

MAY A PROSECUTOR OFFER, AND MAY A CRIMINAL DEFENSE LAWYER ADVISE HIS CLIENT TO ACCEPT, A PLEA AGREEMENT THAT REQUIRES A WAIVER OF THE RIGHT TO LATER CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a defense lawyer represents a client who intends to plead guilty. The plea agreement provides that “I waive any right I may have to collaterally attack, in any future proceeding, any order issued in this matter and agree I will not file any document which seeks to disturb any such order. I agree and understand that if I file any court document seeking to disturb, in any way, any order imposed in my case, such action shall constitute a failure to comply with a provision of this agreement.” This provision is standard in all plea agreements offered by the prosecutor’s office, however, defense counsel has concerns that this provision may have the legal effect of waiving the client’s right to later claim ineffective assistance of counsel. The defense lawyer asks whether he can ethically advise his client as to whether to waive that right and whether the prosecutor can ethically require this waiver as a term of a plea agreement.

### QUESTIONS PRESENTED

1. May a defense lawyer advise a client to enter into a plea agreement with language that may effectively waive the right to allege ineffective assistance of counsel as part of a waiver of the right to collaterally attack a conviction covered by a plea agreement?
2. If the defendant’s lawyer declines to advise him on the issue, does the prosecutor’s suggestion that the defendant agree to the provision knowingly take advantage of an unrepresented defendant?

### APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.3(c)<sup>1</sup>, Rule 1.7(a)(2)<sup>2</sup>, Rule 1.8(h)<sup>3</sup>, and Rule 8.4(a)<sup>4</sup>. Additionally, Legal Ethics Opinions 1122, 1558, and 1817 are relevant to the conflict of interest analysis.

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<sup>1</sup> Rule 1.3 Diligence  
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(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

<sup>2</sup> Rule 1.7 Conflict of Interest: General Rule

(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:  
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(2) there is 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.

<sup>3</sup> Rule 1.8 Conflict of Interest: Prohibited Transactions  
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(h) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to the client for malpractice.  
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<sup>4</sup> Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

## ANALYSIS

Federal courts have consistently held that such a provision is legally enforceable against the defendant. In *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005), the court held that there is no reason to distinguish between a waiver of direct appeal rights and a waiver of collateral attack rights, and therefore a waiver of all collateral attack rights is valid so long as the waiver is knowing and voluntary. In general, a defense lawyer may counsel a client to enter into a lawful plea agreement; however, in this case, the content of the plea agreement raises ethical concerns, to the extent that the language of the plea agreement has the intent and effect of waiving the client's right to claim ineffective assistance of counsel.

Though they are not in full agreement on the rationale for their opinions, several states have found that it is unethical for a defense lawyer to advise his client to accept such a plea bargain provision, and that it is unethical for a prosecutor to propose such a provision.<sup>5</sup> Only one state has found such a provision ethically permissible, on the grounds that Rule 1.8(h) applies exclusively to waivers of malpractice liability.<sup>6</sup>

### *Defense lawyer's duties*

The Committee agrees with the majority of states that have considered this issue that, to the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision. There is a concurrent conflict of interest as defined by Rule 1.7(a)(2) between the lawyer's personal interests and the interests of the client. Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case. This conflict was discussed in LEO 1122, which concluded that a lawyer should not represent a client on appeal when the issue is the lawyer's own ineffective assistance because "he would have to assert a position which would expose him to personal liability." Likewise, LEO 1558 concluded that a lawyer could not argue that he had improperly pressured his client into accepting a guilty plea, because of the conflict between the interests of the client and the lawyer's interest in protecting himself. Further, both conflicts cannot be cured even with client consent. LEO 1817 recently reaffirmed the accuracy of this conflict of interest analysis.

A defense lawyer who counsels his client to agree to this provision also violates Rule 1.3(c). The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.

Although other states have interpreted their versions of Rule 1.8(h) to bar the defense lawyer from advising his client on this issue,<sup>7</sup> Virginia's Rule 1.8(h) does not apply in this situation because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government.

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(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;

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<sup>5</sup> Advisory Committee of the Supreme Court of Missouri, Formal Opinion 126 (2009); The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

<sup>6</sup> State Bar of Arizona Commission on the Rules of Professional Conduct, Opinion 95-08 (1995).

<sup>7</sup> The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

*Prosecutor's duties*

Your second question presented addresses the prosecutor's role in seeking this waiver. The Committee is of the opinion that it is a violation of Rule 8.4(a) for the prosecutor to offer a plea agreement containing a provision that has the intent and legal effect of waiving the defendant's right to claim ineffective assistance of counsel. Because the prosecutor refuses to offer a plea agreement that does not include this provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7.

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion  
July 21, 2011