

ADVISORY ETHICS OPINION 1999-02

SYNOPSIS:

In the context of a plea agreement in a criminal case, a defense attorney should not advise a client to sign a written Waiver of Rights drafted by the prosecution without first fully informing the client of the legal consequences of the Waiver, and that by signing it, the client could also be considered to have waived the right to keep confidential the nature and substance of communications that had taken place between the lawyer and client in deciding whether to enter a plea and could be used against the client in any subsequent dispute over whether the lawyer fully discharged his or her professional duty to the client. Further, the attorney should not sign an Attorney's Certificate as part of a written plea agreement which has the effect of disclosing the nature, substance and extent of confidential attorney-client communications; which will be used as evidence of the knowing and voluntary nature of the plea; and which may have the effect of limiting the client's remedies against the attorney in any subsequent dispute concerning the client's rights involved in the plea agreement.

FACTS:

We are requested to provide an opinion on the ethical obligations of a criminal defense attorney in the context of plea negotiations with the office of State's Attorney in a Vermont county. The prosecution and defense typically enter into discussions to resolve pending cases. As part of its regular practice of negotiating plea agreements, the State's Attorney's office utilizes its own form, entitled "Waiver of Rights," which it presents to defense attorneys for execution by their clients; and it also includes a section for signature by the defense attorney, entitled "Attorney's Certificate." Without the signature of the defendant and the defense attorney, the State's Attorney will not enter into a plea agreement. Disputes over the appropriateness of the form and its requirement that the defense attorneys sign it have been presented to the district court on several occasions, but no definitive ruling has been issued by the Vermont Supreme Court. The form is not authorized or prescribed by the Rules of Criminal Procedure, nor is it used uniformly by prosecutors in all counties.

The form's "Waiver of Rights" section requires the pleading defendant to check off that he or she waives certain substantive and procedural rights as a prerequisite to the plea agreement, including the following statement:

"(3) Check whichever of the following apply."

"(a) _____ I have consulted with my attorney and I have fully discussed the information(s), the matters contained therein and any defenses which might be available to me with my attorney. I have had a full opportunity to assess the advantages and disadvantages of a trial, as compared with those attending my plea(s) today."

The remainder of the "Waiver of Rights" requires the signing defendant to waive his or her right to a trial, and to other important procedural rights, which by Rule 11 of the Rules of Criminal Procedure, the trial court is required to explore on the record with any defendant who enters a plea of guilty or nolo contendere. The final paragraph of the "Waiver" reads:

"I have read the above, have discussed it with my attorney...(as indicated by my check marks in section 3 above), and I understand it fully. I hereby knowingly and voluntarily give up each and every one of the rights written above and I ask the Court to accept my plea(s), making no claim of innocence. I ask the Court to accept my plea(s) and to proceed to sentence me as required by law."

The second page of the form contains the actual plea agreement.

Even where a defendant signs the "Waiver of Rights," the prosecution will not enter into a plea agreement unless the form is also signed by the defense attorney, in the section entitled "Attorney's Certificate." We have been presented with three versions of this section by the requesting attorney. Each version has been drafted by the State's Attorney.

Version No. 1 (12 January 1999)

Attorney's Certificate

"As the attorney of record I have fully discussed this case with the defendant and have explained each of the above rights to the defendant. I stipulate that this document may be received by the Court as evidence of the defendant's knowing, voluntary and intelligent waiver of these rights and it shall be filed by the Clerk as a permanent record of that waiver."

Version No. 2 (10 February 1999)**Attorney's Certificate**

“As the attorney of record I approve the form of this plea agreement and attendant waiver of rights. I acknowledge that the defendant has signed the plea agreement and waiver of rights and I have answered any questions the defendant may have had about them. By signature on the plea agreement, the attorney for the State stipulates that this certificate is not a waiver of the attorney client privilege, and is solely for the purpose of establishing that the defendant understands the plea agreement and the waiver of rights and enters into them knowingly and voluntarily.”

