

KBA Legal Ethics Opinion No. 17-02

March 29, 2017

TOPICS: Requesting or agreeing in criminal cases to a waiver of ineffective assistance of counsel claims and prosecutorial misconduct claims.

DIGEST: It is unethical and inappropriate for defense attorneys and prosecutors to request a criminal defendant to waive or release claims (a) that the defense lawyer's assistance was ineffective; or (b) that the prosecutor committed misconduct in the case in which a plea is to be entered.

DATE OF REQUEST: March 15, 2017

REFERENCES: Rules 1.7(a)(2), 1.8(h)(1), 3.8(a) and (b), and 8.4(a) and (d), Kansas Rules of Professional Conduct, Rule 226, Rules of the Kansas Supreme Court (hereinafter "KRPC").

QUESTION: Is it appropriate for a defense attorney or a prosecutor to request a criminal defendant, in negotiating a plea agreement, to waive claims that the defendant received ineffective representation or that the prosecutor has committed prosecutorial misconduct?

ANALYSIS: Courts today find themselves overloaded, under-funded, and burdened with ever-increasing numbers of criminal cases, clogging the justice system with delays. Thus, the criminal justice system has devolved from one of trials and verdicts to one of pleas and agreements.¹ As a result, a reasonable and effective plea agreement is often the main product of a defense counsel's work, and the main goal of a prosecuting attorney.

Of course, by agreeing to a plea, the criminal defendant must waive his right to a trial.² But, a person charged with a crime who has a constitutional right to counsel, has a right to effective representation by that counsel, even at and before the plea bargaining stage of the proceeding.³ If one enters a plea agreement to resolve the charge, must he also forego his right to claim that the counsel who talked him into the deal missed some point, or that the prosecutor, in forcing the plea, failed to disclose important evidence?

It should be apparent that criminal defendants need effective counsel to guide them through the plea negotiation process and thus, if that counsel is ineffective, should not resulting pleas be subject to attack on that basis?

Effective representation before and during the plea hearing is an indispensable means of ensuring that the waiver of every procedural and substantive constitutional right eliminated by that plea was voluntary and intelligent. Effective assistance waivers and other broad waivers of the right to collaterally attack one's conviction are different in kind than the waiver of the pre-trial and trial rights, themselves. Waivers of pre-trial and trial rights, such as the right to file a suppression motion based on a coerced confession, or the right to have a jury determine factual guilt beyond a reasonable doubt, are acceptable in part

because an effective attorney has evaluated a defendant's chances of winning and properly advised the defendant to waive these rights and plead guilty.

If, on the other hand, an attorney provides poor advice, and relying on that, a defendant waives effective assistance, then the defendant will be virtually barred from raising Sixth Amendment effective representation challenges. The defendant is left without a forum for judicial review of the potentially serious constitutional violations, matters that will never be considered because of the attorney's incompetence. Instead, a defendant must retain her right to argue ineffective counsel at the plea stage, a claim that can only be raised by collateral attack, in case the decision to plead guilty (or to reject the plea) turns out to be unjust. Competent counsel would have countermanded that decision, but a waiver of effective assistance and collateral attack ensures the defendant is precluded from raising the issue.⁴

Many form plea agreements carve out an exception for ineffective assistance of counsel claims post-conviction.⁵ The requester states, however, that "standard plea agreements in federal criminal cases in Kansas . . . frequently include" broad waivers of any right to attack the resulting conviction collaterally, including claims of the ineffective assistance of counsel.⁶ And such broad and general waivers have been held to include a waiver of the right to claim that counsel's advice, even in connection with the plea, was ineffective.⁷

Of course, building into a plea agreement a binding waiver of a claim of ineffective assistance of counsel or of prosecutorial misconduct helps to assure closure, and avoids the necessity of reopening the case, arguing in court and defending the defense counsel's or the prosecutor's conduct. And closure, after all, is one of the principal goals of the plea agreement.

On the other hand, a criminal defendant is particularly vulnerable, and – seeing the prospect of a reduced charge or sentence – might well agree to any other term without being independently advised of its effect.

