

## ETHICS OPINION

RO 2011-02

### Criminal Defendant's Waiver of Ineffective Assistance of Counsel Claims

#### QUESTION:

May a criminal defendant's lawyer advise a client to enter into a plea agreement that includes a provision requiring the client to waive all ineffective assistance of counsel claims against that lawyer? May a prosecutor include in a plea agreement a provision that would require the defendant to waive all ineffective assistance of counsel claim against the defendant's lawyer?

#### ANSWER:

Advising a criminal defendant to enter into an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of Rules 1.7(b) and 1.8(h), Ala. R. Prof. C. Likewise, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea agreement because such would violate Rule 8.4(a), Ala. R. Prof. C., which prohibits an attorney from "induc(ing) another" to violate the Rules of Professional Conduct.

#### DISCUSSION:

The Disciplinary Commission has been asked to issue an opinion regarding the ethical propriety of a criminal defense lawyer advising a client on whether to enter into a plea agreement that contains a provision requiring the client to waive the right to later bring an ineffective assistance of counsel claim against that attorney. The flipside to any such question is whether a prosecutor may require the defendant, as a condition of the plea agreement, to waive such rights. As an initial matter, the Disciplinary Commission stresses that this opinion does not address the legality or constitutionality of such waivers. Rather, this opinion deals solely with whether a criminal defense attorney or prosecutor may, under the Alabama Rules of Professional Conduct, participate in obtaining such a waiver.

A number of state bar associations and state supreme courts have addressed this identical issue and determined that a lawyer may not advise a criminal client as to whether to enter into a plea agreement that includes a provision requiring the defendant to waive a post-conviction right to bring an ineffective assistance of counsel claim against that same lawyer.<sup>1</sup> In doing so, those bar associations and courts have noted that a lawyer may not seek an agreement with a client prospectively limiting his liability for malpractice unless the client is independently represented in making the agreement. This rule is expressed in Rule 1.8(h), Alabama Rules of Professional Conduct, as follows:

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED  
TRANSACTIONS

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(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The Disciplinary Commission is aware that the both the Arizona and Texas Bars find no such violation of Rule 1.8(h) and, therefore, allow defense lawyers to advise their clients on such waivers.<sup>2</sup> In Formal Opinion 95-08, the Arizona State Bar concluded that there was no violation of Rule 1.8(h) because the defense lawyer is not actually a party to the agreement between the client and the government. Additionally, the opinion concluded that the rule simply refers to "malpractice" claims and nothing more. In Opinion 571, the Texas Bar concluded that a violation of Rule 1.8(h) does not exist because a "plea agreement waiving a post-conviction appeals based on ineffective assistance of counsel does not expressly limit the defense counsel's liability to the defendant for malpractice." However, the Disciplinary Commission finds that Rule 1.8(h), Ala. R. Prof. C., does

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<sup>1</sup> See Advisory Committee of the Supreme Court of Missouri Formal Opinion 126; North Carolina State Bar Opinion RPC 129; Ohio Board of Commissioners on Grievances and Discipline Opinion 2001-06; Tennessee Board of Professional Responsibility Advisory Opinion 94-A-549; and Vermont Bar Association Advisory Ethics Opinion 95-04.

<sup>2</sup> Arizona State Bar Committee on the Rules of Professional Conduct Opinion 95-08 and Texas Bar Opinion 571.

prohibit defense counsel from advising a client on whether to enter into a plea agreement that requires a waiver of any right to bring an ineffective assistance of counsel claim.

In Opinion 2001-06, the Ohio Board of Bar Commissioners on Grievances and Discipline noted as follows:

While a waiver of claims of ineffective assistance of counsel does not eliminate the opportunity for a criminal defendant to bring a legal malpractice action against a criminal defense attorney, it significantly limits and may even destroy the defendant's ability to establish proximate cause, a necessary element of a legal malpractice claim. Given this relationship, it is the Board's view that a plea agreement provision that waives appellate or postconviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice.

A civil claim of malpractice and a claim of ineffective assistance of counsel are legally distinct from one another; however, both involve claims by the client that the lawyer's representation was unreasonable or lacking and that the client was harmed as a result. Further, it is often the case that the underlying facts necessary to establish such claims are virtually identical. As the dissent argued in Arizona State Bar Opinion 95-08, "[c]riminal defendants should not be singled out for disparate treatment simply because they usually seek habeas corpus relief rather than malpractice damage awards."

The Disciplinary Commission also finds that, pursuant to Rule 1.7(b), a conflict of interest exists where a lawyer must counsel his client on whether to waive any right to pursue an ineffective assistance of counsel claim against himself. Rule 1.7(b), Ala. R. Prof. C., provides as follows:

#### RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Under Rule 1.7(b), a conflict of interest exists where a client's interests conflict with the interests of his lawyer. The Disciplinary Commission finds it hard to conceive of a situation where it would be in the interests of a lawyer for his client to file an ineffective assistance of counsel claim. Such claims against a lawyer can harm that lawyer's reputation and subject that lawyer to discipline by the Bar or the courts.

However, there are times when it may be in the client's best interest to file an ineffective assistance of counsel claim against his lawyer. It would be inappropriate under any scenario for the lawyer against whom the claim may be brought to counsel the client as to whether to bring that claim or to waive the right to bring such a claim. This is especially so in the context of a criminal case where the client's freedom and liberty may be at stake. As such, the lawyer may not counsel the client as to whether to waive his right to bring an ineffective assistance of counsel claim.

Because a criminal defense lawyer may not advise a client whether to enter into a plea agreement waiving the right to bring an ineffective assistance of counsel claim, a prosecutor may not seek such a waiver from a criminal defendant represented by counsel. Rule 8.4(a), Ala. R. Prof. C., provides, in part, as follows:

#### RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .

As discussed, a criminal defense lawyer may not counsel a client to waive his right to bring an ineffective assistance of counsel claim without violating Rules

1.7(b) and 1.8(h), Ala. R. Prof. C. Rule 8.4(a) provides that is an ethical violation for any lawyer to “induce another” to “violate the Rules of Professional Conduct”. If a prosecutor were to require a waiver of the right to bring an ineffective assistance of counsel claim in a plea agreement, the defense lawyer would be placed in the intolerable situation of either being forced to withdraw from representation or violate Rule 1.7(b) and 1.8(h).

Moreover, a lawyer’s withdrawal would not cure the conflict. Rather, the lawyer’s withdrawal would only pass the conflict on to the defendant’s next lawyer. As a result, the defendant would either be forced to accept counsel that has a conflict of interest or forced to proceed pro se in executing the plea agreement in violation of his Sixth Amendment right to counsel. Additionally, the lawyer cannot simply refuse to explain such a provision to the client as he has a duty under Rules 1.1 [Competence], 1.2 [Scope of Representation], and 1.4 [Communication] to thoroughly explain each and every provision of the agreement to the client. A lawyer must do so to ensure that the client is knowingly and voluntarily entering into the agreement. As such, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea deal since, in doing so, he would be “inducing” the defendant’s lawyer into violating Rules 1.7(b) and 1.8(h), Ala. R. Prof. C.; or, would place the defendant into the untenable situation of either accepting counsel that has an inherent conflict of interest or proceeding without the benefit of counsel.