Version No. 3 (10 February 1999)**Attorney's Certificate**

“As the attorney of record, I approve as to form, this plea agreement and attendant waiver of rights. I acknowledge that the defendant has signed the waiver and I have answered any questions about the plea agreement that the defendant asked me. By its signature to the plea agreement, the State acknowledges that no waiver of the attorney client privilege is made.

QUESTIONS PRESENTED:

The requesting attorney asks whether there are any ethical proscriptions that would prevent the attorney from: (a) advising the client whether to sign the Waiver of Rights section of the State's Attorney's plea agreement form; or (b) signing any of the above versions of the Attorney's Certificate.

RELEVANT DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS:**DR 1-102 (A) (5) states:**

A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice.

DR 4-101 states in pertinent part:

- (A) “Confidence refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of [the] client.
 - (2) Use a confidence or secret of [the] client to the disadvantage of the client.
 - (3) Use a confidence or secret of [the] client for the advantage of [the lawyer] or of a third person, unless the client consents after full disclosure.

DR 6-102 (A) states:

A lawyer shall not attempt to exonerate [him or herself] from or limit [his or her own] liability to [the] client for personal malpractice.

DR 7-101 states in pertinent part:

- (A) A lawyer shall not intentionally:
 - (1) Fail to seek the lawful objectives of [the] client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this...Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice [the] client...
- (B) In . . . representation of a client, a lawyer may:
 - (1) Where permissible, exercise...professional judgment to waive or fail to assert a right or position of [the] client.
 - (2) Refuse to aid or participate in conduct that [the lawyer] believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DISCUSSION:

By its terms, the Attorney's Certificate in the three forms presented here is designed to serve as “evidence of the defendant's knowing, voluntary and intelligent waiver of . . . rights.” Based upon the correspondence between the State's Attorney and the requesting attorney which has been provided to us, it is also clear that the form is designed to secure the defense attorney's

affirmation of the waiver, both for administrative convenience and to provide a substitute record that the Court has complied with the requirements of Criminal Rule 11, in the event that a Court transcript or tape is not available:

“[W]e cannot be sure a record will exist on tape, so we want a record with an accompanying attorney signature and to provide assurance from the defense attorney that he or she has told the defendant what’s going on, what the terms of the agreement are, what the options are, and if the defendant’s bewildered, set that defendant straight or apprise the prosecution and the court that defendant is unable to enter into the agreement.”

Moreover, the State’s Attorney asserts to the requesting attorney that once a defendant engages in a Rule 11 colloquy with the court, the defendant waives any privilege concerning the discussions with the defense attorney that relate to whether the plea is an intelligent and voluntary waiver of rights. In short, the prosecution’s position is that it merely seeks to obtain the defense attorney’s acknowledgment of the client’s state of mind at the time a plea agreement is entered, not to probe the substance of the attorney-client communications leading up to the agreement. In furtherance of this position, Version No. 3 is offered as a disclaimer that the Attorney’s Certificate is a waiver of the attorney-client privilege.

On the other hand, the requesting attorney indicates that the State’s Attorney’s office has stated that it will not negotiate future plea agreements unless the attorney agrees to sign the Attorney’s Certificate. The requesting attorney counters that it is not the defense attorney’s obligation to develop the evidence of a knowledgeable and voluntary waiver of rights that is imposed upon the Court to determine under Criminal Rule 11. Signing the Attorney’s Certificate, it is asserted, constitutes a stipulation that the lawyer has communicated with the client, answered questions and agrees that such fact shall be used either to prove or constitute a formal record of a constitutionally proper waiver of rights. In effect, the lawyer states, the certification “requires counsel to disclose both the fact and substance of attorney-client communications concerning whether to plead guilty or nolo and whether the consequence thereof – the waiver of important due process rights – is knowing and intelligent.” The requesting lawyer suggests that requiring the attorney signature as a precondition to a plea agreement vitiates the attorney-client privilege recognized in Vermont Rule of Evidence 502, and requires the lawyer to reveal confidences and secrets, contrary to DR 4-101(B); delegates the Court’s duties under Criminal Rule 11 and violates public policy by making the attorney party to an agreement in order to restrict a defendant’s right to challenge a plea agreement as uninformed, involuntary or affected by the incompetence of counsel. This, asserts the requesting attorney, puts defense counsel in the position of engaging in “conduct that is prejudicial to the administration of justice,” contrary to DR 1-101(A)(5).

