

13-04

Opinion Number 13-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

November 12, 2013

Issued September 30, 2013

ISSUE

1. The question before the Committee concerns federal criminal law practice in the District of Utah. Although it may have general application, this Opinion is confined to that arena. The question is whether it is ethical under the Utah Rules of Professional Conduct for a criminal defense attorney (hereafter "the attorney") to advise a client/defendant (hereafter "the client") to negotiate and enter into a plea agreement whereby the client, as an integral part of his plea of guilty, waives all post-conviction claims the client may have, including claims of ineffective assistance of the attorney, except for claims of ineffective assistance of counsel based upon negotiating or entering in to the plea or waiver.

OPINION

2. The Committee concludes that it is a violation of Rule of Professional Conduct 1.7 for an attorney to counsel his client to enter into a plea agreement which requires the client to waive the attorney's prospective possible ineffective assistance at sentencing or other postconviction proceedings.[1]

BACKGROUND AND ANALYSIS

3. Numerous federal courts, including the Tenth Circuit Court of Appeals, have concluded that waivers of post-conviction rights by criminal defendants are valid and enforceable so long as there is an adequate plea colloquy and such pleas are entered knowingly and voluntarily.[2] The Committee's opinion is confined to the limited question of whether the attorney can negotiate and advise a client to enter into a guilty plea agreement which waives all postconviction claims, including those based upon ineffective assistance of counsel, consistent with the Utah Rules of Professional Conduct. The Committee concludes that doing so would be a violation of Rule 1.7. Under Rule 1.7(a), "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." In

relevant part, the Rule defines a "concurrent conflict of interest" as the existence of "a significant risk" that the lawyer's representation of "one or more clients" "will be materially limited" "by a personal interest of the lawyer." Utah R. Prof. C. 1.7(a)(2).[3]

4. A defendant's waiver of the statutory right to direct appeal contained in a plea agreement is enforceable if the defendant has agreed to its terms knowingly and voluntarily. *United States v. Atterberry*, 144 F.3d 1299, 1300 (10th Cir.1998). The issue of waiving the right to appeal is analyzed in the Tenth Circuit using the following factors:

(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice . . . (Citation omitted).

United States v. Hahn, 359 F.3d 1315, 1325 (10th Cir. 2004). Thus, given the third prong of the analysis, even in the presence of a waiver of appeal, a criminal defendant does not subject himself to being sentenced entirely at the whim of the district court. *Id.* Nevertheless the Committee's Opinion is launched from the premise that the law is settled, certainly in the Tenth Circuit where this question arises, that a valid plea agreement waiver of either the right to appeal or other collateral attack is entitled to be enforced according to its terms either on appeal or by way of collateral attack. Such a waiver is subject to certain exceptions, e.g., where the agreement was involuntary or unknowing, where the court relied on an impermissible factor such as race, or where the agreement is otherwise unlawful, et cetera. Numerous authorities exemplifying such exceptional circumstances are identified in the Tenth Circuit's pivotal decision, *United States v. Cockerham*, *supra* n. 2, 237F.3d at 1182.

5. The Tenth Circuit in *Cockerham* identifies two critical components to determining whether the right to collateral relief survives a waiver. First, whether there is a basis for a claim of ineffective assistance of counsel. Second, whether that ineffectiveness claim pertains to the validity of the plea. *Id.* 1187.

(W)e hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver. Collateral attacks based on ineffective assistance of counsel claims that are characterized as falling outside that category are waivable. (Citation omitted).

Id. This rubric applies equally to the waiver of the right to appeal as to waiver of other postconviction relief, such as a § 2255 petition. *Id.* 1183. Stated differently, a defendant cannot be held to a waiver of his right to the effective assistance of counsel if that waiver goes to the negotiation of the plea agreement itself. If however, it goes to a matter "falling outside" the negotiation of the plea agreement including any other waiver contained within the ambit of the plea agreement, the waiver will be upheld.[4] The most frequent and obvious matter "falling outside" the negotiation of the plea agreement itself, is the sentencing. It may also include a motion to set aside the plea agreement or to extend the time in which to appeal or other such matters. Primarily however the waiver goes to the attorney's performance at sentencing.

6. The Committee need not determine whether it would be unethical for an attorney to counsel a client to waive a claim of ineffective assistance of counsel in the actual negotiation and entry into a plea agreement. *Cockerham* holds that, "(A) claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself." *Id.*, 1184 (cases cited at n. 2). The government and defense counsel seem to have come to an uneasy truce with regard to this fact by the wording of the waiver which is now included within the plea agreement at issue in this Opinion. ¶ 7, *infra*. As to postconviction matters, however, the question remains: can the attorney ethically counsel the client to waive her ineffective assistance *in futuro*?[5]

7. The specific waiver provision of the plea agreement in this instance states, in relevant part, as follows:

I also knowingly, voluntarily, and expressly waive my right to challenge my sentence, and the manner in which the sentence is determined, in any collateral review motion, writ or other procedure, including but not limited to a motion brought under 28 U.S.C § 2255, except on the issue of counsel's ineffective assistance in negotiation or entering this plea or this waiver as set forth in *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001).

