

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 48
Issued on October 27, 2011.

BACKGROUND

The Committee has received a request from a criminal defense attorney practicing in federal court inquiring into ethical limitations on plea agreement waivers.

QUESTION

May a plea agreement include a waiver of all claims brought via appeal or other post-conviction procedure, including those based on ineffective assistance of counsel, excluding only those claims of ineffective assistance of counsel directly affecting the plea?

ANSWER

No. A waiver must exclude all potential claims of ineffective assistance of counsel, not only those claims limited to the plea agreement itself.

AUTHORITIES

- a. Nevada Rules of Professional Conduct 1.7(a)(2), 1.8(h)(1), 8.4 (2010)
- b. NRS 41.0307(4)(b); 41.032(2)
- c. North Carolina State Bar, *Waiver of Appellate and Postconviction Rights in Plea Agreement*, NC Eth. Op. RPC 129, 1992 WL 753137
- d. Supreme Court of Ohio Board of Commissioners on Grievance and Discipline, OH Adv. Op. 2001-6, 2001 WL 1635553
- e. Supreme Court of Texas Professional Ethics Committee, TX Eth. Op. 571, 2006 WL 2038683
- f. *Morgano v. Smith*, 110 Nev. 1025, 879 P.2d 735 (1994)
- g. *Ramirez v. Clark Co. Public Defender*, 105 Nev. 219, 220, 773 P.2d 343, 344 (1989)
- h. *U.S. v. Djelevic*, 191 F.3d 104, 106 (2d Cir. 1998)
- i. *U.S. v. Pruitt*, 32 F.3d 431 (9th Cir. 1994)
- j. *U.S. v. White*, 307 F.3d 336, 343 (5th Cir. 2002)

DISCUSSION

It is a common practice for prosecutors to include as part of plea negotiations a written requirement that a criminal defendant waive the right to appeal or otherwise challenge a conviction and sentence brought about as a result of the plea agreement. The

general practice is well accepted and not challenged herein.¹ The question has arisen whether plea agreement waivers that purport to waive all appeal and other post-conviction rights, including the right to raise certain ineffective assistance of counsel claims, violate Nevada's Rules of Professional Conduct.

A line of cases has developed in some federal circuits holding that plea agreements may include waivers of claims of ineffective assistance of counsel, excepting only those claims involving ineffective assistance of counsel directly affecting the plea or plea agreement itself.² The Ninth Circuit has not weighed in on this issue, although the Fifth Circuit in *White*³ interprets dicta in *U.S. v. Pruitt*⁴ as implying that the ineffective-assistance-of-counsel exception to waivers would be limited to those cases directly implicating the waiver. These cases have been raised in the context of post-conviction proceedings and have not addressed the question of the ethical duties of the prosecutor or defense attorney.

The issue to be decided is whether the waiver of claims of ineffective assistance of counsel creates a conflict of interest for a defense attorney. Nevada Rule of Professional Conduct [NRPC] 1.7(a)(2), prohibits representation in which a significant risk exists that representation of a client will be materially limited by a personal interest of the lawyer. Additionally, NRPC 1.8(h)(1) prohibits a lawyer from making an agreement prospectively limiting liability to his client for malpractice unless the client is independently represented in making the agreement. The waiver at issue herein would have the effect of requiring a criminal defense attorney to advise his client to waive potential ineffective assistance of counsel claims in order for the defendant to receive the benefit of the plea agreement.

State bar ethics committees addressing this issue have concluded that such advice amounts to a conflict of interest: "...[T]he waiver of rights arising from the ineffective assistance of counsel or prosecutorial misconduct appears to be, and shall prospectively be deemed to be, in conflict with the ethical duties expressed or implied in the rules."⁵ "It is unethical under the Ohio Code of Professional Responsibility 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 postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct."⁶

¹ See, e.g., *U.S. v. Djelevic*, 191 F.3d 104, 106 (2d Cir. 1998): "It is by now well-settled that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed upon guideline range is enforceable."

