

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.

LEGAL ETHICS OPINION 1429

TRIAL CONDUCT: ATTORNEY'S
MISCONDUCT - MISSTATEMENT OF
FACT – FALSE STATEMENTS - DUTY
TO REPORT.

You have presented a hypothetical situation in which a plaintiff's attorney filed a suit in federal court which set forth several claims against defendants A, B, and C. One of the claims against defendant A was based on the negligent installation of a furnace in a home. The suit was filed in 1990, and the plaintiff alleged that the furnace had been installed in 1986. Defendant A raised the defense of the statute of repose, pursuant to § 8.01-250 of the Code of Virginia. During discovery, the plaintiff's attorney and plaintiff stated that the plaintiff had been "informed" by the owner of the home that the furnace had been installed in 1986. In addition, plaintiff's attorney and plaintiff alleged that plaintiff had been "informed" by a service technician employed by defendant A that "he had installed the furnace about two years prior to 1988".

In discovery depositions, the home owner (an 86-year-old woman) testified that she could not remember when the furnace was installed nor remember what she had told the plaintiff. Also during discovery, defendant A produced a purchase order showing that the furnace was purchased in 1982 and time records indicating that the furnace had been installed in 1983. In depositions, two employees of defendant A testified that they had installed the furnace in late 1982 or early 1983. The service technician, who allegedly had "informed" the plaintiff that he had installed the furnace two years prior to 1988, provided an affidavit, which was forwarded to plaintiff's attorney, that he had never been involved in installation of furnaces at the time and in the area in which the furnace was installed. A management official of defendant A also provided an affidavit that defendant A had ceased installing furnaces in 1984. In addition, one of plaintiff's experts testified that prior to filing the suit in federal court, he had been informed by plaintiff's attorney that the furnace had been installed in 1983.

You indicate that Defendant A moved for summary judgment in federal court based on the above facts. Prior to the entry of summary judgment, however, the federal court dismissed the plaintiff's action on a jurisdictional basis. Finally, you inform the Committee that Plaintiff has subsequently filed an action in state court, naming defendants A, B, and C, alleging in the motion for judgment that the furnace was installed in 1986.

You have asked the Committee to opine as to the propriety of plaintiff's attorney's conduct since it appears, under the facts of the inquiry, that he has made a misstatement of fact in a pleading. In addition, you ask the Committee to consider as to any obligation on defendant's attorney to report such misstatement to the tribunal.

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The appropriate and controlling disciplinary rules related to your inquiry are DR:7-102(A)(5), which provides that, in his representation of a client, a lawyer shall not knowingly make a false statement of law or fact; DR:7-102(B)(1), which mandates that a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal; and DR:1-102(A)(4), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. (See also DR:1-103(A) regarding an attorney's obligation to report the misconduct of another attorney.)

The Committee has previously opined that it is improper for an attorney who has executed answers to interrogatories and who has represented to opposing counsel that the answers may be treated as if they were signed under oath by the attorney's client to include in said interrogatories answers which are false. (See LE Op. 743.) The facts you have provided indicate that statements, either by deposition or affidavit, from defendant provide that the furnace was installed before 1984. Of greater import, however, the facts also indicate that the plaintiff's own expert testified that plaintiff's attorney informed him, prior to filing the suit in federal court, that the furnace had been installed in 1983. Based upon the facts you have provided, the Committee is of the opinion that plaintiff's attorney was aware that the furnace had been installed prior to 1986, the date stated in his motion for judgment, and thus that plaintiff's attorney has 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).

The Committee also opines that, since the defense attorney has been able to ascertain by statements made under oath that plaintiff and plaintiff's attorney were aware that the furnace had been installed in 1982 or 1983, rather than 1986 as alleged in the motion for judgment, the defense attorney may have a duty to report such fraud and misrepresentation to the tribunal under DR:7-102(B)(1) and to the appropriate professional authority under DR:1-103(A). (See LE Op. 1361.)