The plea agreement further states,

I further understand and agree that the word "sentence" appearing throughout this waiver provision is being used broadly and applies to all aspects of the Court's sentencing authority, including, but not limited to: (1) sentencing determinations; (2) the imposition of imprisonment, fine supervised release, probation, and any specific terms and conditions thereof; and (3) any orders of restitution[.]

It also contains the standard language incorporated in such statements in support of a guilty plea:

I have no mental reservations concerning the plea.

I understand and agree to all of the above. I know that I am free to change or delete anything contained in this statement. I do not wish to make changes to this agreement because I agree with the terms and all of the statements are correct.

The attorney, in addition to the client, is required to execute the agreement. The attorney certifies that,

I have discussed this statement with the defendant, that I have fully explained his rights to him, and I have assisted him in completing this form. I believe that he is knowingly and voluntarily entering the plea with full knowledge of his legal rights and that there is a factual basis for the plea.

Nowhere within this plea agreement is there an express waiver of the right to effective assistance of counsel subsequent to the entry of a plea of guilty at the trial court level. Nor does it affirmatively suggest that the client is waiving his right to attack his sentence or other subsequent trial court proceedings on the basis of ineffective assistance of counsel in a 28 U.S.C § 2255 or similar such procedure (e.g., *coram nobis*, all of which are hereafter referred to generically by reference to "2255").

8. The question was also raised whether it is ethical for the attorney to counsel and negotiate the waiver of the right to appeal as part of the plea agreement. However, no waiver of the right to appeal is included within the waiver language set forth in ¶7. This has no practical impact on the reasoning underlying this opinion. Whether at the appellate level or in a subsequent 2255 proceeding, the ethical question remains the same. The question is whether the attorney can counsel the client to waive the attorney's own prospective ineffective assistance, specifically, but not necessarily limited strictly, to sentencing. In any case, the issue has little practical importance at the appellate level because under prevailing law of the Tenth Circuit, the ability to challenge the effectiveness of counsel on appeal is extremely limited.[6] Nevertheless, the conclusions set forth herein regarding collateral proceedings apply with equal logic and force to such matters raised on appeal.

9. Many circuits, the Tenth Circuit Court of Appeals included, hold that the waiver of appellate and postconviction rights in a plea agreement will be enforceable as against the claim of ineffective assistance of counsel only if the challenge is to the negotiation of the plea agreement rendering the plea unknowing, unintelligent and involuntary.[7] The client who has waived a 2255 hearing, may challenge the basis of the plea agreement. If the attorney wrongly determined that there was a genuine factual basis for the entry of a plea of guilty to the charges, that is an issue going to the negotiation, counseling, and

entry of the plea of guilty itself. That may be challenged. But as to issues of sentencing, e.g., that the lawyer failed to object to the quantity of drugs, the calculation of which determines the length of the sentence[8], that issue would be barred from future litigation because the right to a 2255 hearing was waived and the issue does not go to the negotiation or entry of the plea.

10 From the government's perspective, without the waiver, substantial valuable legal and judicial resources must be spent litigating 2255 actions alleging ineffective assistance of counsel, the majority of which are likely to be frivolous. This substantially degrades the government's, the court's, and the public's interest in finality of criminal judgments. On the other hand, defense counsel believe they cannot ethically counsel clients to waive actions such as those under 2255 because it implicitly requires attorneys to counsel their clients to waive not only the right to bring such claims generally, but to waive their own prospective ineffective assistance of counsel, during the sentencing or other post-plea procedure. But the query put to the Committee cannot be effectively answered in a vacuum; it is necessary to be advised of the legal background in order to understand the competing considerations. There appears to be no judicial opinion to date which addresses the issues presented within the context of the arguable denial of the right to counsel under the Sixth Amendment.

11 Numerous State Bar ethics opinions have found such a waiver to be unethical on various grounds, usually including, but not always, on the basis of a "personal interest" conflict.[9] The relatively recent opinion, *Alabama State Bar Ethics Op. RO 2011-02*, states with little fanfare:

The Disciplinary Commission finds it hard to conceive of a situation where it would be in the interests of a lawyer for his client to file an ineffective assistance of counsel claim. Such claims against a lawyer can harm that lawyer's reputation and subject that lawyer to discipline by the Bar or the courts. However, there are times when it may be in the client's best interest to file an ineffective assistance of counsel claim against his lawyer. It would be inappropriate under any scenario for the lawyer against whom the claim may be brought to counsel the client as to whether to bring that claim or to waive the right to bring such a claim. This is especially so in the context of a criminal case where the client's freedom and liberty may be at stake. As such, the lawyer may not counsel the client as to whether to waive his right to bring an ineffective assistance of counsel claim.

Unfortunately, this opinion limits itself to the bald question of "the ethical propriety of a criminal defense lawyer advising a client on whether to enter into a plea agreement that contains a provision requiring the client to waive the right to later bring an ineffective assistance of counsel claim against that attorney." It does not raise the question in the

context of the instant query and, even then, contains little or no analysis. Nevertheless, its conclusion is valuable because it deals squarely with Alabama's Rule of Professional Conduct dealing with conflicts analogous to Utah's RPC 1.7(a)(2) and finds that the attorney has a personal interest conflict. We turn then to the issue of what kind of "personal interest" may be involved.