² *U.S. v. White*, 307 F.3d 336, 343 (5th Cir. 2002): "...[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself."

³ *Id.*, at 341.

⁴ 32 F.3d 431 (9th Cir. 1994).

⁵ NC Eth. Op. RPC 129, 1992 WL 753137.

⁶ OH Adv. Op. 2001-6, 2001 WL 1635553.

The decision of the Supreme Court of Texas Professional Ethics Committee⁷ is more equivocal, yet ultimately leads this Committee to the same conclusion regarding waivers of ineffective assistance of counsel. In addressing the potential conflict of interest facing a defense attorney, the Texas Professional Ethics Committee concluded that the attorney could trust his own judgment to decide whether or not his client might have a reasonable claim for ineffective assistance of counsel. If the attorney believed there was no basis for such a claim, he would be free to advise the client to sign the waiver:

In some cases, the defense lawyer may have no cause for any reasonable concern as to his effectiveness in representing the defendant. In such cases, the representation of the defendant as to the waiver would not reasonably appear to be adversely limited by the lawyer's interests, consequently, Rule 1.06(b)(2) would not prohibit the lawyer's representation of the defendant as to the waiver.⁸

This Committee finds the above reasoning to be unsatisfactory. An attorney should not be in a position to make a decision as to the effectiveness of his own representation, particularly when, as here, the decision will be final and unreviewable.

The Texas opinion additionally ruled that such waivers were allowable on the assumption that the remedy of a malpractice claim was still available to the defendant. The Rules of Professional Conduct, however, proscribe unethical conduct regardless of the potential existence of a legal remedy. Furthermore, in Nevada, this remedy likely would be unavailable. Public defenders and court-appointed defense counsel are immune from liability for malpractice claims by virtue of state law.⁹ Claims against privately retained defense counsel are also barred unless a defendant can first show that he has obtained appellate or post-conviction relief from his criminal conviction.¹⁰ A defendant who has waived his appellate and post-conviction remedies is unable to make this showing. The *Morgano* decision thus starkly illustrates the conflict of interest facing a defense attorney in advising a client to waive claims of ineffective assistance of counsel.

The Texas ethics opinion makes clear that in the absence of these limiting factors, waivers relating to ineffective assistance of counsel claims would violate its rules of professional conduct, and is to that extent in agreement with the Ohio and North Carolina opinions. This Committee finds these opinions persuasive and agrees that waivers of claims of ineffective assistance of counsel amount to conflicts of interest in violation of NRPC 1.7(a)(2) and 1.8(h)(1). The Committee therefore concludes that a defense

⁷ TX Eth. Op. 571, 2006 WL 2038683.

⁸ *Id.*

⁹ See *Ramirez v. Clark Co. Public Defender*, 105 Nev. 219, 220, 773 P.2d 343, 344 (1989); NRS 41.0307(4)(b); 41.032(2).

¹⁰ *Morgano v. Smith*, 110 Nev. 1025, 879 P.2d 735 (1994).

attorney may not, consistent with the Rules of Professional Conduct, ethically execute a plea agreement that purports to waive a defendant's claims of ineffective assistance of counsel. Furthermore, it is a violation of Rule 8.4(a) for an attorney to knowingly induce another attorney to violate the Rules of Professional Conduct. This Committee therefore concludes that a prosecutor may not, consistent with the Rules of Professional Conduct, ethically include such a waiver in a plea agreement.

This Committee has also considered the question whether a plea agreement may contain a waiver of claims of prosecutorial misconduct. The Ohio and North Carolina opinions conclude that such waivers violate rules relating to the special obligations of prosecutors. The Texas decision finds no ethical violation in such waivers. There is no explicit prohibition against such waivers in the Nevada Rules of Professional Conduct and the Committee is reluctant to read an implicit prohibition into the Rules. Nor does a prosecutor face the potential for conflicts of interest that forms the basis of this Committee's opinion regarding waivers of ineffective assistance of counsel claims. For these reasons, the Committee is of the opinion that waivers of claims of prosecutorial misconduct do not violate the Rules of Professional Conduct.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.