

ADVISORY ETHICS OPINION 91-09

SYNOPSIS:

The practice of (1) asking the defendant whether the defendant has been counseled by his or her attorney regarding the rights being waived by the change of plea, and (2) requiring the defendant to sign a written form stating, among other things, "I believe that my attorney has done all that anyone could do to counsel and assist me" at a change of plea in a criminal matter does not present an issue under the Vermont Code of Professional Conduct.

QUESTIONS PRESENTED:

What is the attorney's duty under the Code of Professional Conduct at a change of plea hearing when the attorney's client is (1) asked whether the client has been counseled by his or her attorney regarding the rights being waived by the change of plea, and (2) required to sign a written form stating, among other things, "I believe that my attorney has done all that anyone could do to counsel and assist me."

DISCUSSION:

The Committee's opinion is that no issue is presented under either part (1) or (2) which invokes a rule of ethics or an ethical duty.

The rights an accused waives upon entering a guilty plea are not secrets or confidences peculiar to any client, or to any attorney-client relationship. Moreover, whether the accused and his attorney discussed those rights is clearly something the court may consider in determining whether the accused's plea of guilty is voluntary.¹ There is no violation of attorney-client confidences or secrets in this fact setting.

Similarly, there is no real issue raised of a potential violation of DR 6-102(A) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.") under part (2) of the inquiry. First, the printed form is Vermont District Court Form No. 362 and the wording is not attributable to, or conduct on the part of, the attorney. Second, although the Committee does not involve itself with legal rulings, we believe that if an attorney tried to use his client's signed form to exonerate himself from malpractice liability, the attempt would be fruitless. A client's belief as to whether his attorney followed the required standard of care would not seem material in a malpractice action, since the standard of care issue generally is controlled by expert testimony or by court declaration.

¹ See V.R.Cr.P.11(c) & (d) and *In re Hall*, 143 Vt. 590,469 A.2d 756 (1983).