12. An attorney's "personal interest" may take several forms. A personal interest conflict may result from entirely "altruistic" interests or "from a lawyer's deeply held religious, political, or public policy beliefs." *Restatement 3rd of the Law Governing Lawyers*, § 125, A Lawyer's Personal Interest Affecting Representation of a Client, Comment c. Although it is increasingly a part of the everyday life of the criminal defense lawyer, no attorney wishes to have an action brought alleging ineffective assistance; it goes against the grain and is uncomfortable in varying degrees of intensity, based on the circumstances. An attorney's reputation is a highly valuable commodity, which a 2255 alleging ineffective assistance puts at risk. Having to respond in some fashion, or having to prepare, appear and testify at a 2255 could involve very substantial time on the part of the attorney, at considerable loss of billable hours. In some cases, the attorney, or errors and omissions insurer, may feel the need to put money out of pocket to hire counsel to represent her in such a proceeding. And although such instances are rare, for serious enough conduct, an adverse finding against the attorney in a 2255 action could trigger disciplinary action by the Bar Association and/or affect the attorney's malpractice coverage/premiums. For counsel appointed in federal court under the Criminal Justice Act of 1964 (CJA), 18 USC § 3006A, et seq., reliant upon payment by the government for their services, an adverse finding in a 2255 action could mean expulsion from the CJA panel and the consequent significant loss of income. Another common situation is that many if not most criminal defense lawyers charge a flat fee in advance of entering an appearance on behalf of the client. For those who have received a flat fee, whether or not the post-conviction portion is deemed earned at the time of the plea or only after sentencing, there exists a disincentive for the attorney to go the extra mile and may well have the psychological effect of diminishing devotion to the client's cause knowing that the proceeding is already paid for and that any measure of ineffective assistance at sentencing would be a claim barred by the plea agreement anyway.[10] There may be other personal interest conflicts not mentioned as well. "Furthermore, unlike under Rule 1.7(a)(1), under Rule 1.7 (a)(2), there is no threshold requirement that the competing interest be 'directly adverse' to the client's interest. Any significant competing interest that threatens to 'materially limit' the representation is sufficient." (Emphasis in original) *The Law of Lawyering*, 3rd, Hazard and Hodes, § 11.8 Model Rule and the Risk

That Representation Will Be Materially Limited, Overview of Conflicts of Interest in the Law of Lawyering.[11] Taking these various factors into consideration, it is evident that an attorney has a substantial personal interest in counseling a client to waive the 2255, thereby waiving any claim of ineffective assistance in postconviction matters. Such a personal interest conflicts with the right of the client's to unalloyed loyalty from the attorney.

13. A more current decision, *Florida Bar Professional Ethics of the Florida Bar, Op. 12-1*, finds that, "(A) criminal defense lawyer has an unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel. . . ." While the question is posed in terms of an express or explicit waiver, the opinion itself does not seem so limited as the aforementioned Alabama opinion. It quotes approvingly language from the Virginia State Bar issued Legal Ethics Opinion 1857 (2011): "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 of course raises the important point that, unlike their civil counterparts, criminal lawyers have a "duty of loyalty" imposed by the Sixth Amendment to the U.S. Constitution, [12] in addition to the duty of loyalty which runs as a theme throughout the Rules of Professional Conduct.[13]

14. It is this duty of loyalty, heightened for the criminal lawyer by the duty of loyalty under the Sixth Amendment to the United States Constitution, which raises the objectivity factor to a level which, in part, constrains this Committee to opine that an unwaivable conflict arises under RPC 1.7(a)(2). Waiver of ineffective assistance *in futuro* interferes with the relationship between the attorney and the client. It shifts the focus from advice about the case and the plea agreement to the attorney-client relationship itself. It demands that the attorney counsel the client that, even though she intends to do a good job in future matters, if she doesn't, the client can do nothing about it. It sets up an untenable "personal interest" conflict in the form of a professional, if not psychological, dilemma. This is because the decision to advise the client to waive appeal and collateral attack in a plea agreement is inextricably intertwined with a waiver of the attorney's prospective ineffective assistance of counsel. Given the various types of personal interests involved, this will almost inevitably cloud the lawyer's ability to give wholly un-conflicted advice. This, the Committee believes, is a "material limitation" on the attorney's ability to effectively represent the client. Obviously, if an attorney were prescient enough to know whether she were going to be ineffective in the future, she would change her course of action. Therein lies the problem. Theoretically, although some cases are obviously

much easier to predict than others, the attorney can never know for a certainty that her performance will not fall below the stringent standard required for there to be "effective assistance" under the Sixth Amendment as well as other professional requirements.[14] In Rumsfeldian terms, the attorney simply does not know what the attorney does not know. This professional dilemma, cognitive dissonance as it were, in separating the duty of loyalty to the client from the attorney's personal interest in remaining free from future claims of ineffective assistance, portends that the attorney's reasonable objectivity in counseling the client and negotiating the plea is at great risk of being lost. This, the Committee believes gives rise to the sort of "material limitation" in representing a client which is proscribed by RPC 1.7(a)(2).

