Committee Opinion
May 11, 1993

LEGAL ETHICS OPINION 1528 OBLIGATION TO REPORT ATTORNEY MISCONDUCT.

You have presented a hypothetical situation in which Attorney (P) is employed by a law firm and is contacted by a client to represent him in a personal injury matter. The client completes a one or two paragraph representation agreement and the client provides the attorney with the operative facts, and documentation in the client's possession. The claim relates to an accident on the client's employer's premises and the facts also indicate possible negligence by two independent third parties. You state that P files a timely worker's compensation claim but that he selects the date of the report as the date of injury (i.e., accident occurs on January 1st, but the report of injury is noted as January 10th). You also state that P continues to use the later date as the date of injury.

You indicate that P sends a letter and accompanying copy of a motion for judgment ("suit" or "lawsuit") to his client about ten days prior to the expiration of the statute of limitations and affirmatively represents to the client that the lawsuit has been filed. You state that P does not review the lawsuit with the client nor request that the client sign the lawsuit papers.

You state that the lawsuit is not filed on the day the letter is written to the client and, instead, is filed (by hand delivery) approximately seventeen days after the statute of limitations has passed. You indicate that P later sends client a letter, after the suit is filed, and fails to disclose that the statute of limitations has run.

You indicate that the defendants then each file answers asserting the statute of limitations as an affirmative defense. The first defendant files a plea in bar and the matter is heard before a judge. You state that it is believed that P represents to the court that the clerk's office made a mistake which caused the suit to be filed late, although P does not, however, provide any brief in opposition to the plea, or any documents, witnesses or affidavits. The suit as to the first defendant is dismissed with prejudice because of the statute of limitations. P notes a general objection without setting forth specific grounds to support any appeal. No transcript is maintained.

You state that subsequently P tells his client that the suit has been "dismissed" and that he gives client several options as to how to proceed. You also indicate that P does not disclose to his client that he intends to pursue the case for the client. The client then investigates the possibility of hiring new counsel. You indicate that P, however, continues to represent the client without either his knowledge or consent.

The second defendant then files a plea in bar. Again, you indicate that it is believed that P represents that the lawsuit was filed late due to a mistake by the clerk's office, but again offers no exhibits, brief, witnesses or affidavits at the hearing. You indicate that the remainder of the case as to the second defendant is dismissed with prejudice. Again, no transcript is maintained. You state that P notes a general objection on the Order but fails to preserve all possible grounds for appeal.

1. To the extent that earlier Legal Ethics Opinions reference a subjective test to be employed in a lawyer's determination as to DR 1-103, those references are hereby overruled. See, e.g., Legal Ethics Op. Nos. 977, 1308, 1346, 1351; see also Legal Ethics Op. Nox. 1359, 1362, 1434, 1443.

Furthermore, you also state that P does not disclose the actions taken by him, or the status of the case, to the client.

The client then retains another attorney to pursue a malpractice claim against P. The second attorney (Attorney 2) investigates the claims and requests the file from P who then releases part of the file, which includes a memorandum to the file drafted just prior to release. You indicate that the memorandum sets forth P's account of events.

The second Attorney then undertakes an investigation of the client's claims and, as part of the investigation, procures the complete court file which you indicate shows that the suit was filed by hand delivery after the statute of limitations had run, even though a cover letter is written by P on the date of the statute of limitations.

The second Attorney then interviews the clerk's office regarding procedures and the facts as set forth in P's memorandum to the file. The judge who dismissed the case against the first defendant is also interviewed. You state that the judge has a few notes that state that there were no mitigating circumstances proved to justify defendant's plea. You further indicate that the judge states that the case would not have been dismissed if P had presented evidence to support his claim as to the clerk's mistake. You advise that the second judge has not yet been interviewed. The new Attorney also contacts opposing counsel for both defendants; both recall P having made representations as to the late filing due to a clerk's mistake.

You state that P then produces a certified mail receipt in the package (file) produced to the second Attorney and claims that it is the certified mail used to send the lawsuit to the clerk's office. You also indicate that the receipt is undated and unsigned. Further, you indicate that the first judge, when shown the receipt, states that the case would not have been dismissed if such proof had been produced and corroborated.

