

The Supreme Court of Kentucky affirmed this opinion in *U.S., ex rel. U.S. Attorneys, ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Association*, \_\_\_ S.W. 3d \_\_\_ (2014), 2014 WL 4159988 (August 21, 2014)."

## KENTUCKY BAR ASSOCIATION

### Ethics Opinion KBA E-435

Issued: November 17, 2012

*The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.*

- Subject: Plea Agreements Waiving the Right to Pursue an Ineffective Assistance of Counsel Claim
- Question 1: May a criminal defense lawyer advise a client with regard to a plea agreement that waives the client's right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement?
- Answer: No.
- Question 2: May a prosecutor propose a plea agreement that requires a waiver of the defendant's or potential defendant's right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?
- Answer: No.
- References: SCR 3.130 [Kentucky Rules of Professional Conduct] (1.7, 1.8(h)(1), 3.8(b), 3.8 Cmt 1, 8.4(a)); Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); Vt. Adv. Eth. Op. 95-04 (1995); N.C. Eth. Op. RPC 129 (1993). Tex. Eth. Op. 571 (2006) Az. Eth. Op. 95-08 (1995)

#### Question 1 Discussion

*Defense Counsel May Not Advise a Client about a Plea Agreement Involving a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Related to the Subject of the Plea Agreement*

Prosecutors sometimes propose plea agreements that bar collateral attacks on convictions that result from the plea agreements. Sometimes these plea agreement proposals require the defendant to waive the right to pursue a claim of ineffective assistance of counsel. The question that has arisen is whether defense counsel may ethically advise the client about a plea agreement proposal that bars the client from later pursuing a claim of ineffective assistance of counsel related to the conviction that results from the plea agreement. In effect, the question is whether defense counsel may advise the client regarding a waiver of a claim of ineffective assistance of counsel that would be based on the attorney's own conduct in representing the client. Because the offered plea agreement creates a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived, such an attorney ethically cannot advise a client about such an agreement.

SCR 3.130(1.7(a)) states in pertinent part:

(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 significant 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.

The lawyer in the plea agreement setting has a "personal interest" that creates a "significant risk" that the representation of the client "will be materially limited." The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Even in cases of concurrent conflict, SCR 3.130(1.7) allows a representation to occur if, among other requirements, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." SCR(1.7(b)(1)). A lawyer cannot reasonably believe that he or she can provide competent representation when the lawyer is tasked with advising the client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel when that claim would be based on the attorney's own conduct in representing the client.

This reasoning is consistent with the reasoning surrounding SCR 3.130(1.8(h)(1)). Rule 1.8(h)(1) states: "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." Thus, a lawyer cannot ethically advise the client when the issue is the attorney's own conduct.

Rule 1.8(h)(1) does not directly apply to the plea agreement situation because the issue in the plea agreement situation is a waiver of the client's ineffective assistance claim, not a waiver or limitation of a malpractice claim. Yet, the underlying basis for a malpractice claim is the attorney's own professional conduct. Likewise, the underlying basis for an ineffective assistance of counsel claim is the attorney's own professional conduct. If a lawyer ethically cannot advise a client about a malpractice limitation, a lawyer ethically cannot advise a client about an ineffective assistance of counsel waiver.

Other ethics bodies have reached the conclusion that defense counsel may not advise the client on a plea agreement when the agreement involves a waiver of the right to later claim ineffective assistance of

counsel. See, e.g., Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); Vt. Adv. Eth. Op. 95-04 (1995); N.C. Eth. Op. RPC 129 (1993). But see Tex. Eth. Op. 571 (2006) (conflict of interest must be evaluated on a case by case basis); Az. Eth. Op. 95-08 (1995)(Rule 1.8 not a bar to defense counsel's participation; no discussion of the conflict of interest).

## Question 2 Discussion

### *A Prosecutor May Not Propose a Plea Agreement Requiring a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Relating to the Matter that is the Subject of the Plea Agreement*

A prosecutor cannot ethically offer a plea agreement to a defendant or potential defendant that requires that the person waive his or her right to pursue an ineffective assistance of counsel claim relating to the representation in the matter that involves the plea agreement. Accord Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); N.C. Eth. Op. RPC 129 (1993).

As Comment 1 to SCR 3.130(3.8) states:

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.

SCR 3.130(3.8) Cmt 1. SCR 3.130(3.8(b)) requires a prosecutor to “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.” In addition, SCR 3.130(8.4(a)) states:

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.

SCR 3.130(8.4(a)).

It is inconsistent with the prosecutor's role as a minister of justice and the spirit of SCR(3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of ineffective assistance of counsel. Accord Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009).

In making such a proposal, a prosecutor is assisting or inducing another lawyer, defense counsel, to violate the Rules of Professional Conduct, conduct proscribed by Rule 8.4(a). Accord Va. State Bar Legal Eth. Op. 1857 (2011).

### ***Note to Reader***

*This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.*