15. Rule 1.7 provides for client waiver with informed consent. See 1.7(b)(4). Obtaining an informed consent from the client to such a conflict presents further problems.[15] It is untenable for an attorney to have to be in the position of having to advise a client that it is wise to waive her own future possible ineffective assistance of counsel. The official comments to the Rules of Professional Conduct indicate that any attorney who fails to "personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid." [16] The only practicable remedy for such an oppositional conflict would be to bring in "conflict counsel," who would be required, depending upon the complexity and circumstances presented, to review the documentation existing in the case, make a determination as to the possible future pitfalls which might arise, and attempt to render impartial neutral advice to the client regarding whether such waiver were advisable.[17] This then spawns the further question as to the duty of loyalty of the lawyer charged with resolving the conflict question and whether that lawyer's crystal ball advice could later be questioned on the basis of ineffective assistance. No doubt that also could be waived. Nevertheless, one can fantasize a daisy chain of conflict lawyers, each passing upon the soundness of the judgment of the next preceding one. But the more realistic issue is the practicality of having to bring in separate counsel on each such plea agreement. Such a requirement is simply too cumbersome and expensive to be practical.

16. The Florida Bar Opinion, *supra*, cites several other state bar opinions which find a waiver of ineffective assistance to be unethical, for a variety of reasons. Those grounded in a personal conflict of interest are worthy of mention. The *Missouri Formal Ethics Formal Opinion 126* (2009) arose in the context of a waiver of postconviction relief, much as the instant Opinion. It opined, *inter alia*, in a brief opinion that it is impermissible for a lawyer to advise a criminal defendant to relinquish claims of ineffective assistance of counsel by that lawyer, because the lawyer cannot properly ask the client to waive this type of personal

conflict. *State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Op. 48* (Citing The Nevada Rule of Professional Conduct (NRPC) 1.7(a)(2), which prohibits "representation in which a significant risk exists that representation of a client will be materially limited by a personal interest of the lawyer," concluded that a waiver must exclude all potential claims of ineffective assistance of counsel, not only those claims limited to the plea agreement itself.). *Supreme Court of Ohio Board Of Commissioners On Grievances And Discipline OH Advisory OPINION 2001-6* determined it to be 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 post-conviction claims of ineffective assistance of trial counsel or prosecutorial misconduct.

17. *Texas Ethics Opinion 571* (2006) is perhaps the only opinion to set no hard and fast rule, leaving it to the attorney's discretion in evaluating the circumstances on a case by case basis:

In summary, a criminal defense lawyer must consider the application of Rule 1.06 [analogous to Utah's RPC 1.7(b)] in each case involving a plea agreement waiver of post-conviction appeals based on ineffective assistance of counsel. In some cases, the criminal defense lawyer will be able to determine that there is no concern on the part of the lawyer as to the effectiveness of the lawyer's assistance to the defendant that would create a conflict of interest for the lawyer under Rule 1.06(b)(2). In that event, the lawyer may represent the defendant with respect to the plea agreement waiver. In other cases, the representation will be permitted after the lawyer's evaluation under Rule 1.06(c)(1) and disclosure and consent under Rule 1.06(c)(2). In other cases, a conflict of interest will exist within the scope of Rule 1.06(b)(2) and it will not be possible for the lawyer to meet the requirements of Rule 1.06(c). In that event, the defendant must be advised by separate counsel concerning the proposed waiver of post-conviction appeals based on claims of ineffective assistance of counsel.

This opinion does no more than place the attorney at square one, in exactly the position she would have been had the question not been asked and there were no opinion. It provides no guidance except to leave it to the attorney's discretion to determine whether the prosecution's offer of a deal coupled with a 2255 waiver is just too sweet to pass up even if the attorney cannot objectively assess whether there is a possibility, remote though it may be, that she would be ineffective in postconviction proceedings in the trial court. The Committee finds this opinion to be unpersuasive.

18. The *National Association of Criminal Defense Counsel Opinion 12-02*, indicates that a criminal defense lawyer may not participate in a plea agreement that waives the

client's right to collaterally attack the plea with a claim of ineffective assistance of counsel, *inter alia*, because of the personal conflict of interest it presents for criminal defense counsel. "(I)n 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." The opinion cites Model Rule of Professional Conduct 1.7(a), analogous to Utah Rule 1.7(b). It further cites Comment ¶10 [analogous to Comment 10 of Utah's Rule 1.7(b)][18]

19. With regard to the further question put to the Committee, whether it would be unethical for a prosecutor to require the defense attorney to counsel his client to enter into a waiver with regard to her own ineffectiveness, if the latter activity is a violation of the Rules Of Professional Conduct, the Rules are clear and this Committee has previously ruled in an analogous context, such conduct would be an ethical violation. RPC 8.4 states that 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.

Consequently, "... the conclusion cannot be avoided that a lawyer cannot require or ask opposing counsel to agree to (violate a Rule of Professional Conduct) as a condition of settlement since that would constitute inducing and assisting another to violate the Rules of Professional Conduct." [19]

CONCLUSION

20. It is a violation of Rule of Professional Conduct 1.7 for an attorney to counsel his client to enter into a plea agreement which requires the client to waive the attorney's prospective possible ineffective assistance at sentencing or other postconviction proceedings.