We reference the foregoing points not to attempt to resolve a dispute between the defense and prosecution over how plea negotiations should be conducted. This Committee obviously has no such authority or expertise to do so. Rather, the material provides the context within which we have reviewed the request for an opinion on the ethical obligations of the requesting defense attorney. Under our Rules (Nos. 4 and 7) we will not comment on the propriety of the professional conduct of attorneys other than the requesting lawyer, or issue opinions on a question of law.

Question No. 1 - Advising the Client Whether or Not to Sign the Waiver of Rights

In this instance, the plea agreement is intended to utilize both the defendant’s signature and the Attorney’s Certificate as evidence that the waiver of certain constitutional and statutory rights is knowing and voluntary. It is the defendant’s exclusive prerogative to decide whether to plead and whether to sign the agreement. Assuming for discussion purposes that the Waiver of Rights would operate as a waiver of the attorney-client privilege, at least to the extent of resolving questions of voluntariness against the defendant, then it is the defense attorney’s obligation to fully advise the client that execution of the Waiver presented here not only constitutes a waiver of the rights listed, but also a waiver of the attorney-client privilege, which could then be probed in detail by the court. Since the privilege is owned by the client, he or she may relinquish it, but the record must be “distinct and unequivocal.” Moreover, since the plea agreement involves the lawyer in the process, there is an ethical obligation to use professional judgment in advising the client whether to sign and to assure that the client has adequate information about the consequences of the decision.¹ However, it is not the attorney’s obligation to make a record for review that is adequate for a court to conclude as a matter of law that the decision is a knowing and voluntary relinquishment of rights. That obligation belongs to the Court under Rule 11 and well-established constitutional principles.²

There is an ethical duty for the defense attorney to carefully inform and advise a client in order to enable the client to make an informed decision about whether to execute the provisions of a Waiver relating to specific procedural rights, such as the rights to a jury trial and to confront witnesses and present a defense, etc. However, it would be improper for the lawyer to advise the client to sign the provision of the Waiver that reads:

¹ See Model Rules of Professional Conduct, Rule 1.4 (b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.)

² See *McCarthy v. United States*, 394 U.S. 459, 466-67 (1969).

“I have consulted with my attorney and I have fully discussed the information(s) the matters contained therein and any defenses which might be available to me with my attorney, I have had a full opportunity to assess the advantages and disadvantages of a trial, as compared with those attending my plea(s) today.”

This prosecution-drafted provision, on its face, operates as a waiver of the attorney-client privilege; and, in addition, implies, if not states directly, that the attorney has fulfilled his or her obligations to the client, thereby operating as a probable limitation on the attorney’s liability to the client.³

Question No 2 - Whether to Sign the Attorney’s Certificate

The Attorney’s Certificate, however, presents a more complex issue. Given its intended purpose, i.e., to be used as evidence, we conclude that it would be ethically improper for the requesting attorney to sign the Attorney’s Certificate in any of its versions presented here.

First, the Certificate effectively requires the attorney to confirm the nature and substance of privileged communications without an explicit waiver of the privilege by the client.⁴ The interaction between a lawyer and client that leads up to a significant decision by the client (we cannot conceive of a more significant set of decisions for a client in a criminal case) is precisely the type of informational interchange that the privilege is designed to protect. A lawyer should not sign such a statement unless the client is fully informed and agrees distinctly and unequivocally that the privilege is waived and that the attorney’s signature will be used as evidence to support the proof of the Court’s compliance with the constitutional requirements of Criminal Rule 11.

