

# The Ethical Consequences of Improper Subpoena Use

by  
Kenneth L. Jorgensen, First Assistant Director  
Minnesota Office of Lawyers Professional Responsibility

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The use of subpoena can be a powerful tool for compelling the production of information, especially from nonparties. However, the ability to wield this power is not without limits.

The procedural rules governing the various proceedings in which subpoenas are issued typically impose procedural requirements to protect nonparties from improper subpoena tactics. Failure to comply with these requirements can render the subpoena deficient and/or result in sanctions to the noncomplying party or lawyer. In addition, as illustrated in this article, improper subpoena use can also be the basis for lawyer discipline.

## Juvenile proceedings

The lawyer representing a father in a juvenile proceeding caused a subpoena to be served upon the doctor for the child's mother. The subpoena directed the doctor to deliver the mother's medical records to the lawyer's office. A notice of deposition did not accompany the subpoena, nor was counsel for the mother or the child given notice of the subpoena. The doctor complied with the subpoena and delivered medical records to the lawyer.

The procedural rules governing the proceeding, the Minnesota Rules of Juvenile Procedure, limited discovery to nonprivileged information. Moreover, the rules limited the use of subpoenas to compel information from nonparties to the production of information "at hearing." Here the subpoena directed the nonparty doctor to deliver the records to the lawyer's office and not to any hearing.

When the disclosed records became known, the court scolded the lawyer, directed the immediate return of the records and prohibited the lawyer from using the information. The lawyer's subpoena misuse later became the subject of an ethics complaint, which resulted in the lawyer being privately admonished.

By failing to comply with the requirements for subpoena use established by the rules of juvenile procedure, the lawyer used a method "of obtaining evidence that violate[d] the [medical privacy] rights" of a third person (i.e., Mom). See Rule 4.4 of the Minnesota Rules of Professional Conduct, entitled "Respect for the Rights of Third Persons."

## Criminal proceedings

A lawyer defending a client charged with multiple counts of sexual misconduct subpoenaed victim records from a number of medical providers for in camera review by the court pursuant to *State v. Pardee*, 403 N.W.2d 640 (Minn. 1987). The lawyer's cover letter serving the subpoena informed the providers that they could send the medical records to the lawyer's office in lieu of producing the documents at the designated time and place. Neither *Pardee* nor the Minnesota Rules of Criminal Procedure authorized this procedure.

The court, after first recognizing that the lawyer acknowledged his wrongdoing and had taken steps to mitigate the consequences of his acts, then sanctioned the lawyer by imposing restrictions on the lawyer's cross-examinations of the victims. Despite the prosecutor's request, monetary sanctions were denied. The ensuing ethics complaint against the lawyer resulted in a private admonition.

Like the juvenile proceeding, the lawyer's failure to comply with the criminal procedure requirements for subpoenaing medical records constituted a method that violated the privacy rights of third persons (i.e., the victims) in violation of Rule 4.4.

### **Civil litigation**

Several attorneys have received private discipline over the years for subpoenaing nonparty information without issuing the corresponding notice of deposition. Most of these violations were due to the lawyer's failure to distinguish between nonhearing subpoenas (i.e., those compelling nonparty information to be given to the party) and subpoenas compelling production of information at a hearing or trial. See Rule 45.01 (b), Minn. R. Civ. Pro. (Subpoenas shall be issued only in connection with a duly noted deposition or in connection with a hearing or trial under Rule 45.05).

Adherence to procedural requirements is necessary to ensure subpoena enforceability. Failure to comply can lead to sanctions, and where confidential information is improperly disclosed, professional discipline can follow.