

NACDL ETHICS ADVISORY COMMITTEE
Formal Opinion 12-02 (October 2012)

Question Presented:

NACDL's Ethics Advisory Committee, as well as the Strike Force and other committees, have again¹ received several 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. We also believe that prosecutors may not ethically propose or require such a waiver.

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. NACDL issued an informal opinion in 2003 that counseled against defense counsel participating in 2255 waivers. Since then, several states ethics opinions have discussed the implications of defense counsel agreeing to a waiver of an ineffective assistance claim as a general waiver of rights in a plea agreement. They all agree that defense counsel has a conflict of interest in participating in a 2255 waiver. Some even find that prosecutors also have a conflict of interest in such waivers.

It is the opinion of the NACDL Ethics Advisory Committee that, aside from whether the courts might approve such waivers, the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client's ability to claim ineffective assistance of counsel. The lawyer has a conflict of interest in agreeing to such a provision because it becomes a 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:

Model Rules of Professional Conduct, Rules 1.7(a)(2), 1.8(h)(1), 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

¹ NACDL issued Proposed Opinion 03-02 (February 2003) dealing with this issue, and it was debated before the Board and deferred. The issue has arisen again.

Opinion:

I. Introduction

For many years, federal plea agreements have included 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 violates 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. We also believe that prosecuting attorneys have an ethical duty not to propose such agreements.

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.² Typical is *Frederick v. Warden, Lewisburg Correctional Facility*, 308 F.3d 192, 195-96 (2d Cir. 2002):

² See, e.g., *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001); *United States v. Thomas*, 49 Fed. Appx. 781 (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 4, *infra*).

There is no general bar to a waiver of collateral attack rights in a plea agreement. *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.³ One court has still left the question open.⁴ One method of circumventing such agreements is the argument that

³ See, e.g., *Jones v. United States*, 120 Fed. Appx. 594 (6th Cir. 2005) (finding voluntary waiver); *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); *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (a valid sentence-appeal waiver, entered into voluntarily and knowingly, pursuant to a plea agreement, precludes the defendant from attempting to attack in a collateral proceeding the sentence through an ineffective assistance of counsel claim during sentencing).

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

⁴ *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) (general waiver of rights by plea did not encompass waiver of § 2255 rights to an illegal sentence).

the ineffective assistance claim infected the plea, no matter when the ineffectiveness arose.⁵

II. Ethical and Constitutional Implications

No case finding such waivers ethical could be found. None even discuss defense counsel's duty in regard to such a waiver in a plea agreement.⁶ Apparently no case was willing to deal with that part of this controversy head on.

It is the opinion of the NACDL Ethics Advisory Committee that such a plea agreement provision creates a personal 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 the Sixth Amendment. It is also a violation of due process of law under the Fifth and Fourteenth Amendments. Defense counsel has a duty to see that the offending provision is removed by the prosecutor or the court because of the inherent conflict it forces on the accused and his or her defense counsel.

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 forced on defense counsel by the government. Model Rule of Professional Conduct 1.7(a) provides:

(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 a personal interest of the lawyer.

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

⁵ See *DeRoo v. United States* (defendant claimed ineffectiveness in plea for counsel's not previously challenging indictment; § 2255 permitted to go forward).

⁶ See *United States v. Poindexter*, 342 Fed. Appx. 871 (4th Cir. 2009) (even with appeal waiver in the plea agreement, 2255 counsel is obliged to file a notice of appeal); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005) (defendant entitled to appeal without parsing whether he waived it under the exceptions in the plea agreement).

loyalty to the client. *Id.*, Comment ¶ 10.⁷ Model Code of Professional Responsibility DR 5-101(A) and RESTATEMENT (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, because of this, they are unethical.

Model Rule of Professional Responsibility, Rule 1.8(h)(1) provides:

A lawyer shall not:

(1) 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, ...

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 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 RONALD E. MALLIN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 27:13 (2012 ed.) (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

⁷ The ABA amended this rule to move personal conflicts from 1.7(b) to 1.7(a). Depending on when one's state adopted the rules, it may still be 1.7(b) in the state. It would be worded differently, but it means the same thing.

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 creates a situation where the criminal defense lawyer has a conflicting duty to the client and a personal interest to avoid being accused of ineffective assistance. We submit that the prosecutor violates ethical rules by insisting on such a condition in a plea agreement. This is prejudicial to the administration of justice.

There are opinions in several states which hold that these plea agreement conditions are unprofessional. Federal prosecutors are bound by the ethics opinions in the state in which they work and where they are licensed. 28 U.S.C. § 530B (see part II.E. *infra*).

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. If it is possible to raise the issue and correct it before entry of the plea, the lawyer should attempt to do so. Because so many federal cases permit such 2255 waivers, it is doubtful that a disciplinary authority would move against a lawyer unless a state opinion already exists governing the prosecutor.

E. Opinions from the States

All of the state ethics authorities considering this issue are in accord: Alabama Informal Op. (Sept. 22, 2010); Arizona Op. 95-08 (1995); Missouri Op. 126 (May 19, 2009); North Carolina Op. PRC 139 (Jan. 15, 1993); Ohio Op. 2001-6 (Dec. 7, 2001); Tennessee Op. 94-A-549 (1995); Texas Op. 571 (May 2006); Vermont Op. 95-04 (1995).

Florida's Ethics Committee approved its draft opinion, Proposed Advisory Opinion 12-1 (June 22, 2012, voted late September 2012), citing NACDL's Proposed Opinion 03-02 (see note 1, *supra*).

Accord: J. Vincent Aprile II, *Waiving the Integrity of the Criminal Justice System*, 25 CRIMINAL JUSTICE 46, No. 4 (Winter 2010); Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIMINAL JUSTICE 28, No. 1 (Spring 2010).

F. Constitutional Implications

The NACDL Ethics Advisory Committee 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 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).

It is clear that the right to effective assistance of counsel includes the conduct of counsel engaging in plea bargaining. See, e.g., *Laffler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

III. Defense Counsel's Duty

Because of the inherent conflict under Rules 1.7(a)(2) and 1.8(h)(1), it is NACDL's position that defense counsel has an ethical and constitutional duty to object to and refuse to sign any plea agreement provision that amounts to a waiver of post-conviction remedies. This protects 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 either (1) raise the issue with the district court or (2) seek additional counsel for the defendant who must be fully apprised of the situation to advise the defendant. New defense counsel would have to be privy to everything 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, adding unnecessary expense to the accused (and the government if counsel is a Federal Defender or CJA appointed) because another lawyer would have to be involved 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 later learns that defense counsel never investigated a possible defense or witness, even though defense counsel represented to the defendant that he or she did.