

NACDL ETHICS ADVISORY COMMITTEE
Proposed Formal Opinion 03-02 (February 2003)

Question Presented:

NACDL's Ethics Advisory Committee, as well as the Strike Force and other committees, have received queries regarding a requirement in some federal plea agreements that bar collateral attacks on convictions under 28 U.S.C. § 2255. The question presented is whether it is ethical for a criminal defense lawyer to participate in such a plea agreement.

We have determined that it is not.

Digest:

Case law has split on this issue with the weight of authority sustaining such waivers in general, but not where the client seeks to set aside his or her conviction by claiming that the plea itself was induced by ineffective assistance. No opinion we could find discussed the ethical implications of defense counsel agreeing to a waiver of an ineffective assistance claim as a general waiver of rights in a plea agreement.

It is the opinion of the NACDL Ethics Advisory Committee that, aside from the general effect the courts might give such waivers, the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement that limits the client's ability to claim ineffective assistance of counsel because the lawyer has a conflict of interest in agreeing to such a provision because it amounts to prospective limiting of liability. Therefore, the lawyer is duty bound to object to portions of a plea agreement that limit 2255 claims and refuse to assent to such an agreement with such language in it.

Ethical Rules, Statutes, and Constitutional Provisions Involved:

Mode Rules of Professional Conduct, Rules 1.7, 1.8(h), 8.4(a), 8.4(d)
Code of Professional Responsibility, DR 5-101(A), DR 6-102(A)
U.S. Const., Fifth, Sixth, and Fourteenth Amendments

Opinion:

I. INTRODUCTION

Federal plea agreements have been including waivers of the right to appeal and collateral acts. Common language is as follows:

The defendant hereby expressly waives the right to appeal his conviction and sentence, including, but not limited to, any appeal right conferred by Title 18, United States Code, Section 3742. The defendant further agrees not to contest his conviction or sentence in any post-conviction proceeding, *including, but not limited to, a proceeding under Title 28 United States Code, Section 2255*. The defendant, however, reserves the right to appeal the following: (a) any punishment imposed in excess of the statutory maximum, and (b) any punishment to the extent it constitutes an upward departure from the guidelines range deemed most applicable by the sentencing court. (emphasis added)

The specific inquiries from NACDL members concern whether signing off on such a plea agreement violates professional ethics. The NACDL Ethics Advisory Committee believes that it does violate professional ethics as well as defense counsel's constitutional duty to provide unconflicted representation. Accordingly, defense counsel has a duty to object to any waiver of potential ineffective assistance claims in a plea agreement.

II. WAIVERS IN THE FEDERAL COURTS

Case law on waivers of collateral attack in plea agreements have been sustained, with limitations. One group of cases finds no problem with such waivers, as long as they do not bar 2255 claims attacking the *underlying plea*.¹ Typical is *Frederick v. Warden, Lewisburg Correctional Facility*, 308 F.3d 192, 195-96 (2d Cir. 2002):

There is no general bar to a waiver of collateral attack rights in a plea agreement.

¹ See, e.g., *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 821 (2002); *United States v. Thomas*, 49 Fed. Appx. 781, 2002 WL 31323474 (10th Cir. 2002); *United States v. Broughton*, 288 F.3d 1183 (10th Cir. 2002); *United States v. Broughton*, 71 F.3d 1143, 1147 (4th Cir. 1995); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) (*see also* note 3, *infra*).

See Garcia-Santos v. United States, 273 F.3d 506, 509 (2d Cir.2001) (*per curiam*). However, a waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been procured, here, the plea agreement. *See United States v. Hernandez*, 242 F.3d 110, 113-14 (2d Cir. 2001) (*per curiam*) (declining to enforce waiver of appellate rights where defendant sought to challenge on appeal the constitutionality of the process by which appeal rights were waived); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (holding that waiver of right to file a Section 2255 motion is unenforceable where defendant claims ineffective assistance of counsel with respect to the agreement which effected the waiver).