The client’s statements to the lawyer in deciding whether to plead are privileged and for the client alone to reveal. Also, the relationship between lawyer and client necessarily entails the revelation or transmission to the lawyer of “other information gained in the relationship” the disclosure of which “would be likely to be detrimental to the client.” By signing the Certificate and thereby agreeing that it can be used as evidence of a knowing and voluntary waiver of rights by the client, the lawyer is effectively revealing “secrets” protected under DR 4-101(A): that the lawyer certifies his or her conclusion that the client is informed, competent, aware of the circumstances, the importance of the decision and possesses the intellect and capacity to execute an important agreement.

By their explicit terms, each of the versions of the Attorney’s Certificate requires the defense attorney to approve the form of the Waiver of Rights and acknowledge that the defendant has signed it after the lawyer has explained the client’s rights and has answered “any questions” about the plea agreement. Thus, the Certificate is more than a mere acknowledgment of the signature but supplies a crucial element of the findings that the Court is required to make in order to determine whether the waiver is voluntary. Without the client’s explicit consent, after full disclosure of the effect of the attorney’s signature, the lawyer should not sign any version of the Attorney’s Certificate. Since protection of the client’s control over the decision to reveal confidences and secrets is so fundamental to the principles encompassed within the Code of Professional Responsibility, we do not believe that the attorney can unilaterally decide to execute an Attorney’s Certificate of the types presented in this request. Therefore, we do not conclude that it is “permissible” under DR 7-101(B)(1) for the lawyer to exercise “professional judgment to waive or fail to assert [the] right” of a client alone to decide reveal, through a personal colloquy with the Court, the kind of information that establishes a constitutionally sufficient plea of guilty of nolo contendere under Criminal Rule 11 and McCarthy, supra.

In the correspondence between the State’s Attorney and the requesting attorney, it is suggested that the execution of the Attorney’s Certificate is merely a formality if the client signs the Waiver of Rights and engages in a Rule 11 colloquy in open court; and otherwise promotes finality of litigation in guilty plea situations by protecting the record. We are not persuaded that these considerations affect the conclusions reached here about the defense lawyer’s ethical obligations. What is required by the Attorney’s Certificate of the defense attorney in order to get the State’s Attorney to engage in plea negotiations seeks more than accession to a “reasonable request of opposing counsel which [does] not prejudice [the] client.”⁵ Rather, it seeks the defense attorney’s participation in an agreement designed to insulate the plea agreement from collateral attack by the client; and it is therefore permissible for the defense attorney to refuse to sign the Certificate if the lawyer “believes [it] to be unlawful, even though there is some support for an argument that the conduct is legal.”⁶ Otherwise, were the attorney forced by the circumstances (and the “no signature-no plea bargaining” policy of the prosecution as explained to us in the request) to sign the Attorney’s Certificates, even in the face of the important Disciplinary Rules applicable here, we conclude that such action would be “conduct that is prejudicial to the administration of justice,” contrary to DR 1-102(A)(5).

³ DR 4-101; DR 6-102(A). See also, Opinion 91-7.

⁴ DR 4-101(A) and (B). See Opinion 91-7.

⁵ DR 7-101(A)(1).

⁶ DR 7-101(B)(2).

Finally, we regard the language of the Attorney's Certificate as contrary to the proscription of DR 6-102(A), in that it may be used to "exonerate...from or limit [the lawyer's own] liability to [the] client for personal malpractice." If there were a subsequent claim by the client that the attorney did not fully inform the client or explore all avenues of defense prior to the execution of the Waiver of rights and plea agreement, the Attorney's Certificate would almost certainly be used against the client to limit his or her remedies. In a different context, we concluded that a declaration drafted by opposing counsel in a real estate transaction, would have such an effect; and consequently, the attorney should not counsel the client to sign it.⁷

⁷ See Opinion 91-7.