DISSENTING OPINION

Ryan D. Tenney, Judge.

Suppose that a defendant is charged in federal court with distributing child pornography. This crime ordinarily carries a mandatory minimum sentence of 5 years in federal prison, with an upward possibility of up to 20 years in prison. See 18 U.S.C § 2252A(a)(2), (b)(1). But because the defendant also has a prior sex offense conviction involving a minor, the potential sentence is actually much worse. Under § 2252A(b)(1), the defendant is now subject to a mandatory minimum of 15 years in prison, with an upward possibility of 40 years in prison.

After the defendant's attorney meets and negotiates with federal prosecutors, however, the U.S. Attorney's office

agrees to offer a deal in which the defendant would plead guilty to one count of possessing child pornography. The sentencing range for this crime is 0 to 10 years. *See* 18 U.S.C. § 2252A(a)(5), (b)(2).

In exchange for these substantial concessions, the U.S. Attorney's office insists that the defendant agree to the following as part of the plea bargain: "I also knowingly, voluntarily, and expressly waive my right to challenge my sentence, and the manner in which the sentence is determined, in any collateral review motion, writ, or other procedure, including but not limited to a motion brought under 28 U.S.C. § 2255."

Even with this waiver, the defendant would still have very good reason to accept the deal. As a starting point, the deal would remove the mandatory minimum—a pronounced benefit in its own right. But perhaps more importantly, even if everything that could possibly go wrong at the upcoming sentencing hearing does go wrong, the defendant would still likely serve several fewer decades in prison than he would have without the deal.

Despite this, the Committee concludes today that it would be unethical for the defense attorney to advise the defendant to take this deal. I disagree. [1]

As indicated in the Committee's opinion, the waiver provision at issue would bar the defendant from later claiming that his counsel was ineffective at the sentencing

hearing. The Committee concludes that the defense attorney's perceived personal interest in avoiding an ineffective assistance claim based on his own performance creates a conflict of interest under rule 1.7(a)(2) of the Utah Rules of Professional Conduct. Under this rule, a "conflict of interest exists" when there is a "significant risk" that the lawyer's representation will be "materially limited" by his own "personal interest."

The underlying premise of the Committee's opinion is that when a defendant raises an ineffective assistance claim, that claim is "against" the defense lawyer. For example, the Committee relies on an ethics opinion from Alabama stating that it would be inappropriate "for the lawyer *against whom the claim may be brought*" to advise the client whether to agree to such a waiver. *See* Cmte. Op. at 1J11 (emphasis added, quotations and citation omitted).

But this premise is simply wrong. The ineffective assistance of counsel doctrine stems from the Sixth Amendment to the United States Constitution, which states that "[i]n all criminal prosecutions, " "the accused" shall have the assistance of counsel "for his defense." In *Strickland v. Washington*, 466 U.S. 668, 686 (1984), the Supreme Court clarified that the right to counsel also

includes the right to the "effective assistance of counsel."

Because an ineffective assistance claim is based on the Sixth Amendment, it ordinarily arises in the direct appeal from the "criminal prosecution! [.]"*Cf. Turner v. Rogers*, 131 S.Ct. 2507, 2516 (2011) ("the Sixth Amendment does not govern civil cases"). Or, pursuant to state or federal statute, it may also arise in a collateral attack on the criminal conviction that is filed in a post-conviction proceeding. But in both scenarios, the parties to the case are the government and the defendant, not the defendant and his prior lawyer. *Cf. Hinton v. Rudasill*, 624 F.Supp.2d 48, 50 (D.D.C. 2009) (recognizing that "the Sixth Amendment restrains only governments, not private individuals"). Thus, when a defendant raises an ineffective assistance claim under the Sixth Amendment, he does not raise it "against his lawyer"—rather, he raises it against the government which he claims has unconstitutionally convicted him even though he did not receive the effective assistance of counsel.

This is further demonstrated by the nature of the requested relief. If a defendant demonstrates that his trial counsel was ineffective, the defendant does not receive anything from the lawyer as a remedy. Rather, what the defendant receives is a reversal of his criminal conviction or sentence. Because of this, "the ineffective assistance doctrine does not deter misfeasance or malfeasance by counsel. It is the government, not the defense attorney, who suffers adverse consequences when a defendant's conviction is vacated due to 'ineffective assistance.'" *Ramirez v. United States*, 17 F.Supp.2d 63, 66 (D.R.I. 1998).

The Committee's opinion assumes otherwise—i.e., it assumes that the waiver provision at issue in this opinion request is a broad one that would somehow protect the defense lawyer's personal interests. But by its own terms, the effect of this waiver provision is actually very limited. Again, when the defendant agrees to this provision, the only thing he agrees to waive is "*my right to challenge my sentence*, and the manner in which the sentence is determined, in any collateral review motion, writ, or other procedure....." (Emphasis added). This provision does not purport to waive anything else. Thus, even if the defendant agrees to such a waiver, and even if his counsel subsequently underperforms at sentencing, the defendant could still hold the lawyer personally responsible using any and all means that would have been available to him if he did not agree to the waiver.

