

You have presented a hypothetical situation in which Attorney A and his firm were defendants in a malpractice action. This matter was nonsuited, and plaintiff's attorney has stated that the lawsuit will be refiled. While the civil lawsuit was pending, the plaintiff in that action, with substantial assistance from his attorney, filed a Bar complaint against Attorney A, alleging the same matters which were the subject of the malpractice suit.

While the Bar complaint was still under investigation, plaintiff's attorney sought settlement from Attorney A and offered in return to withdraw plaintiff's Bar complaint against Attorney A. Attorney A believes this is a violation of DR:7-104 which he must report as required by DR:1-103, but is concerned that he may violate DR:7-104 in doing so since plaintiff's attorney has stated an intention to refile the civil suit against Attorney A.

Under the facts you have presented, you have asked the committee to opine whether Attorney A must immediately report the misconduct of plaintiff's attorney to the Virginia State Bar, or must wait until the conclusion of the malpractice claim before reporting the misconduct so as to avoid a violation of DR:7-104.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:7-104(A) which states that a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter; and DR:1-103(A) which requires an attorney to report the misconduct of another lawyer " ... that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects "

The committee has previously and repeatedly opined that misconduct in violation of DR:7-104 may give rise to an obligation for an attorney to report such matters to the appropriate professional authority. LE Op.1528, LE Op. 1582 and LE Op. 1635.

Based on the facts presented, you have already concluded that plaintiff's attorney's settlement offer violates DR:7-104(A) and you do not seek an opinion from the committee in that regard. Further, under the facts presented you have likewise concluded that the misconduct meets the two-prong test under DR:1-103(A) for reporting the matter to the Virginia State Bar. See, e.g., LE Op. 1004. The committee's premise is, therefore, that the sole issue consists of the timing of such a report to the Bar.

In LE Op. 1635 the committee addressed the issue of when misconduct must be reported, given the tension between DR:1-103(A) and DR:7-104(A) and the reporting attorney's concern that he might be viewed as filing a report of misconduct to obtain a civil advantage. The committee referred to its prior opinions in LE Op. 1338 and LE Op. 1548 stating that once the reporting attorney determines that both prongs of DR:1-103(A)

Committee Opinion
September 8, 1995

are met, "the attorney is obligated to report such misconduct without any unnecessary delay."

The committee observes that it may be difficult, in some instances, to determine the subjective intent or motive of an attorney who threatens or presents criminal or disciplinary charges against an opposing counsel while a civil matter is contemplated or pending. The issue requires a factual case-by-case determination. LE Op. 1388.

If Attorney A reports the misconduct while the malpractice claim is pending or unresolved, then the report of misconduct is rendered suspect as long as there is a possibility that Attorney A would gain an advantage in the simultaneously pending malpractice claim. However, assuming that the motive of Attorney A and his firm in reporting the misconduct is to discharge their obligation under DR:1-103, and not solely to use or threaten the Bar complaint for leverage to settle or conclude the malpractice claim, then Attorney A is not required under DR:7-104 to wait until the settlement or conclusion of the malpractice claim before reporting the misconduct.

Committee Opinion
September 8, 1995

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.