So, given the prevalence of the practice, is it ethical for a defense attorney to request and then induce his client to sign a release of any claim that the defense lawyer's work has been ineffective, and is it ethical for a prosecutor to request and then induce a criminal defendant to waive and release any potential claim for prosecutorial misconduct?

A policy of the American Bar Association opposes the inclusion of such waivers of claims of ineffective counsel into plea agreements.⁸ As noted below, many other state bar associations have held the practice to be unethical.

Rule 1.7(a), KRPC provides in pertinent part as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Because of the lawyer's own interest in protecting himself against claims that his work has been ineffective, a lawyer has a non-waivable conflict of interest under Rule 1.7(a) in advising his criminal defense client to waive the right, in a plea agreement, later to claim that the lawyer's representation has been ineffective.⁹

Rule 1.8(h)(1), KRPC provides as follows:

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

Of course, waiver of the right to claim ineffective counsel does just that: it limits the lawyer's liability to a client for malpractice. Thus, it is inappropriate and unethical for a lawyer to request a client to release the lawyer from a claim of malpractice or unethical behavior, absent express advice that the client consult with independent counsel, because the lawyer has a conflict of interest.¹⁰

Rule 3.8(a) and (b) provide:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; . . .

The Comments to this Rule include the following:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

Given the prosecutor's special role, care should be taken to insure that appropriate and ethical conduct is accorded to the criminal defendant.¹¹

Rule 8.4(a), KRPC states that it is professional misconduct for a lawyer to:

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.

Thus, it would be inappropriate for a lawyer to invite or induce another lawyer to act in a manner inconsistent with that other lawyer's ethical duties.¹² In the present context, therefore, it would be improper for a prosecutor to request or demand that a criminal defense lawyer talk his client into accepting a plea agreement which includes the waiver of the right to claim ineffective representation or prosecutorial misconduct, as they both would then be guilty of misconduct.

Rule 8.4(d), KRPC states:

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice; . . .

Thus, it is a violation of Rule 8.4(d) for an attorney to request, or for a prosecutor to demand, that a criminal defendant release his right to claim ineffective advice of counsel or prosecutorial misconduct as part of a plea agreement.¹³

Nearly all of the other state bar associations which have been asked to opine on this issue agree with the conclusions stated herein. These include the following:

Alabama: The Alabama Bar prohibits a prosecutor from seeking a waiver of effective assistance because it would, by extension, require the defense attorney to violate rules of professional conduct.¹⁴

Missouri: A Missouri Bar Opinion prohibits a defense attorney from asking for a waiver, and prohibits the prosecutor from insisting on it.¹⁵

Ohio: The Ohio Board of Commissioners on Grievances and Discipline has stated it is unethical "for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or post-conviction claims of ineffective assistance of trial counsel or prosecutorial misconduct."¹⁶

Tennessee: Tennessee Bar Board of Professional Responsibility Formal Opinion 94-A-549 proscribes defense counsel and prosecutors from including waivers of ineffective assistance of counsel or prosecutorial misconduct in a plea agreement.¹⁷

Nevada: (Same).¹⁸

North Carolina: (Same).¹⁹

Ohio: (Same).²⁰

Vermont: The Vermont Bar has opined that a defendant's waiver of his right to attack effective assistance and to attack the prosecutor's conduct in pre-plea and pre-trial proceedings would cause both the defense attorney and the prosecutor to violate the code of ethics forbidding an attorney from limiting his liability for malpractice.²¹

Virginia: Virginia Legal Ethics Opinion 1857 concludes that a criminal defense attorney may not ethically advise a client to accept a plea agreement that includes a waiver of effective assistance of counsel claims.²²

Florida: Florida's Bar has opined that a both criminal defense and prosecuting attorneys have an "unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel and prosecutorial misconduct."²³

Kentucky: The Kentucky Bar opinion committee has issued an Advisory Ethics Opinion holding that a criminal defense attorney has a personal conflict of interest when he advises a client to accept a plea bargain containing a provision barring the client from pursuing a claim of ineffectiveness against the defense attorney, and that it is unethical for the prosecutor to request such a provision.²⁴