For example, nothing in this waiver would prevent the defendant from suing his lawyer for malpractice or breach of contract. Nothing in this waiver would prevent the defendant from filing a bar complaint alleging that his lawyer violated his professional obligations. Nothing would prevent him from contacting the Utah Bar's Office of

Professional Conduct and asking them to investigate the lawyer. Nothing would prevent the defendant from telling all of his friends and neighbors and colleagues about what a terrible job his lawyer did representing him. Instead, the only thing that the defendant would no longer be able to do is use his lawyer's performance as a means for challenging *his own sentence in his own case*.

Despite this, the Committee maintains that there are still several ways in which an ineffective assistance claim might personally impact the defense lawyer to such a degree that a conflict of interest would exist under rule 1.7(a)(2).

First, the Committee suggests that an ineffective assistance claim might adversely impact the lawyer's personal reputation. Cmte. Op. at 1J12. But I don't believe this is a realistic problem, let alone one that is significant enough to create a conflict of interest under rule 1.7, because it is not the ordinary practice of either the 10th Circuit or Utah's state appellate courts to publicly identify defense lawyers who are accused of having been ineffective. In reviewing this ethics opinion request, I surveyed 10th Circuit opinions from the last 5 years. The Tenth Circuit issued hundreds of opinions in criminal cases during that span. So far as I can tell, though, only about 3 to 5 of them a year identified the trial lawyer by name as part of an ineffective assistance analysis. The rest either did not involve an ineffective assistance claim, or, more commonly, analyzed an ineffective assistance claim but did not identify the lawyer whose conduct was at issue. Moreover, even of those that did analyze an ineffective assistance claim and did identify the lawyer, the majority of cases *rejected* the ineffective assistance claim, thereby negating any adverse reputational impact on the lawyer. When I reviewed decisions from Utah's state appellate courts over the same time span, I found similarly sparse results.

Thus, even if a criminal defendant is dissatisfied with his attorney's performance, the likelihood that the defense lawyer will ever be publicly identified as having been ineffective under the Sixth Amendment seems exceedingly remote. As noted above, however, a conflict of interest exists under rule 1.7 only when there is a "significant risk" that the attorney's performance will be "materially limited" by the personal interest at stake. Here, where the possibility of being publicly identified in an ineffective assistance ruling is so small, I do not believe that the attorney's perceived interest in avoiding this would materially limit the lawyer's ability to advise the client about the pros and cons of a plea deal.

Second, the Committee suggests that an attorney might be motivated to advise his client to accept such a waiver in order to avoid the possibility of professional discipline. Cmte. Op. at ¶12. The *Utah Bar Journal* publishes a monthly summary of all attorneys who have been

professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.

To be clear, there were a number of reported instances in which criminal defense lawyers were sanctioned for their professional misconduct. But in each of those instances, the professional discipline was based on the attorney's violation of his professional obligations under Utah's Rules of Professional Conduct. In no instance that I could find was the discipline based on a court's conclusion that the attorney was ineffective under the Sixth Amendment.

This distinction is critical. The Utah Rules of Professional Conduct do not contain a predicate requirement under which a criminal defense lawyer can only be professionally disciplined if there was an ineffective assistance ruling in the criminal case. Thus, if a criminal defense lawyer performs incompetently, he could always be professionally sanctioned for violating his obligations of competence and diligence under rules 1.1 and 1.3. The existence or non-existence of an ineffective assistance claim in the criminal case would not foreclose this. Nor, for that matter, would this waiver provision—which, again, only prevents the defendant from challenging his own sentence in his own case. Thus, this waiver provision would not insulate the defense lawyer from professional discipline at all.

Third, the Committee is troubled by the idea that this waiver encompasses future events. Cmte. Op. at ¶14. The principal concern here seems to be about the provision's enforceability. *See id.* As a volunteer ad hoc ethics advisory committee, however, such concerns would seem to be beyond our institutional competence. In any event, parties can choose to accept (or not accept) agreements that will impact future events. In *Penunuri v. Sundance Partners*, 2013 UT 22, ¶¶23-33, 301 P.3d 984, for example, the Utah Supreme Court recently affirmed the validity of contractual waivers for future negligence.

In a given case, of course, accepting such a waiver may or may not be a good idea. But whether it is a good idea seems to be an entirely separate question from whether an attorney would have a conflict of interest under rule 1.7 in advising the client to take it. I don't believe that the future component to the plea bargain creates such a conflict.

Finally, the Committee raises the possibility that this waiver would create an incentive for sloppy performance. Cmte. Op. at ¶12. The Committee is concerned that if the defense lawyer knows that the defendant will not be able to raise an ineffective assistance claim in the criminal case, the lawyer will no longer have an "incentive" to "go the extra

mile" when preparing for sentencing. *Id.*

I don't agree that this impacts the lawyer's personal incentives at all. Even with such a waiver, the lawyer would still have the same principled incentives for competent performance that he would have had if the defendant never agreed to the waiver: the lawyer's own professional obligations under the Rules of Professional Conduct, as well as his contract with the defendant. Neither of these are removed by this waiver. Instead, the only thing that is now off the table is the defendant's ability to challenge his own sentence in his own case based on the lawyer's conduct.

