OPINION NO. 79-077

Syllabus:

When a subpoena in a civil action is issued by the clerk of a court of common pleas in one county for service by the sheriff of another county, sufficient funds must be deposited to pay the sheriff for serving the subpoena and the subpoena must be indorsed with the words, "Funds deposited to pay for the execution of this writ." Absent this indorsement, the sheriff is not required to serve the subpoena.

To: John E. Shoop, Lake County Pros. Atty., Painesville, Ohio
By: William J. Brown, Attorney General, November 9, 1979

I have before me your request for my opinion on the following three questions:

(1) Is a subpoena in a civil case a "writ" as the term is used in R.C. 2303.16?

(2) When the clerk of courts of the court of common pleas issues a civil subpoena to another county, must he require the party requesting the issue thereof to deposit with him sufficient funds to pay the officer to whom it is directed for executing it, and must the clerk indorse upon the subpoena the words, "Funds deposited to pay for the execution of this writ"?

(3) When the sheriff of a county receives a subpoena in a civil action issued by the clerk of courts in another county, is he required to serve such subpoena absent the indorsement as set forth in Question 2 above?

R.C. 2303.16 reads as follows:

> The clerk of the court of common pleas shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall indorse thereon the words, "Funds deposited to pay for the execution of this writ." On the return thereof, the clerk shall pay to such officer the fees for executing such writ, and no officer shall be required to serve such writ unless it is so indorsed.

For R.C. 2303.16 to be applicable, there must be a determination that the document or paper involved is a "writ."

There is ample authority for the proposition that a subpoena is a writ. For example, the Cuyahoga County Court of Common Pleas, in discussing the subpoena duces tecum, held that:

> This writ from its common law character, is a process of the same kind as the subpoena ad testificandum, including a clause of requisition for the witness to bring with him and produce books, writings, or other things under his control, which he may be compelled to produce as evidence.
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> . . . .
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> It cannot be claimed that at common law an officer of this grade had authority to issue the writ of subpoena duces tecum. Iti s [sic] a writ of compulsory obligation and effect in the law. [In re Sims, 4 Ohio Dec. Reprint 473, 474 (C.P. Cuyahoga County 1879) (emphasis added).]

See also State v. Stout, 49 Ohio St. 270 (1892); Ex Parte Dalton, 44 Ohio St. 142 (1886). In addition, several of my predecessors have considered subpoenas to be writs. See, e.g., 1931 Op. Att'y Gen. No. 3099, p. 469; 1913 Op. Att'y Gen. No. 547, p. 379.

In determining whether a subpoena is a writ for purposes of R.C. 2303.16, it is necessary to refer to the intent of the legislature in enacting that statute. The intent of the legislature must be ascertained from the language employed and the purpose to be accomplished. State ex rel. Francis v. Sours, 143 Ohio St. 120, 124 (1944). A reading of the statute discloses that the intent of R.C. 2303.16 is to assure that a sheriff is reimbursed for executing a writ issued by a court of a foreign county. Duncan v. Drakely, 10 Ohio 39, 43 (1840). The legislature must have intended this purpose to be given effect whenever the court of one county issues an order to be served by the sheriff of another county. Therefore, a restrictive meaning of the word "writ," so as to exclude subpoenas, could not have been intended.

In response to your first question, it is, therefore, my opinion that a subpoena is a writ for purposes of the application of R.C. 2303.16.

This conclusion is also dispositive of your second question. R.C. 2303.16

states that "the clerk shall indorse thereon [i.e., on a writ to another county] the words, 'Funds deposited to pay for the execution of this writ.' " (Emphasis added.) Unless the legislature evinces an unequivocal intent to the contrary, the word "shall" indicates a mandatory duty. Dorrian v. Scioto Conservancy Dist., 27 Ohio St. 2d 102 (1971). In your letter, however, you inquire whether there is a conflict between R.C. 2303.16 and Civ. R. 45. While Rules of Civil Procedure promulgated by the Supreme Court take precedence over conflicting statutes on the same subject, Ohio Const. art. IV, §5(B), I find no conflict between R.C. 2303.16 and the civil rule. Civ. R. 45(A) provides, in pertinent part, that "[t]he clerk [of courts] shall issue a subpoena. . . signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in and file a copy thereof with the clerk before service." (Emphasis added.) This provision for issuance in blank is not in conflict with R.C. 2303.16 since the rule deals only with issuance and not with service of the subpoena. Civ. R. 45(A) specifically provides that, prior to service, a copy of the completed subpoena must be filed with the clerk. At this time it can be ascertained whether service is to be in a foreign county. If that is the case, funds should be deposited and the subpoena should be indorsed by the clerk in accordance with R.C. 2303.16. The provision for issuance in blank is merely a convenience to the party, allowing the party to fill in the substance of the subpoena at some time later than the time of issuance by the clerk.

Your third question deals with the duty of a sheriff to execute a subpoena.

It is provided in R.C. 311.08 that "[t]he sheriff shall execute every summons, order, or other process, make return thereof, and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law." (Emphasis added.) Once again, the use of the language "shall execute" evinces the intent of the Legislature to make the duty of the sheriff to execute a subpoena mandatory. If a sheriff fails to execute a valid process properly directed to him, he may, under R.C. 2707.03, be subject to amercement, a penal and quasi-criminal proceeding. Conkling v. Parker, 10 Ohio St. 29 (1859); Bryant v. Topper-Goldberg Iron Co., 17 Ohio App. 350 (Franklin County 1923). He may also be liable in a civil action. R.C. 2707.03; see Whitely v. Long, 9 Ohio Dec. Reprint 731 (C.P. Highland County 1887).

For the sheriff's duty to serve a subpoena to arise, however, the writ must be properly issued. In order for a writ to be properly issued, the party requesting its issuance must deposit with the clerk of court the costs of execution and the clerk must acknowledge receipt of the deposit for an indorsement on the writ. R.C. 2303.16; 1948 Op. Att'y Gen. No. 3043, p. 175. Moreover, R.C. 2303.16 provides that "[n]o officer shall be required to issue such writ unless it is so indorsed [with the words, 'Funds deposited to pay for the execution of this writ']." The absence of this indorsement on the writ is a defense to an action of amercement for failure to serve. R.C. 2707.03. See Duncan v. Drakely, supra; Central Ohio Buggy Co. v. Cowin, 10 Ohio App. 16 (Ct. App. Geauga County 1918); 1937 Op. Att'y Gen. No. 500, p. 812.

In light of the foregoing, it is my opinion, and you are advised, that when a subpoena in a civil action is issued by the clerk of a court of common pleas in one county for service by the sheriff of another county, sufficient funds must be deposited to pay the sheriff serving the subpoena and the subpoena must be indorsed with the words, "Funds deposited to pay for the execution of this writ." Absent this indorsement, the sheriff is not required to serve the subpoena.