5-104(10)(a), C.R.S. In contrast, for purposes of this Opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a criminal action or proceeding, such as research, development or commercial information; and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination).

3. Rule 17(c) of the Colorado Rules of Criminal Procedure states that "[a] subpoena may also command the person to whom it is directed to produce books, papers, documents, photographs, or other objects designated therein" and adds the requirement: "[*T]he subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance.* The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced

before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys." (*New language emphasized*.)

Rule 17(c) of the Federal Rules of Criminal Procedures provides for production of documentary evidence and of objects: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys."

4. *See also* C.R.S. § 18-4-412 (class 6 felony to obtain a medical record or medical information without proper authorization).

5. *See United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993) ("The practice of using trial subpoenas to compel witnesses to attend pretrial conferences is improper under Rule 17 of the Federal Rules of Criminal Procedure."), *appeal after remand*, 54 F.3d 457 (8th Cir.), *cert. denied*, 116 S. Ct. 264 (1995); *United States v. Keen*, 509 F.2d 1273, 1274 (6th Cir. 1975) ("highly improper" for prosecutor to use subpoenas to compel attendance at pretrial interviews); *United States v. Hedge*, 462 F.2d 220, 222-223 (5th Cir. 1972) (use of subpoenas to compel attendance at pretrial conference is "irregularity" not authorized by Rule 17(a)); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963) (same); *cf. United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir. 1976) ("Rule 17 does not . . . authorize the use of grand jury subpoenas as a ploy for the facilitation of office interrogation."), *cert. denied sub nom. Lupon v. United States,* 429 U.S. 1038 (1977).

6. *United States v. Hart*, 826 F.Supp. 380 (D. Colo. 1993) (no *ex parte* procedure for issuing subpoenas for production of documents authorized by Rule 17(c)); *United States v. Urlacher*, 136 F.R.D. 550 (W.D.N.Y. 1991) (Rule 17(c) does not support *ex parte* procedures for or issuance of subpoena *duces tecum*).

7. Normally, under a subpoena *duces tecum* the documents and other things called for would be brought into court at the time of the hearing or trial. Rule 17(c) provides that in the proper case, a court may direct that in advance of the time that they are offered into evidence, they may be inspected in court, unless the court directs otherwise, to enable the requesting party to see whether the evidence can be used and whether he or she wants to use it. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167-168.