Moreover, if it is true that a lawyer has a conflict of interest under rule 1.7 if he has conceivable reason to not work as hard, then flat fees in general would suffer from the same ethical defect. After all, if a defendant agrees to pay a lawyer a flat fee for representing him up to a certain point in a case, then the lawyer now has a personal incentive to minimize his time expenditure on the case (and thus maximize his hourly return).

But despite this possible concern, flat fees are accepted in Utah. Indeed, this Committee recently approved their use in criminal cases—with the caveat being that the defendant must have the ability to seek a refund of any unearned fees. *See generally* Utah Ethics Advisory Committee Opinion 12-02. In the scenario at issue here, the defendant would have that same ability to seek that same contractual recourse. Given this, I do not see why the attorney's ethical obligations suddenly change if the defendant no longer has the ability to challenge his own sentence in his own case.

Finally, this opinion may well end up harming the very people that the Committee ostensibly seeks to protect: criminal defendants. Approximately "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012). It is recognized that this process is ultimately a contract negotiation between two sides who are both seeking to maximize their own value. *See State v. Patience*, 944 P.2d 381, 386 (Utah App. 1997). It is, in essence, "horse trading" between prosecutor and defense counsel—"that is what plea bargaining is." *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (quotations and citation omitted).

When the Eleventh Circuit looked at the validity of this kind of provision, it recognized that "plea agreements containing such waivers" are not only valuable to the government, but "also of value to a defendant, because it is another chip the defendant can bring to the bargaining table and trade for additional concessions from the government." *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006). Consistent with this, representatives from the U.S. Attorney's Office have assured this Committee—both in

writing and in person—that federal prosecutors only request this kind of waiver in cases where they are making "substantial concessions" to the defendant as a result. Representatives from the Federal Public Defender's Office did not dispute this when directly asked about it at a meeting of this Committee.

Despite this, this Committee's opinion will now likely remove this as a permissible bargaining chip in the plea negotiation process—at least in any case negotiated by attorneys who are subject to Utah's Rules of Professional Conduct. But if the federal government can no longer ask for such waivers in such cases—thereby preventing the government from receiving this particular benefit—, then it stands to reason that the federal government will also be less inclined to make the same kinds of "substantial concessions" in its offers. Thus, in many cases, the end result will be defendants who receive worse sentences than they would have if this provision were still an available negotiation item.

In my view, rule 1.7(a)(2) does not require this. Instead, I believe that, even with this waiver, a defense lawyer who still remains bound by his professional obligations of competence, diligence, and loyalty, not to mention his contractual obligations, would be able to competently advise his client about the plea bargain—particularly where the waiver's only direct effect would be to foreclose the defendant's ability to challenge his own sentence in his own case.

For these reasons, I respectfully decline to join the Committee's opinion.

Christopher H. Glauser (concurring)

Notes:

[1] The term "postconviction proceedings" is used in this Opinion to mean those matters, specifically but not necessarily limited to sentencing, which may occur subsequent to the client's plea of guilty pursuant to the negotiated plea agreement. "Conviction" as used here does not mean the "judgment of conviction" as defined in Fed. R. Crim. P. 32(k).

[2] *United States v. Cockerham*, 237 F.3d 1179, 1183-1188 (10th Cir. 2001) citing, *inter alia*, *Jones v. United States*, 167 F.3d 1142, 1144-1145 (7th Cir.1999).; *U.S. v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (A defendant may waive her right to appeal, if that waiver is the result of a knowing and intelligent decision to forgo the right to appeal); *U.S. v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995)(Waiver is valid, however, dismissal of an appeal based on a waiver in the plea agreement is inappropriate

where the defendant's motion to withdraw the plea incorporates a claim that the plea agreement generally, and the defendant's waiver of appeal specifically, were tainted by ineffective assistance of counsel); *DeRoo v. U.S.*, 223 F.3d 919, 923 (8th Cir. 2000)(Waiver of appeal, or challenge via post-conviction writs of *habeas corpus* or *coram nobis*, or the district court's entry of judgment and imposition of sentence, is enforceable); *Frederick v. Warden, Lewisburg Correctional Facility*, 308 F.3d 192, 195-196 (2nd Cir. 2002) cert. denied, 537 U.S. 1146, 123 S.Ct. 946, 154 L.Ed. 847 (2003)(There is no general bar to a waiver of collateral attack rights in a plea agreement. 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, e.g., the plea agreement); *U.S. v. Pruitt*, 32 F.3d 431 (9th Cir. 1994)(Waivers must be express and clear. A plea agreement does not waive the right to bring a § 2255 motion unless it does so expressly. The government gets nothing more than what it bargains for); *Davila v. U.S.*, 258 F.3d 448, 450-451 (6th Cir. 2001) (surveying cases and expressly adopting waiver)(A defendant may waive any right, even a constitutional right by means of a plea agreement so long as it is done knowingly, intelligently and voluntarily); *Mason v. U.S.* 211 F.3d 1065, 1069 (7th Cir. 2000)(Because defendant's challenge has nothing to do with the issue of a deficient negotiation of the plea agreement, the waiver of right to seek post-conviction relief contained therein is enforceable).

[3] Utah's version of Rule 1.7 states as follows:

Rule 1.7. Conflict of Interest: Current Clients.

