

**ALASKA BAR ASSOCIATION  
ETHICS OPINION NO. 96-5**

**Ethical Issues, If Any, Raised By The  
Use Of An “Attorney’s Representation” Form  
In Conjunction With The Execution Of Release Agreements**

The Committee has been asked whether an attorney is ethically prohibited from signing an affirmation or representation concerning an attorney’s advice to a client in conjunction with the execution of a release agreement. For purposes of this opinion, the Committee will assume the affirmation or representation reads as follows:

I, [attorney], of Anchorage, Alaska declare that I am the attorney representing Releasor in the above-matter, and that I have carefully and fully explained the terms, provisions and effects of this release to Releasor, and that Releasor has represented to me that he/she believes they understand the terms thereof and significance of said terms.

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[Attorney]

In the Committee’s view, there is no ethical prohibition to using this type of affirmation or representation. However, the Committee’s opinion is confined solely to the form of affirmation cited above. There are, or may be, serious ethical issues raised if an attorney affirms, or is asked to confirm, matters which go beyond the scope of the sample form. Further, the use of these forms is a matter of negotiation between the parties and/or contract formation. The Committee does not express any view as to whether such forms are necessary or appropriate; its observations are limited solely to the ethical issues, if any.

**DISCUSSION**

At the outset, it is important to emphasize that an attorney representing a client called upon to execute a release agreement as part of a settlement has an ethical duty and obligation to do what is spelled out in the affirmation. See ARPC 1.1, 1.2, 1.3, and 1.4.

For instance, many releases incorporate by reference the decisions by the Alaska Supreme Court in Witt v. Watkins, 579 P.2d 1065 (Alaska 1978) (release agreement is enforceable unless, at time of signing of release, releasor did not intend to discharge disabilities which were subsequently discovered) and Young v. State, 455 P.2d 889 (Alaska 1969) (release of one tortfeasor does not release other joint tortfeasors unless such tortfeasors are specifically named in the release.) A client reading the release agreement would have no knowledge or understanding of the import of these decisions, and although the client may understand the other terms and conditions of the release, there are matters addressed in the release which are simply beyond the ken of a lay person and which require an attorney to explain.

While a lawyer is not permitted to reveal information relating to representation of a client unless the client consents after consultation, ARPC 1.6 does allow “disclosures that are impliedly authorized in order to carry out the representation . . . .” In the Committee’s view, an attorney signing an affirmation along the lines outlined above is “impliedly authorized” to make that representation. For instance, in the comment to the Rule, it points out that “a lawyer may disclose information . . . in negotiations by making a disclosure that facilitates a satisfactory conclusion.”

However, an attorney cannot make a warranty regarding the client’s state of mind when he or she signs a release, nor can the attorney categorically state that the client understands the terms and effects of a release. The attorney can carefully and fully explain the terms and effects of the release to the client, and the attorney can acknowledge the client’s belief that he or she understands those terms and effects. Any affirmation or statement which purports to be a warranty by the attorney regarding the client’s state of mind, or the client’s understanding of the release, is inappropriate and does create a potential conflict between the attorney and the client which is unnecessary and probably violates the attorney’s duties to the client under ARPC Rule 1.6 and 1.7(b).

If an attorney has fulfilled his or her ethical obligations to the client in advising the client about the execution of a release, that attorney will almost certainly be a witness in the event the client attempts to revive the subject matter of the release. In that event, the attorney who represented that client is necessarily implicated in the client’s effort to overturn the release and, pursuant to ARPC 1.7(b), the lawyer could not ethically represent the client in that instance because his representation “may be materially limited . . . by the lawyer’s own interests. . . .” The rule prohibits the attorney from going forward with the representation unless “the lawyer reasonably believes the representation will not be adversely affected.” However that belief is very

doubtful under the circumstance where the client is attempting to set aside the release because the lawyer has a strong interest in protecting himself or herself by proving that he or she gave proper advice to the client, and this testimony would not inure to the benefit of the client under any circumstance.

In conclusion, as long as the attorney representation merely acknowledges fulfillment of the attorney's obligation to explain the terms and effects of a release agreement, and an acknowledgment that the client "believes" he or she understands the terms and provisions of that agreement, the Committee believes there is no ethical constraint which would prevent the attorney from signing that limited statement. However, to the extent the attorney is asked to somehow warrant the client's state of mind, or the client's understanding of the release agreement, the attorney is being asked to potentially create a conflict situation with the client which is neither necessary nor desirable. It would be unethical for an attorney to make such a warranty under the circumstances, and it would be unethical to ask the attorney to make such a representation. See ARPC Rule 8.4(a). The Committee takes no view on whether the use of the form, as outlined above, is necessary or appropriate. This is a matter of contract negotiation between the parties. As long as the form is limited in its scope, the Committee believes there are no ethical constraints which would prevent the attorney from signing the statement.

Approved by the Alaska Bar Association Ethics Committee on June 6, 1996.

Adopted by the Board of Governors on August 22, 1996.