

Advisory Opinion 1984-5

An Albuquerque attorney has requested the Advisory Opinions Committee to comment on a release provision currently in use by claims adjustors and the defense bar. The release provision reads:

This release expressly reserves all rights of the person, or persons, on whose behalf the payment is made and the rights of all persons in privity or connected with them, and reserves to them their right to pursue their legal remedies, if any, including but not limited to claims for contributions, property damage and personal injury against the undersigned or those in privity or connected with the undersigned.

A release must be read as a whole and the intent of the parties gathered from the entire instrument and not from separate portions. *Garrison v. Navajo Freight Lines*, 74 N.M. 238, P.2d 580 (1964). Counsel did not provide us with a copy of the entire release. Consequently, this opinion assumes that the release is one under which the Releasor releases the Releasee from all claims of any kind arising out of a certain incident in exchange for the payment of a certain sum of money.

The release provision in question reserves to the Releasee any claim he may have against the Releasor while apparently the Releasor is releasing the Releasee from all claims. Counsel has raised the question of whether this practice is an unfair and deceptive trade practice along with being a questionable ethical practice.

The New Mexico law pertaining to unfair trade practices defines unfair or deceptive trade practice as "any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services, in the extension of credit or in the collection of debts by any person in the regular course of his trade or commerce." N.M. Stat. Ann. § 57-12-2 (1978). The Committee does not believe that the release provision falls within the purview of § 57-12-2 and furthermore it is unaware of any case law so holding.

As far as the ethical propriety of the release provision is concerned, the Committee notes that releases are contractual in nature and thus governed by the substantive contract law of the state where the contract was formed, absent conflict of law issues. *Ratzlaff v. Seven Bar Flying Service, Inc.*, 98 N.M. 159, 646 P.2d 586 (Ct. App.) *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). The public policy in New Mexico relative to the law of releases is to favor amicable settlement of claims without litigation when the agreements are fairly secured, are without fraud, misrepresentation or overreaching and when they are supported by consideration. *Id.* The Committee is unaware of any law that indicates that a release which is not mutual is illegal or unethical. Additionally, the person dealing with the Releasor on behalf of the Releasee may not always have authority to affect the rights of the Releasee against the Releasor. In the absence of a valid contractual defense, the Committee sees nothing inappropriate with the release provision. Nothing prevents the Releasor from bargaining for a mutual release provision as a condition of any release.