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The second Attorney investigates the receipt and determines that a receipt bearing that number was received by the court a day before the running of the statute of limitations. You indicate that the receipt is unsigned and undated and that only the back portion is produced. Furthermore, you also indicate that there is no copy of the receipt in the court file and it is unknown if the materials contained in the package received the day before the running of the statute of limitations contained client's papers or other papers.

Finally, the second Attorney notifies P and P's firm, which previously did not have notice, of the legal malpractice claim.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; DR:1-103(A) which provides that a lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR:4-101; DR:5-102(A) and (B) which provide respectively that a lawyer may not continue to serve as an advocate for his client when it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client and, where a lawyer learns that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client; DR:7-104 which prohibits a lawyer from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter; and DR:7-102(A)(5) which states that a lawyer shall not knowingly make a false statement of law or fact.

On several questions related to the facts presented, the committee opines as follows:

1. You ask whether the second Attorney has a duty to report Attorney P's misrepresentations to the Virginia State Bar. The facts you have provided indicate that Attorney P represented to his client, opposing counsel, and to the court that the suit had been filed before the running of the statute of limitations. The facts also indicate that Attorney P filed the suit seventeen days after the running of the statute of limitations and that he represented that the late filing was due to a clerk's error. Finally, the facts indicate that the court file does not support Attorney P's assertions. Based upon these facts, the committee is of the opinion that Attorney P thus knowingly made a false statement of fact, in violation of DR:7-102(A)(5). Such conduct may also be violative of DR:1-102(A)(4). See LE Op. 1429.

The committee believes, then, that the second Attorney may have a duty to report Attorney P's misconduct under DR:1-103(A).

Disciplinary Rule 1-103(A) contains a two-prong test. See LE Op. 1004. First, a lawyer must have information indicating that another lawyer has committed a

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violation of the Disciplinary Rules. The committee is of the opinion that Attorney P's conduct is violative of DR:7-102(A)(5); thus the committee believes that the first prong has been satisfied.

The second prong of DR:1-103(A) is whether the violation of the disciplinary rule "raises a substantial question as to that lawyer's fitness to practice law in other respects." Relevant factors to be considered include, but are not limited to, the recency of the conduct, the seriousness of the conduct, the likelihood that the behavior will be repeated, the likelihood that it will affect the attorney's competence and any mitigating or aggravating circumstances. The committee is of the opinion that Attorney P's knowingly representing to his client, opposing counsel, and to court that the suit had been filed prior to the statute of limitations when, in fact, it had been filed seventeen days after the statute's running, raises a substantial question as to his fitness to practice law in other respects. /1

2. As to when an attorney's duty to report possible misconduct arises, the committee believes that the duty attaches when the information possessed by the reporting lawyer is based upon a substantial degree of certainty and not on rumors or suspicion. See LE Op. 1338; Maine LE Op. 100 (October 4, 1989), ABA/BNA Law. Man. on Prof. Conduct, 901:4208. In addition, the committee cautions that the reporting lawyer must be vigilant in observing the DR:7-104 prohibition against presenting or threatening to present disciplinary charges solely to obtain an advantage in a civil matter.

3. You ask whether the affirmative duty to report P, if one exists, renders the second Attorney a fact witness, thereby precluding that attorney from representing the client in a malpractice lawsuit. The committee believes that the answer to this question turns on whether or not the second Attorney either "ought to be" called as a witness on behalf of his client (DR:5-102(A)) or "may be" called on behalf of one other than his client (DR:5-102(3)). The committee does not believe it to be obvious that the second Attorney "ought to be" called as a witness by his client simply by virtue of the Attorney's obligation to report Attorney P's misconduct. Furthermore, even if the second Attorney "may be" called as a witness under DR:5-102(B), he may continue representation of his client until it is apparent that his testimony is or may be prejudicial to his client. See LE Op. 866, LE Op. 1226, LE Op. 1240, LE Op. 1455.

4. Finally, regarding whether or not the second Attorney has an independent duty to file a grievance if the client instructs him not to file, the committee believes that LE Op. 1468 is applicable only where a confidence or secret is protected by DR:4-101.

Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.

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Rule 8.3(a) requires a lawyer to report another lawyer's ethics violation under certain circumstances if the lawyer has "reliable information" about the breach.

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