Another group finds such waivers generally enforceable.² One court has still left the question open.³ One method of circumventing such agreements are arguments that the ineffective assistance claim infected the plea, no matter when the ineffectiveness arose.⁴

² *See, e.g., Davila v. United States*, 258 F.3d 448, 450-51 (6th Cir. 2001) (surveying cases and expressly adopting waiver); *Watson v. United States*, 165 F.3d 486, 488-89 (6th Cir.1999) (upholding explicit waiver of the right to collaterally attack a sentence under § 2255 because it was an informed and voluntary waiver); *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000) (determining that defendant waived right to seek relief under § 2255); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994) (stating that plea agreement may “waive the right to bring a § 2255 motion [if] it does so expressly”); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (upholding an express waiver of postconviction proceedings, including § 2255, because court could “see no principled means of distinguishing such a waiver from the [enforceable] waiver of a right to appeal”); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1993) (holding that defendant may waive statutory right to file § 2255 petition challenging length of his sentence); *United States v. Djelevic*, 161 F.3d 104, 107 (2d Cir. 1998).

See also United States v. Lowery, 48 Fed. Appx. 894, 2002 WL 31375589 (4th Cir. 2002).

³ *United States v. Andis*, 277 F.3d 984, 988 (8th Cir. 2002) (attack on illegal sentence not barred); *Latorre v. United States*, 193 F.3d 1035, 1037 n. 1 (8th Cir. 1999) (observing that Eighth Circuit had “not yet addressed the question of a defendant’s power to waive collateral-attack rights in a plea agreement” and indicating that court’s prior “decisions upholding waivers of direct-appeal rights have explicitly noted the availability of § 2255 collateral attack”); *United States v. Michelson*, 141 F.3d 867, 869 n. 3 (8th Cir. 1998), *cert. denied*, 525 U.S. 942 (1998) (general waiver of rights by plea did not encompass waiver of 2255 rights to an illegal sentence).

⁴ *See DeRoo v. United States* (defendant claimed ineffectiveness in plea for counsel’s not previously challenging indictment; 2255 permitted to go forward).

II. ETHICAL AND CONSTITUTIONAL IMPLICATIONS

No case we could find even discusses defense counsel's duty in regard to such a waiver in a plea agreement.

It is the opinion of the NACDL Ethics Advisory Committee that such a plea agreement provision creates a conflict of interest between the criminal defense lawyer and the client that rises to the level of denial of the right to loyal counsel under a Sixth Amendment and a violation of due process of law under the Fifth and Fourteenth Amendments.

A. Conflict of Interest

The NACDL Ethics Advisory Committee believes that defense counsel faced with a waiver of ineffective assistance claims in a proposed plea agreement has a conflict of interest being forced on defense counsel by the government. Model Rule of Professional Conduct 1.7(b) provides:

- (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.

In such plea agreements, the lawyer is advising the client to waive his or her rights to challenge the constitutional effectiveness of the lawyer. This is an obvious conflict of loyalty to the client. *Id.*, Comment ¶ 4.⁵ Model Code of Professional Responsibility DR 5-101(A) and RESTATEMENT

⁵ In the ABA's Ethics 2000 report, Rule 1.7 will move this to 1.7(a):

- (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:
 - (1) the representation of one client will be directly adverse to another client; or
 - (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

(THIRD) OF THE LAW GOVERNING LAWYERS § 125 (2000) are in accord. Conflicts of interest between lawyer and client have constitutional implications. *See infra*.

B. Limiting liability

The NACDL Ethics Advisory Committee also believes that such agreements are prospective attempts at limiting liability of the lawyer to the client and are unethical.

Model Rule of Professional Responsibility, Rule 1.8(h) provides:

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.⁶

Code of Professional Responsibility DR 6-102(A) is in accord: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." Such agreements are virtually unenforceable by the lawyer. *See, e.g., Swift v. Choe*, 242 A.D.2d 188, 192-93, 674 N.Y.S.2d 17, 20 (1st Dept. 1998).

The RESTATEMENT § 54(4) takes an extremely dim view of any attempt at prospectively limiting liability, and explicit states that, "[f]or purposes of professional discipline, a lawyer may

former client or a third person or by a personal interest of the lawyer.