Mississippi: The Mississippi Bar has held that it is inappropriate for a defense attorney to request or advise a client to waive or release potential claims against the lawyer, and it is unethical for the prosecutor to ask.²⁵

South Carolina: This State's Bar Association holds that it is never permissible for a prosecutor to condition dismissal of a criminal charge on the defendant's release of claims against the government arising from the arrest.²⁶

New Jersey: (Same).²⁷

Nebraska: A Nebraska Opinion states it is unethical for a defense attorney to advise a client, and it is unethical for a prosecutor to request or demand, a release of a claim of ineffective assistance of counsel.²⁸

Pennsylvania: (Same).²⁹

Utah: (Same).³⁰

Now, two state bar opinions have been located which differ somewhat from the conclusion reached here, but this Committee finds them to be aberrant and distinguishable.

Arizona's Opinion, referring to Rule 1.8, holds that the lawyer is not precluded from asking for a release of ineffective assistance claims, since Rule 1.8 only refers to a waiver of claims "for malpractice." Further the Opinion makes no mention of Rule 1.7(a).³¹ Also, see the strong dissent in that Opinion, which, quoting from a prior Arizona Opinion, argued that Rule 1.8 prohibits an agreement between lawyer and client that client would not file a bar complaint, stating "agreements such as the one the inquiring attorney proposes involve the very same evils that [Rule] 1.8(h) is designed to prevent; the strong potential of coercion and over-reaching on the attorney's part, and the potential conflict between the lawyer's interests and those of his client."³²

And the Texas Bar has stated that a prosecutor is not prohibited from obtaining a waiver of post-conviction rights in a plea agreement, so long as the defendant is represented, and thereby receives independent advice.³³

It should be noticed that, although the United States Department of Justice apparently finds no conflict with the Rules of Professional Conduct in the described practice, it nonetheless has adopted a policy against the practice. The 2014 policy states:

While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.

Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel. . . .³⁴

CONCLUSION. In negotiating a plea agreement, it is improper for a defense attorney to request, counsel, advise, or recommend that his criminal defendant client release or waive the client's right to assert a claim that the defense attorney's representation has been ineffective or departed from the applicable standard of care, or that the prosecutor committed prosecutorial misconduct. In the same setting, it is improper for a prosecutor to request or demand that a criminal defendant waive, release or forego the right to claim that the defense attorney's representation has been ineffective or departed from the standard of care or to waive, release or forego the right to claim misconduct on the part of the prosecutor. The Committee finds that such a practice violates Rules 1.7(a), 1.8(h)(1), 3.8(a) and 3.8(b), and 8.4(a), 8.4(d), KRPC.

J. Nick Badgerow, Chairman
For the Committee

¹ In all federal criminal cases in 2010, 89% of the defendants pled guilty, 8.7% had their cases either dismissed by the judge or were acquitted at trial by the judge or jury, and 2.3% were convicted after trial. *Sourcebook of Criminal Justice Statistics Online*, table 5.22.2010, available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>. See also Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the U.S. Courts*, Table D-4 (2012) available on-line at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> (finding an 89% guilty plea rate for all federal defendants charged with a felony for the year 2012).

² *United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995).

³ *Laffler v. Cooper*, 132 S.Ct. 1376 (2012) (defense counsel's failure to communicate the prosecutor's plea bargain to the defendant constituted deficient performance); *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (defense attorney's erroneous legal advice that the penalty imposed after trial would be better than the sentence offered at the plea deal constituted deficient performance).

⁴ Susan R. Klein, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015), available on-line at https://papers.ssrn.com/sol3/papers.cfm?abstract_id_2422545 (p. 19)(hereinafter "Klein")(pp. 25 – 26).

⁵ "Forty-nine boilerplate agreements that mandate waivers of collateral attack also include an exception for ineffective assistance claims." Klein, p. 19.

⁶ Request for Kansas Ethics Advisory Opinion, March 15, 2017, pp. 1 – 2.

⁷ See *United States v. Jackson*, No. 08-20150-02-CM, 2012 WL 5869822, at *2 (D. Kansas, Nov. 19, 2012), where the court enforced the defendant's waiver of her right to appeal or collaterally attack "any matter in connection with th[e] prosecution," and denied the claim that her attorney's assistance was ineffective.