(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:

(a)(1) The representation of one client will be directly adverse to another client; or

(a)(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(b)(4) each affected client gives informed consent, confirmed in writing.

[4] *Cockerham* offers no reasoning for distinguishing between negotiation of the plea agreement and postconviction matters. "The courts that have differentiated between ineffectiveness claims attacking the validity of the plea or waiver and claims challenging counsel's performance with respect to sentencing have not adequately explained why they make this distinction." /d.1186. And although *Cockerham* has seemingly withstood the test of time, it is a split decision, with the dissent observing, "My disagreement stems from the majority's conclusion that a general waiver-of-appeal-rights provision, such as the one at issue here, is sufficient to preclude a defendant from asserting on direct appeal or in a § 2255 motion Sixth Amendment violations that occur after entering into the plea agreement." *Id.* 1191.

[5] It does not appear that any federal court has taken on the ethical ramifications of waivers of ineffective assistance of counsel in a negotiated guilty plea agreement either with respect to counseling the client and negotiation of the agreement itself or the waiver of ineffective assistance in matters yet to come to pass.

[6] "Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir.1995) (*en banc*).

[7] See note 2, *supra*.

[8] See U.S.S.G. § 2D1.1.

[9] Other opinions have found there to be potential for violation of provisions analogous to RPC 1.8(h)(1), prospectively limiting the lawyer's liability for malpractice; RPC 8.4(a) misconduct for a lawyer, i.e., a prosecutor to knowingly assist or induce another lawyer to violate the Rules of Professional conduct. Because this Opinion is believed to be well grounded in the conflict of interest set forth in RPC 1.7, it is confined to that basis.

[10] Several of these financially related conflicts could conceivably also implicate RPC 1.8(a), stating that,

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client

unless:

(a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(a)(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

As with Rule 1.7(a)(2), the requirements of this Rule would be difficult for the attorney to circumnavigate under the circumstances presented. As pointed out by Hazard and Hodes, "there is often significant overlap between the two [1.7(a)(2) and 1.8(a)]. *The Law of Lawyering*, *supra*, § 11.17, Material Limitation on the Representation Arising from a Lawyer's Financial or Other Professional Interests.

[11] Rule 1.7(a)(2) further differs from Rule 1.7(a)(a) in terms of the assumed severity of the conflicts of interest addressed. The latter paragraph applies where *directly* adverse representation *will* take place, as when one current client is about to file suit against another current client. . . . Rule 1.7(a)(2) on the other hand, applies only when representation of a current client is at *substantial risk* of being material impaired by the lawyer's responsibilities to others. (Emphasis in original)

The Law of Lawyering, Id.

[12] "Representation of a criminal defendant entails certain basic duties (under the Sixth Amendment). Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, *supra*, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69, 53 S.Ct., at 63-64."

Strickland v. Washington, 466 U.S. 668, 667-688, 104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674 (1984); *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.;

Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942) ("Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.")

[13] "Loyalty to clients is one of the core values of the legal profession, perhaps equal in importance with maintaining confidentiality and diligently or zealously working to advance a client's interest."

The Law of Lawyering, 3rd, Hazard and Hodes, § 10.1 Overview of Conflicts of Interest in the Law of Lawyering.

[14] "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland, supra*, 466 U.S. at 688, 104 S.Ct. at, 2065 citing *Powell v. Alabama*, 287 U.S., at 68-69, 53 S.Ct., at 63-64.

[15] "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and *reasonably* available alternatives to the proposed course of conduct."

Rules of Professional Conduct, 1.0(f).

[16] [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include

whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Official Comments to RPC 1(f) Informed Consent.

[17]. . . (W)hen the risk to a client is particularly high, the lawyer will sometimes make an initial determination that it is not reasonable to ask for consent. In such situations, the client may have to hire other counsel and to expend time and money educating the new lawyer about the matter involved. *Theses consequences merely accentuate the fact that the long-term public Interest In protecting clelnts against foolish waivers must occasionally outweigh the short-term Interest of Individual lawyers and clients.* (Emphasis added)

The Law of Lawyering, 3rd, Hazard and Hodes, § 11.8, *supra*.

[18] 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. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7

ordinarily are not imputed to other lawyers in a law firm).

Official Comment 10 to RPC 1.7(b).

[19] *Utah State Bar Ethics Advisory Opinion Number 11-01*, August 24, 2011; accord *Alabama State Bar Ethics Op. 2011-02*, *supra*; *Florida Bar Professional Ethics of the Florida Bar*, Op. 12-1, *supra*.

[1] The waiver provision cited above makes no direct reference to the defendant waiving the right to challenge the attorney's effectiveness on direct appeal. The apparent reason for this is that this opinion request is based off a waiver provision currently being used in federal criminal litigation, and the Tenth Circuit has held that ineffective assistance claims must be brought in a collateral challenge, not on direct appeal. See, e.g., *United States v. Dyke*, 718 F.3d 1282, 1294 n.3 (10th Cir. 2013). In any event, the provision does include a general waiver of the right to raise an ineffective assistance claim in any "other procedure." The opinion request contemplates that this would include a direct appeal, as does the Committee's opinion. This distinction does not change the result of the ethics question at issue, so, for consistency, I follow suit.