Id., Comment ¶ 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."). <http://www.abanet.org/cpr/e2k-redline.html>.

⁶ The Ethics 2000 version is more expansive:

- (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; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client without first advising unless that person is advised in writing that of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent representation is appropriate legal counsel in connection therewith.

not: [¶] (a) Make an agreement prospectively limiting the lawyer’s liability to a client for malpractice”

An ineffective assistance claim is not strictly a malpractice claim, but a successful ineffective assistance claim is a predicate to suing a criminal defense lawyer for malpractice in virtually all jurisdictions. RESTATEMENT § 53, *Comment d* (colorable claim of innocence must be made before malpractice action will lie against criminal defense lawyer); 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 25.3 (4th ed.1996) (nearly universal rule); *compare Heck v. Humphrey*, 512 U.S. 477 (1994) (§ 1983 cannot be used to collaterally attack a conviction until the conviction is set aside).

C. Prosecutor’s Ethical Responsibility

The NACDL Ethics Advisory Committee also believes that prosecutors have an ethical duty to not attempt to limit ineffective assistance claims under Model Rule of Professional Conduct, Rule 8.4:

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

Accord: RESTATEMENT § 5(2); Code of Professional Responsibility DR1-102(A)(2, 5).

When a prosecutor proposes a plea agreement limiting ineffective assistance claims, the prosecutor is creating a situation where the criminal defense lawyer has a conflicting duty to the client and a personal interest to not be accused of ineffective assistance. We submit that the prosecutor is attempting violate ethical rules through defense counsel by insisting on such a condition in a plea agreement.

D. Duty to Report?

A criminal defense lawyer *may* also have a duty to report the attempted ethical violation of the prosecutor if the lawyer thinks that the prosecutor’s action “rais[es] a substantial question of the lawyer’s honesty or trustworthiness or the lawyer’s fitness as a lawyer in some other respect.” Model Rule of Professional Conduct, Rule 8.3(a); RESTATEMENT § 5(3). Reporting thus appears

to be discretionary with the complaining lawyer, depending upon the gravity of the situation.

E. Constitutional Implications

The NACDL Ethics Advisory Committee also believes that imposing such a plea agreement provision on defense counsel creates a violation of the Sixth Amendment right to unconflicted counsel and a violation of the right to due process of law under the Fifth and Fourteenth Amendments. We have recently spoken on the question of divided loyalty creating a Sixth Amendment violation. NACDL Ethics Advisory Committee, Formal Opinion 02-01 (Nov. 2002), at 12-13, citing *Holloway v. Arkansas*, 435 U.S. 475, 480-90 (1978) (conflict of interest creates Sixth Amendment violation), and *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850) (fidelity and loyalty to client vital to attorney-client relationship), and quoting *Damron v. Herzog*, 67 F.3d 211, 214 (9th Cir. 1995) (on the general duty of loyalty in attorney-client relationship).

III. DEFENSE COUNSEL'S DUTY

Defense counsel has an ethical and constitutional duty to object to and refused to sign any plea agreement provision that amounts to a waiver of post-conviction remedies to protect the rights of the client to later challenge the representation of the lawyer. If the government insists on such a provision, defense counsel then must seek additional counsel for the defendant who must be fully apprised of the situation just to advise the defendant. That defense counsel would have to be privy to every thing the defendant and defense counsel know. In complex cases, it would virtually make the plea agreement impossible because it might take weeks or months to resolve those questions, and it adds unnecessary expense to the accused (and the government if counsel is a Federal Defender or CJA appointed because another lawyer would have to be appointed to fully advise the client).

The client cannot be fully informed of what potential ineffective assistance or other collateral attacks may lie when the client is being advised by the lawyer who might have failed the client in some duty, known or unknown at the time. Facts may later develop that show, for example, a *Brady/Agurs/Kyle* violation by the government that the defense is obviously unaware of at the time of the plea. Another example might be that the defendant learns later that defense counsel never investigated a possible defense or witness, even though defense counsel represented to the defendant that the counsel did.