⁸ ABA Formal Op. 113E (Aug. 12-13, 2013), available on-line at http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_113E.docx.

⁹ *Cooper v. State*, 356 S.W.3d 148 (Mo. 2011).

¹⁰ *In re Braun*, 734 N.E.2d 535 (Ind. 2000).

¹¹ See e.g. S.C. Ethics Op. 05-17 (2005) and N.J. Ethics Op. 661 (1992) (it is never permissible for a prosecutor to condition dismissal of a criminal charge on the defendant's release of claims against the government arising from the arrest).

¹² See *In re Pyle*, 283 Kan. 807, 156 P.3d 1231 (2007) (improper for lawyer to induce client to do act which lawyer was prohibited from doing).

¹³ State Bar of Nev. Standing Comm. on Ethics and Prof'l Resp., Formal Op. No. 48 (Oct. 27, 2011), available on-line at https://www.nvbar.org/sites/default/files/Ethics_Op_48.pdf.

¹⁴ Ala. State Bar Office of General Counsel Op. 2011-02 (Feb. 2011), available on-line at <http://www.alabar.org/oge/topDisplay.cfm?oneId=429>.

¹⁵ Missouri Advisory Comm. Formal Op. 126 (2009), available on-line at http://www.mobar.org/uploadedFiles/Home/For_Lawyers/Professionalism/Formal_Opinions/Formal-126.doc.

¹⁶ Ohio CPR Op. 2001-6 (2001), available on-line at http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2001/Op%2001-006.doc.

¹⁷ Tenn. Bd. Professional Responsibility Advisory Formal Op. 94-A-549 (1994).

¹⁸ State Bar of Nev. Standing Comm. on Ethics and Prof'l Resp., Formal Op. No. 48 (Oct. 27, 2011), available at https://www.nvbar.org/sites/default/files/Ethics_Op_48.pdf.

¹⁹ The North Carolina State Bar, RPC 129, January 15, 1993.

²⁰ Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6, December 7, 2001.

²¹ Vermont Advisory Ethics Op. 95-04 (1995).

²² Virginia State Bar Legal Ethics Opinion 1857 (2011), available at <http://www.vsb.org/site/regulation/leo-1857-final>.

²³ Professional Ethics of the Florida Bar Opinion 12-1 (June 22, 2012), available on-line at <http://www.floridabar.org/1fb/FEBETOpin.nsf/b2b76d49c9fd64a5852570050067a7af?6a2611d9cdcc8db485257ad00070e3fb!OpenDocument>.

²⁴ Ky. Bar Ass'n Ethics Op. E-435 (Nov. 17, 2012), available on-line at http://www.kybar.org/documents/benchbar/2013/bb_0313_12.pdf, aff'd, *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014).

²⁵ Mississippi Ethics Op. 260 (2014), available on-line at <https://www.msbar.org/ethics-discipline/ethics-opinions/formal-opinions/260.aspx>.

²⁶ S.C. Ethics Op. 05-17 (2005).

²⁷ N.J. Ethics Op. 661 (1992).

²⁸ Nebraska Ethics Advisory Opinion For Lawyers No. 14-03 (2014), available on-line at <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/ethics/lawyers/14-03.pdf>.

²⁹ Penn. Bar Ass'n, Conflicts of Interest and Other Misconduct Related to Waivers of Claims for Ineffective Assistance of Counsel, Formal Op. 2014-100 (2014).

³⁰ Utah State Bar Ethics Advisory Op. Cmte., Op. No. 13-04 (Sept. 30, 2013).

³¹ State Bar of Ariz. Ethics Op. 95-08 (Nov. 1995), available at <http://m.azbar.org/RulesofPC/Opinion.aspx?id=460>.

³² *Id.*

³³ Supreme Court of Texas Prof'l Ethics Comm. Op. No. 571 (2006), 2006 WL 2038683.

³⁴ Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). Press Release, "Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendants' Right to Counsel" (Oct. 14, 2014), available at <http://www.justice.gov/justice-news>. Prior to the new policy, U.S. Attorney's Offices had been seeking plea waivers extending to ineffective advice of counsel claims.